Equitable Distribution in Large Marital Estate Cases

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I. Introduction

As a marital estate increases in size, should the percentage distribution in favor of a dependent spouse decrease?[1] This can be a significant issue in equitable distribution states that afford no presumption of an equal division. There are those who argue that marriage is a partnership in which material contributions to financial success are equivalent to nonmaterial, but equally critical, contributions of a homemaker and caregiver.[2] Others argue that the party who provides the 'spark' that financially creates the large marital estate should receive a higher percentage.[3] This debate has continued and evolved in numerous cases from around the country. As women's roles continue to change, it can only be assumed that courts will continue to wrestle between the

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1 For the purposes of this article, the authors define "large" marital estates as those exceeding $3,000,000. While this amount is arbitrary, the courts appear to treat cases of that magnitude differently, perhaps because the assets exceed the amount needed to support most parties' lifestyles. In this analysis, a "dependent spouse" is the spouse who is *not* primarily responsible for the financial assets accumulated during the marriage. The analysis does not apply to co-partners who share equally in the business and non-business aspects of the marriage.

2 *See*, *e.g.* Sanford N. Katz, MARRIAGE AS PARTNERSHIP, 73 Notre Dame L. Rev. 1251 (1998). *See* discussion *infra* notes 53-106.

3 *See* discussion *infra* note 123-138.

opposing viewpoints of "I made it, I should keep it "and "marriage is an equal partnership."

This article will address the various factors that have been considered by the courts in deciding how to equitably divide large marital estates. Obviously, the cases are extremely fact sensitive: they run the gamut from both spouses having been equally involved in all financial and non-financial aspects of their marriage to 'traditional' relationships where one spouse is exclusively the homemaker and caregiver and the other spouse is exclusively the breadwinner. Excluded from this article are cases from community property states and those from equitable distribution states that have a presumption of an equal division of marital property. It is, thus, limited to those states that have equitable distribution and no presumption of an equal division. Additionally, the cases cited are representative examples of the positions asserted; the authors have not attempted to include all the cases from throughout the county that involve large estates. In fact, many large estate cases cannot be reviewed or cited because they are settled, not appealed, or the appellate decision is issued as a memorandum opinion, which specifically precludes it from being treated as precedent.

In resolving these cases, the courts generally rely on their particular jurisdiction's statutory scheme for property distributions upon the dissolution of marriage. However, none of the statutes reviewed indicate how one should handle a large estate.[4] Instead, the courts tend to emphasize broad principles and then make judgments based upon the specific facts. For example, the Pennsylvania Superior Court in *Platek v. Platek*[5] reasoned: "An equitable division often will not be even; the essence of the concept of an equitable division is that 'after considering all relevant factors,' the court may 'deem just' a division that awards one of the parties more than half, perhaps the lion's share of the property."[6] Applying a partnership view is a slightly different approach explained by the Virginia Court of Appeals in *Matthews*

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4 This is a clear distinction from state support guidelines, which generally set a specific guideline for how to determine support based on an amount below, and often above, a certain income.

5 454 A.2d 1059 (Pa. Super. Ct. 1982).

6 *Id.* at 1063.

v. Matthews.[7] This view treats marriage as an economic partnership. Based on that theory, following a marital break-up, each partner should receive a fair portion of the acquired marital property.

A more blunt analysis of why, even in a partnership, the spouses might receive disproportionate shares upon divorce was provided in *Dewberry v. Dewberry*.[8] There, the Florida Court of Appeals stated:

> The concept of marriage as a partnership entitles each of the partners, upon termination, to an equitable share, not necessarily an equal share. The parties, because of their education, training and personalities, or because of the lack of those factors, do not come into the partnership with equal abilities or assets. Merely because they share part of their life together does not of itself require that they leave the partnership with equal assets or liabilities, but only that their contributions to the marriage receive equitable recognition and award.[9]

As suggested by the *Dewberry* Court, the parties' respective marital contributions appear to have the greatest effect on the final property division in these large estate cases. For this reason, this article highlights the role of the parties' contributions, including presenting potential arguments for both the dependent and independent spouses. Other factors that appear to have a lesser effect upon the proportional distribution, such as length of marriage, the parties' potential futures, and fortuitous receipt of wealth, are also addressed. Interestingly, a financial calculation of the final property division appears to be the only true measure of how effective a party's arguments ultimately were. In many cases, as will be illustrated in this article, while the language of a court's opinion suggests great deference for the dependent party's contributions, the actual dollar distribution frequently falls far short of equality. In these large estate cases, it still appears that, in most cases, the party whose contributions resulted in the acquisition of the marital wealth receives the majority of that wealth.

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7 496 S.E.2d 126 (Va. Ct. App. 1998).

8 455 So.2d 420 (Fla. Dist. Ct. App. 1984).

9 *Id*. at 422.

II. Statutory Factors Considered by Equitable Distribution States

A number of Model Acts have addressed the factors to be considered in dividing marital property. The 1974 Uniform Marriage and Divorce Act specifically referred to the "contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and as the contribution of a spouse as a homemaker or to the family unit."[10] It appears that, as illustrated below, a number of equitable distribution jurisdictions have included this factor in their statutory schemes regarding property division.

In contrast, the Uniform Marital Property Act does not name specific factors but provides instead that "[a]fter a dissolution, each former spouse owns an undivided one-half interest in the former marital property as a tenant in common except as provided otherwise in a decree or written consent."[11] Despite the wording, this Act does not provide for mandatory equal distributions. The court is able to reallocate the property in accordance with factors deemed relevant in that jurisdiction.

While states have enacted those portions of the Model Acts considered appropriate by their legislatures, the states differ on the exact factors they deem critical to equitable distribution. A survey of the various states' equitable distribution statutes reveals the following most common factors:

- Length of marriage;[12]
- The age, health, station, amount of income, vocational skills, employability, estate, liabilities and needs of each party;[13]

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10 Unif. Marriage & Divorce Act § 307, 9 U.L.A. 347 (1987).

11 Unif. Marital Prop. Act § 17(3), 9 U.L.A. 135 (1983).

12 This factor is considered in Colorado - COLO. REV. STAT. § 14-10-113 (2001), Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - 750 ILL. COMP. STAT. 5/503 (2001), Maryland - MD. CODE ANN, FAM. LAW § 8-205 (2001), Nevada - NEV. REV. STAT. ANN. § 125.150 (2001), New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Ohio - OHIO REV. CODE ANN. § 3105,171 (Anderson 2001), Pennsylvania - 23 PA. CONS. STAT. ANN. § 3502 (West 2001), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), Tennessee - TENN. CODE ANN. § 36-4-121 (2001), Vermont - VT. STAT. ANN. tit. 15, § 751 (2001), and Virginia - VA. CODE ANN. § 20-107.3 (2001).

13 Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - ILL. COMP. STAT. 5/503 (2001), Maryland - MD. CODE ANN, FAM. LAW § 8-205

- The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time;[14]
- The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property including the contribution of the homemaker;[15]
- The economic circumstances of each party, including federal, state and local tax ramifications or the desirability of awarding the family home or the right to live in the home with minor children, at the time the division of property is to become effective.[16]

Some other factors considered by equitable distribution states include:

- The sources of income of both parties, including, but not limited to medical retirement, insurance or other benefits;[17]

(2001), New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001), Pennsylvania - 23 PA CONS. STAT. ANN. § 3502 (2001 year), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), Tennessee - TENN. CODE ANN. § 36-4-121 (2001), Vermont - VT. STAT. ANN. tit. 15, § 751 (2001), and Virginia-VA. CODE ANN. § 20-107.3 (2001).

14 Colorado— COLO. REV. STAT. § 14-10-113 (2001), Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - ILL. COMP. STAT. 5/503 (2001), Ohio - OHIO REV. CODE ANN. § 3105, 171 (Anderson 2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), Tennessee - TENN. CODE ANN. § 36-4-121 (2001), and Vermont - VT. STAT. ANN. tit. 15, § 751 (2001).

15 Colorado— COLO. REV. STAT. § 14-10-113 (2001), Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - 750 ILL. COMP. STAT. 5/503 (2001), Maryland - MD. CODE ANN, FAM. LAW § 8-205 (2001), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Pennsylvania - 23 PA. CONS. STAT. ANN. § 3502 (West 2001), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), Tennessee - TENN. CODE ANN. § 36-4-121 (2001), and Vermont - VT. STAT. ANN. tit. 15, § 751 (2001).

16 Colorado— COLO REV. STAT. § 14.10-113 (2001), Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - 750 ILL. COMP. STAT. 5/503 (2001), Maryland - MD. CODE ANN, FAM. LAW § 8-205 (2001), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Ohio - OHIO REV. CODE ANN. § 3105, 171 (Anderson 2001), Pennsylvania - 23 PA. CONS. STAT. ANN. § 3502 (West 2001), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), and Virginia - VA. CODE ANN. § 20-107.3 (2001).

17 Maryland - MD. CODE ANN, FAM. LAW § 8-205 (2001), Pennsylvania-23 PA. CONS. STAT. ANN. § 3502 (2001 year), and Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001).

- Any transfer or encumbrances made in contemplation of a matrimonial action without fair consideration;[18]
- The value of the property set apart to each party;[19]
- The liquidity of the property to be distributed;[20]
- The economic desirability of retaining intact an asset or an interest in an assets;[21]
- The presence of children of the marriage in the respective homes of the parties;[22]
- The value of the property acquired by gift, devise or descent;[23]
- Any award of alimony and any award or other provision that the court has made with respect to family use, personal property or the family home;[24]
- Any increases or decreases in the value of the separate property of the spouse during marriage or the depletion of the separate property for marital purposes;[25]
- The ability of the party seeking maintenance to become self-supporting and if applicable, the period of time and training necessary;[26]
- The reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training employment or career opportunities during marriage;[27]
- The standard of living of the parties established during the marriage;[28]

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18 New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001).

19 Colorado - COLO. REV. STAT. § 14-10-113 (2001), Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Maryland - MD. CODE ANN., FAM. LAW § 8-205 (2001), New Hampshire -N.H. REV. STAT. ANN. § 458.16 (2000), Ohio - OHIO REV. CODE ANN. § 3105, 171 (Anderson 2001), Pennsylvania - 23 PA. CONS. STAT. ANN. § 3502 (West 2001), and Tennessee - TENN. CODE ANN. § 36.4-121 (2001).

20 Ohio - OHIO REV. CODE ANN. § 3105, 171 (Anderson 2001), and Virginia - VA. CODE ANN. § 20-107.3 (2001).

21 Ohio - OHIO REV. CODE ANN. § 3105,171 (Anderson 2001).

22 New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001).

23 New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000).

24 Maryland - MD. CODE ANN., FAM. LAW § 8.205 (2001).

25 Colorado - COLO. REV. STAT. § 14-10-113 (2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000).

26 New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001).

27 New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001).

28 Pennsylvania - 23 PA. CONS. STAT. ANN. § 3502 (2001).

- The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property that may serve for such debts and liabilities;[29]
- The contribution by one party to the education, training or increased earning power of the other party;[30]
- The opportunity of each party for future acquisitions of capital assets and income.[31]

A. *The Size of the Marital Estate.*

Noticeably absent from the above list is the size of the marital estate. In fact, some courts have expressly rejected the view that a large marital estate alone justifies a disproportionate split in the marital estate. In *Dombrowski v. Dombrowski,*[32] the husband alleged that he should have received a disproportionate share of the marital estate. However, the New Hampshire Supreme Court emphasized that "the size of the marital estate alone cannot justify an unequal distribution where the parties each contributed equally to their thirty-year marriage."[33] The court noted that the marital master had specifically "found that the parties' long-term marriage was an 'economic partnership' in which both parties played an equal role in the acquisition of assets— the plaintiff primarily as homemaker and caretaker of the children, and the defendant as the 'primary breadwinner' in the computer and electronics industry."[34]

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29 Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Ohio - OHIO REV. CODE ANN. § 3105.171 (Anderson year), Vermont - VT. STAT. ANN. tit. 15, § 751 (2001), and Virginia - VA. CODE ANN. § 20-107.3 (2001).

30 New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000), North Carolina - N.C. GEN. STAT. § 50-20 (2000), Pennsylvania-23 PA. CONS. STAT. ANN. § 3502 (West 2001), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), and Tennessee - TENN. CODE ANN. § 36-4-121 (2001).

31 Delaware - 13 DEL CODE ANN. tit. 13, § 1513 (2001), Illinois - 750 ILL. COMP. STAT. 5/503 (2001), New Hampshire - N.H. REV. STAT. ANN. § 458.16 (2000), New York - N.Y. DOM. REL. LAW § 236 (Consol. 2001), Pennsylvania-23 PA. CONS. STAT. ANN. § 3502 (West 2001), Rhode Island - R.I. GEN. LAWS § 15-5-16.1 (2001), Tennessee - TENN. CODE ANN. § 36-4-121 (2001), and Vermont - VT. STAT. ANN. tit. 15, § 751 (2001).

32 559 A.2d 828, 832 (N.H.1989).

33 *Id.* at 832.

34 *Id.* at 831 (The precedential value of the *Dombrowski* case is somewhat limited because, at least at the time of the decision, New Hampshire followed a

Recently, the Michigan Supreme Court also rejected the argument that the size of the estate by itself warrants a different distribution scheme. In *Dart v. Dart,*[35] the court reviewed an English court's property division. The husband had renounced his citizenship and relocated to England to receive a trust distribution of approximately five hundred million dollars. Although the wife did not renounce her United States citizenship and remained a resident of Michigan, she resided primarily in England. Following marital difficulties, the husband pursued a divorce in England and the English court awarded the wife $450,000 per year for life, a lump sum of $13,500,000, the Michigan marital residence, some artwork and jewelry. The English court concluded that the trust proceeds were not marital property because they were not created during the marriage or generated by the parties' efforts.

The wife, who had brought a divorce action in Michigan, argued in the Michigan courts that the award was not entitled to comity because of a lack of due process and because English law violated Michigan's public policy. In England, the courts treat large asset cases differently from cases involving smaller estates. The English apply a rule called the "Preston ceiling" which "limits the award to an amount that satisfies the court's estimation of a wife's needs for support."[36] The Michigan Supreme Court found that if the English court had actually applied the Preston ceiling, it might have agreed that wife was denied due process. However, the court found that the English judge had declined to apply the Preston ceiling, finding instead that the trust assets were not marital property and thus not subject to any division. Since this type of determination was consistent with Michigan's own law concerning marital property, the court concluded that the wife had not been denied due process.[37]

Not every case, however, rejects the concept of differing treatment between large and more modest estates. In the Penn-

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rule that "absent special circumstances, the distribution of marital assets should be 'as equal as the court can make it.'")

35 597 N.W.2d 82 (Mich. 1999), *cert. denied*, 120 S. Ct. 1418 (2000).

36 *Id.* at 87.

37 *Id.* at 86.

sylvania trial court opinion of *Anastasi v. Anastasi,*[38] the trial court stated: "[t]he Court has awarded 76% of the assets to the Husband and 24% to the Wife. For an estate of lesser value, a more even distribution might be equitable."[39] Moreover, in actual practice, as demonstrated by most of the cases cited in this article, there does appear to be an economic difference in outcome based upon the size of the estate. Whether the courts specifically acknowledge it or not, dependent spouses in these large asset cases frequently do receive less than half of the marital estate.

B. *Standard of Review.*

As suggested by the large number of factors that courts consider in deciding how to divide a marital estate, the trial courts have a great deal of discretion in reaching their conclusions. In virtually all of the states, to overturn a trial court's decision the appellate court must find that the trial court abused its discretion. This is a difficult appellate standard. To conclude that the trial court has abused its discretion, the appellate court customarily must find that the trial court either incorrectly applied the law or could not reasonably conclude as it did.

By way of example, in *Puris v. Puris,*[40] the Connecticut appellate court explained that in using the abuse of discretion standard, the court's:

> role is not to retry facts of the case, substitute our judgment for that of the trial court, or articulate or clarify the trial court's decision. . . When reviewing claims that the trial court abused its discretion in making these awards, 'every reasonable presumption should be given in favor of its correctness . . . [T]he ultimate issue is whether the court could reasonably conclude as it did.'[41]

Similarly, the Rhode Island Supreme Court in *Wrobleski v. Wrobleski*[42] stated that the "findings of fact by a trial judge in a divorce action will not be disturbed unless the judge miscon-

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38 No. 80-11898 (Montgomery County. Sept. 30, 1982), *aff'd,* 484 A.2d 810 (Pa. Super. Ct. 1984).

39 Id. at 823.

40 620 A.2d 829 (Conn. App. Ct. 1993).

41 *Id*. at 833.

42 653 A.2d 732 (R.I. 1995).

ceived the relevant evidence or was otherwise clearly wrong."[43] That this is a heavy burden is clear. For example, in *Mellum v. Mellum,*[44] the North Dakota Supreme Court held that a "trial court's findings of fact will not be reversed unless they are clearly erroneous,"[45] and one appellate court has stated that the decision will not be reversed "unless plainly wrong or without evidence to support it."[46]

This is not to say that appellate courts never find an abuse of discretion. For example, in *Capasso v. Capasso*[47], the New York intermediate appellate court reversed the trial court's equitable distribution scheme in part because of what it deemed was a misperception of the wife's contributions to the business. The trial court had found that the wife's business activities were not sufficiently active or meaningful. These activities included: being an officer of the husband's business, co-guaranteeing business loans, record-keeping, contact with accountants; picking up bids, running of errands, and entertaining and attending business social functions. In reversing the trial court, the appellate court found that "no matter how minimal, these contributions were not totally devoid of value, and some recompense should have been given on their account."[48]

C. *Issues of Valuation and Non-Marital Property.*

One consequence of the abuse of discretion standard of review is that appellate courts rarely have the opportunity to enunciate clear uniform rules for dividing marital estates. Trial courts decide equitable distribution matters on all sorts of differing factual grounds. What might be a significant contribution to one court might be treated as minor by another. Additionally, the actual property distribution cannot be viewed in a vacuum. Significant valuation issues affect the result and may skew the percentages awarded to the parties. For example, if the court uses the date of separation as the valuation date for the assets and one of the spouses is awarded the bulk of the post-separation appre-

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43 *Id.*

44 607 N.W.2d 580, 583 (N.D. 2000).

45 *Id*. at 583.

46 *Matthews,* 496 S.E.2d at 128.

47 506 N.Y.S. 2d 686 (1986).

48 *Id.*

ciation, that could affect the percentages as well as how the court might divide other marital assets. This occurred in the Massachusetts case of *Savides v. Savides*[49] where the husband's business grew substantially during the parties' lengthy separation, such that at the time of divorce his separate estate was worth close to five million dollars. Because the wife's contribution to the marital estate ceased at the time of separation, the wife did not share in the greatly increased value of the husband's estate.

Similarly, whether an asset is treated as marital can have a significant impact. This was demonstrated in *Dart,*[50] in which trust proceeds worth hundreds of millions of dollars were considered the husband's separate property, thereby reducing the marital estate available for distribution. A variation of this is where one spouse has significant non-marital property. In the Pennsylvania trial court opinion of *S.M. v. J.M.,*[51] the court found it significant that the dependent spouse had separate assets of her own exceeding two million dollars. In part because of this, the trial court found it appropriate to award the wife a smaller percentage of a specific disputed marital asset.

Another factor that must be considered is whether the spouses are receiving other benefits under the dissolution award. For example, a large alimony award might impact upon the equitable distribution. In *Gill v. Gill,*[52] the Pennsylvania intermediate appellate court considered the wife's receipt of alimony of $30,000 a year, which it considered substantial, as a justification for her receipt of less than half of the marital asset. By focusing on alimony, as was done in *Gill*, or on valuation or property characterization issues, as demonstrated in the cases referred to above, some courts indicate that the magnitude of the marital estate is not entirely determinative of the ultimate distribution. In contrast, as discussed below, other cases do focus on the significant value of the assets involved, often treating the parties' relative contributions as the most important factor.

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49 508 N.E.2d 617 (Mass. 1987).

50 *Dart*, 597 N.W.2d 82.

51 No. FD89-8502 (CP Allegheny, June 28, 1999).

52 677 A.2d 1214 (Pa. Super. Ct. 1996).

III. Dependent Spouse Arguments in High Asset Divorce Cases

In these cases involving large marital estates, certain arguments have been repeatedly raised in support of the opposing viewpoints of the dependent and independent spouses.

A. *Constitutional Challenges to Lack of Presumption in Favor of an Equal Distribution.*

The failure to have a statutory presumption of equal division of the marital estate has been asserted to violate a state's equal rights amendment under its constitution. In the well publicized case of *Wendt v. Wendt,*[53] Lorna Wendt and her husband fought over a marital estate estimated to be worth more than one hundred million dollars.[54] Arguing for what she believed to be her fair share, Lorna Wendt, in addition to asserting her contributions as homemaker and devoted corporate wife, also argued that the equal rights amendment (ERA) in Connecticut's constitution requires a presumption that property be divided equally between the spouses. She asserted that the absence of such a presumption violated the ERA. More specifically, she argued that since it is generally women who serve as homemakers and do not make the major material contributions to the marital unit's financial success, the gender neutral language of Connecticut's equitable distribution law actually had the effect of discriminating against women. This is especially true, she argued, in large estate cases by allowing "an extremely wealthy wage earner to shirk the responsibilities of equitable distribution of property."[55] In rejecting that claim, the Connecticut appellate court noted that Mrs. Wendt had failed to provide any evidence of discrimination, and even if she had, "intentional or purposeful discrimination [also] must be shown to make a successful equal protection claim."[56]

In response to Lorna Wendt's claim that the courts must include a presumption of equal division, the trial and appellate

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53 757 A.2d 1225 (Conn. App. Ct. 2000).

54 Mrs. Wendt's Petition for Certification for review to the Connecticut Supreme Court was denied. *Wendt v. Wendt*, 763 A.2d 1044 (Conn. 2000).

55 *Wendt*, 757 A.2d at 1244.

56 *Id.*

courts reasoned that since the statute did not have the specific language providing a presumption, it does not exist. Consequently, the trial court confirmed that "the legislative intent is to be found, not in what the legislature intended to say, but in the meaning of what it did say . . . It is our duty to apply the law, not make it."[57]

Both the trial court and appellate court rejected the invitation to implement the sweeping social change envisioned by the wife. The appellate court adopted the language of the trial court that:

> the plaintiff would have the decision in this case take its place along the great events making changes in women's rights: the 1848 Seneca Falls Convention . . . the nineteenth amendment of the United States Constitution, ratified in Connecticut . . . and the ERA to the Connecticut constitution, adopted in November 24, 1974. This historical progression, while compelling, does not warrant the results the plaintiff seeks. The plaintiff seeks, by judicial fiat, to declare unconstitutional, statutes in order to correct an economic disorder.[58]

Thus, the appellate court concluded that Mrs. Wendt did not successfully prove a violation of the ERA.[59]

Although Mrs. Wendt was unsuccessful in her claim that marriage is an equal partnership which upon dissolution should result in the partners receiving equal shares, some legislative support exists for the partnership concept, although the assertion that this partnership necessitates an equal distribution has been rejected. In the Missouri case of *Goller v. Goller*[60], the Missouri Court of Appeals noted that it is a major guiding principle of its statute that "property division should reflect the concept of marriage as a shared enterprise similar to a partnership."[61] While this does not require an equal division, this philosophical approach—according to practicing Missouri lawyers—results in the courts starting with a basic premise of equal division.

Similarly, in the Illinois case of *In re Marriage of Mahaffey*,[62] the appellate court acknowledged that under its property division

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57 *Id*. at 1242.

58 *Id.* at 1245.

59 It is interesting to note that in virtually none of the cases reviewed by the current authors was the wife the independent spouse.

60 758 S.W.2d 505 (1988).

61 *Id*. at 508.

62 564 N.E.2d 1300 (Ill. App. Ct. 1990).

statute, "marriage is a shared enterprise or partnership".[63] It quoted one commentator as explaining that:

> Like a commercial partnership, the parties in a marriage function by sharing duties and by dividing their labor, without which the relationship could not succeed. It is conceded that the relationship cannot successfully operate without the acquisition of some capital. The accumulation of that capital, however, will not occur, especially if children are present, unless the homemaker-spouse contributes a significant part of her energies to the marriage. The services of both are necessary for the continuance of the relationship. 'The wife who spends almost all her married life in homemaking and childrearing contributes significantly to the family's economic welfare by making it possible for [the] husband to earn income and amass property during the marriage.' Parties enter into marriage to achieve particular objectives, and, as in a commercial partnership, the degree to which the joint efforts effectuate this purpose provide [sic] the basis for determining and assessing property rights upon dissolution.[64]

Notwithstanding this concept of a shared enterprise, the Illinois court recognized that its statute does not require that "marital property be equally divided between the parties. The statute merely requires that a trial court divide the marital property in 'just proportions' considering all relevant factors."[65]

B. *Rewarding the Efforts of the Corporate Spouse.*

An argument made by many dependent spouses in cases in which the independent spouse is a highly successful businessperson is that major contributions were made to the marital estate as a result of the spouse's efforts as a "corporate spouse." Interestingly, while some courts express their admiration for the corporate spouse's efforts, these spouses still appear to receive a less than equal share of the final distribution. In *Wendt*[66] and the similarly well-publicized New York trial court case of *Goldman v. Goldman,*[67] both wives contended that their role as corporate spouse supported their claim to an equal share of the marital es-

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63 *Id*. at 1304.

64 *Id*. (quoting Heyman, THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT: NEW SOLUTIONS TO OLD PROBLEMS, 123 J. Marshall J. Prac. & Proc. 1, 8 (1978)).

65 *Id*. at 1307-1308.

66 *Wendt*, 757 A.2d 1225.

67 Index No. 313111/96, Supreme Court of the State of New York, County of New York: IAS Part 15 (April 24, 1998).

tate. In *Goldman*, the parties were married for more than thirty years with one child of their own and two children from Mr. Goldman's prior marriage. The trial court described Mr. Goldman's business career during the marriage as "nothing short of spectacular."[68] At the time of divorce, the marital estate was estimated at ninety million dollars.

The trial court held that Mrs. Goldman's contributions to the marriage justified awarding her half of the marital estate. In reaching its decision, the court cited several factors in particular supporting the contribution Mrs. Goldman made as a corporate wife. The court found that Mrs. Goldman not only raised their daughter without a nanny but also entertained without a full-time maid and "accompanied Mr. Goldman to conventions and social gatherings. Mrs. Goldman for 33 years came as close to a life partner as one could get short of actually being employed at Congress [i.e., Mr. Goldman's business]."[69]

In *Wendt*, the wife also argued that she had been a corporate wife and should be recognized for her efforts. The parties were married for thirty-two years and had two children. As the marriage progressed, Mr. Wendt developed into a very successful businessman, becoming chairman and chief executive officer of GE Capital Corporation. As in the *Goldman* case, the large financial contribution of the independent spouse resulted in a marital estate estimated to be many tens of millions of dollars.

Recognizing her contributions to the marriage, the court awarded Mrs. Wendt a property distribution of twenty million dollars. The appellate court pointed out that throughout most of the marriage she was a mother, homemaker and corporate wife, entertaining GE customers and other business associates in social and business settings. The court explained, "the defendant's [Mr. Wendt] employment with a major international corporation triggered an increased workload and extensive social duties. Entertainment grew more formal and on a larger scale, and the plaintiff commonly hosted events."[70] As Mr. Wendt's "corporate responsibilities expanded so did his wife's entertainment duties. In addition, she traveled extensively with the defendant to nu-

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68 *Id.* at 2.

69 *Id.* at 5.

70 *Wendt,* 757 A.2d at 1230.

merous countries for business purposes."[71] Thus, the court determined that while Mrs. Wendt made no direct financial contribution to the marital estate, her contributions as a corporate spouse were significant and deserving of twenty million dollars in marital assets. (Mrs. Wendt appealed this award based in part upon the husband's receipt of substantial other assets).[72]

A wife received twenty percent of a marital estate worth approximately three million dollars in recognition of her role as a corporate wife in *Marriage of Gray*.[73] In that case, the Indiana Court of Appeals found that the wife had contributed to the increase in value of a company owned by the husband through her extensive involvement in the social aspects of the business. The husband placed importance on socializing with clients and employees and the wife was involved with much of this entertaining. Without discussion as to how the percentage was determined, the trial court considered the value of the entertaining and homemaker activities to be worth approximately twenty percent of the increase in value of the business. Applying the abuse of discretion standard, the appellate court refused to substitute its judgment for that of the trial court.

Another case in which the court credited the wife's contributions, but still awarded her a minority percentage of the marital estate, is *Casto v. Casto*.[74] In this Florida case, the husband was a substantial developer of shopping centers and had a net worth of between four million seven hundred thousand dollars and ten million dollars. The wife was awarded one million five hundred thousand dollars based upon the fact that the husband's business entertaining was considered of the "utmost importance and where an aura of success and family stability was thought by the husband to be indispensable to his business success."[75] Because the court found that the wife had been highly successful in her role as corporate spouse, it concluded that her awarded property share was not so high as to be an abuse of discretion.

Perhaps equally as important as the social and entertaining part of the corporate spouse's role, yet seemingly absent to date

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71 *Id.* at 1230-1231.

72 *See supra* note 54.

73 422 N.E.2d 696 (Ind. Ct. App. 1981).

74 458 So.2d 290 (Fla. Dist. Ct. App. 1984).

75 *Id*. at 291.

from the courts' consideration, is the contribution the dependent spouse makes as a sounding board for the independent spouse. Similar to the relationship which history has revealed exists between First Ladies and Presidents—where the First Ladies have given advice and guidance—spouses like those in *Goldman* and *Wendt* argue that they have played a similar role, by virtue of the length of the marriage and their role as corporate spouse. Certainly the independent spouse during the course of the marriage frequently has shared information about business dealings, daily experiences, and asked for advice in a wide variety of circumstances.[76] While not easily quantified, this role as informal advisor potentially could be traced to the success of the independent spouse and the size of the marital estate, resulting in a larger award to the dependent spouse.

Sometimes, arguments can have an unintended result and leave the dependent spouse still receiving a minority of the estate. An interesting offshoot from the argument that a dependent spouse's efforts as the corporate spouse should increase her equitable distribution share is the position that through these efforts the dependent spouse also has increased her own earning capacity, thereby lessening her need for ongoing financial support. For example, in the New York case of *Avramis v. Avramis,*[77] the appellate court affirmed an award of approximately four million dollars to the wife from an estate valued at almost nine and one-half million dollars, and agreed with the trial court's decision not to award maintenance. The court noted the wife's extensive role in managing real estate holdings during the thirty year marriage. It concluded that "although it is apparent that [Mrs. Avramis] indeed devoted substantial efforts to building the marital estate, it is equally apparent that she acquired numerous business skills along the way."[78] In this way she improved her prospects of obtaining future economic success, on her own merits and needed less financial support or maintenance from her former husband.

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76 *See*, HOW SPOUSES INFLUENCE EXECUTIVES, Bus. Wk., May 2, 1983, at 17.

77 664 N.Y.S.2d 885 (1997).

78 *Id*. at 886.

C. *Active Involvement in Decision Making Regarding the Finances.*

Another type of contribution often cited by dependent spouses and the courts in equitable distribution matters is the dependent spouse's role in the financial aspects of the marriage in addition to serving as homemaker. This situation was present in the North Dakota case of *Mellum.*[79] In this smaller asset case (involving approximately one million dollars), the parties were married for twenty-seven years and had four children. Shortly after their marriage, Mr. Mellum began a construction business with Mrs. Mellum performing various tasks at the construction site. Upon divorce, Mrs. Mellum argued that she not only acted as the homemaker and raised the children, but also worked in Mr. Mellum's construction business throughout the marriage, which prevented the development of an independent career.

The lower court agreed with Mrs. Mellum's contention by awarding her sixty-five percent of the marital estate (worth approximately one million dollars). Mr. Mellum appealed, arguing that the trial court erred in making findings that detailed his wife's contribution to the construction business but not his own. The North Dakota Supreme Court disagreed, ruling that "'financial contributions are but one factor to consider' in distributing marital property and 'a party's other, non-economic contributions to a marriage must be given equal consideration.'"[80] The Supreme Court pointed to the contribution Mrs. Mellum made to the construction business as an important factor in determining the equitable distribution of the marital estate.

In the 1998 Virginia case of *Matthews,*[81] the parties were married for twenty years and had one child. At the time of the divorce, the marital estate had grown to over fifty million dollars. Mrs. Matthews asserted that in addition to her primary role as homemaker and her other non-monetary contributions, during the first ten years of the marriage, she played a significant role in creating the business which became the marriage's main asset. When Mr. Matthews formed a corporation at the beginning of the marriage, Mrs. Matthews handled the incorporation and per-

79 *Mellum*, 607 N.W.2d 580.

80 *Id*. at 584(fn2).

81 *Matthews,* 496 S.E.2d 126.

formed valuable historical and market research. Later, Mrs. Matthews handled tax, corporate, financial planning, legal and other issues and acted as the primary liaison with the firm's accountant and tax planner.[82] Thus, it was her hard work that in part formed the basis of the husband's success in later years. The trial court agreed, awarding the wife nearly fifty percent of the marital estate.

On appeal, the husband argued that he should receive a larger portion of the estate because of his "primary and extensive role in the extraordinary success" of the business.[83] The appellate court disagreed, finding that the lower court properly balanced the wife's contribution to the business in the first half of the marriage and her superior non-monetary contributions throughout the marriage against the husband's greater monetary contribution in the second half of the marriage. While recognizing cases in which one spouse received the majority of the estate, the court concluded that prior Virginia cases "do not indicate that a trial court must fashion a disparate award if one of the parties has made substantially larger monetary contributions to the marital estate than the other."[84]

As discussed above, the New York case of *Avramis*[85] involved a nine and one-half million dollar estate, of which the wife was awarded approximately four million dollars. In reaching its determination, the trial court considered the very active role the wife had played in managing the parties' real estate holdings, including "making offers on parcels, attending closings, executing notes and mortgages, renting apartments, collecting security deposits and rents and maintaining the books."[86] Noting that equitable distribution is designed to arrive at a fair distribution of the parties' marital property, the court reasoned that the dependent spouse "was entitled to receive an award that reflects the significant contributions that she made to the parties' economic partnership during the marriage," but rejected the wife's claim that an equitable award was an equal share of the estate.[87]

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82 *Id*. at 127.

83 *Id*. at 129.

84 *Id*.

85 *Avramis*, 664 N.Y.S.2d 885. *See supra*, discussion in text at note 77.

86 *Id*. at 885.

87 *Id*.

The court also noted the wife's significant financial contribution in the Tennessee case of *Inman v. Inman,*[88] which involved the distribution of a nine million dollar marital estate. During the early years of the marriage, the wife cared for the parties' four children while the husband worked over seventy hours a week at a service station and bought and sold real estate. Once the children began school, the wife joined the husband in real estate sales. Ultimately, the husband established a real estate agency before becoming extremely successful in the management and dealing of Nutri/System franchises. While the wife had no involvement with the franchises, she continued in real estate as a successful salesperson and was a member of the Million Dollar Sales Club. Interestingly, after noting the wife's financial accomplishments, the Tennessee Supreme Court then went on to affirm the wife's award of only approximately one-third of the marital estate on the basis of her contributions as a homemaker and parent.

Another case involving the dependent spouse's substantial contributions on behalf of the business is *In re Marriage of Harding.*[89] In this case, the wife was a nurse and the husband a dermatologist. During the early years of the marriage, the wife worked part-time for other doctors and part-time in the husband's office. After the birth of the first of four children, the wife handled the practice's books from home. The wife estimated that she prepared billings for 700 to 800 patients each month and spent approximately fifty hours per week keeping the accounts current as well as additional time on miscellaneous paperwork for the practice. At the time of their divorce, after twenty-nine years of marriage, the marital estate exceeded four million dollars. The trial court awarded the wife forty percent of the estate. On appeal, the Illinois Court of Appeals affirmed the award finding that the trial court had considered the relevant factors, including each spouse's contribution to or dissipation of the marriage.[90]

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88 811 S.W.2d 870 (Tenn. 1991).

89 545 N.E.2d 459 (Ill. App. Ct. 1989).

90 *Id.* at 465.

Finally, in *Goldman,*[91] the dependent spouse, while not involved with the independent spouse's business, made decisions that contributed financially to the marital estate. She was extensively involved with the renovation of the parties' five-story townhouse valued at over four million dollars, including supervising the renovations and acting as general contractor for the work done at the home. She became a noted collector of antiques and skilled at period restoration. The five-story townhouse alone was found by the court to have displayed close to two and one-half million dollars in antiques with another $250,000 worth of antiques in storage. She also decorated and renovated the couple's farmhouse, an apartment in New York City and two other properties, increasing the value of all of these properties. The trial court concluded that Mrs. Goldman's contribution to the estate through these properties as well as from her duties as homemaker and mother entitled her to one-half of the marital property.

Active involvement by the dependent spouse in the financial aspects of the marriage, therefore, appears to have a critical bearing upon the marital share the dependent spouse ultimately receives. It appears that to approach or receive fifty percent of these large estates, the dependent spouse must be a "homemaker plus", that is, she must perform well all the typical duties of the wife, parent and homemaker and still be able to demonstrate that she made an actual economic contribution to the estate. Perhaps helping with the business is considered more tangible than engaging in the business/social entertaining or the other endeavors of the corporate spouse. Or, perhaps it is easier for the court to award a higher portion when there is a direct link between the dependent spouse's business efforts and the ultimate value of the estate. In essence, these dependent spouses perform double duty — the primary homemaking activities and substantial, albeit partial, financial contributions.

D. *Sacrifices of the Dependent Spouse.*

Another argument that has been presented by dependent spouses is that they should be compensated in equitable distribu-

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91 *Goldman*, Index No. 313111/96, Supreme Court of the State of New York, County of New York: IAS Part 15 (April 24, 1998).

tion for various sacrifices which enabled the couple to achieve financial success. The Supreme Court of Rhode Island addressed this issue in *Wrobleski v. Wrobleski* [92] (involving a marital estate of slightly less than three million dollars). The parties were married for twenty-five years and had one child. At trial, the wife demonstrated that she had made enormous personal sacrifices to further the husband's medical career including frequent moves from state to state and the taking of numerous jobs to help support the family. Because of the moves, the wife's career in education was not able to develop, even though she held both undergraduate and masters degrees in education. The trial court awarded Mrs. Wrobleski sixty percent of the total marital assets and substantial indefinite alimony. The Rhode Island Supreme Court agreed with the lower court's award to Mrs. Wrobleski of a majority of the marital assets. The Supreme Court stated: "the trial judge's decision persuades us that he complied with the mandate of the statue in making an equitable assignment of the property."[93]

A similar showing of personal sacrifice is set out in *Flechas v. Flechas.*[94] This Mississippi case involved a six-year marriage during which the wife acted as the homemaker, raising her daughter and the husband's son. Prior to marrying, Mrs. Flechas moved to Mississippi from Georgia and left her job as a teacher with the expectation of marrying Mr. Flechas. However, after she relocated, Mr. Flechas decided not to marry her. She then moved back to Georgia and began teaching again. Shortly after she moved back, Mr. Flechas changed his mind and decided that he did want to marry her. She then sold her home and left her teaching position to marry Mr. Flechas. Mrs. Flechas never worked again during the six-year marriage and instead became a homemaker. During the marriage, according to the trial court, the parties did not accumulate any marital property, but Mr. Flechas' separate assets grew from almost four and one-half mil-

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92 653 A.2d 732 (R.I. 1995).

93 *Id*. at 734.

94 724 So.2d 948 (Miss. App. Ct. 998). *See also* John R. Dowd, Note, DEFINING THE DOCTRINE OF EQUITABLE DISTRIBUTION IN MISSISSIPPI: A REBUTTABLE PRESUMPTION THAT HOMEMAKING SERVICES ARE AS VALUABLE TO THE ACQUISITION OF MARITAL PROPERTY AS BREADWINNING SERVICES, 16 Miss. C. L. Rev. 479 (1996).

lion dollars to over six million dollars. However, the trial court held that none of the increase was marital property and awarded her no property and limited alimony.

On appeal, the Mississippi Court of Appeals ruled that there may have been a marital estate of over one million dollars subject to equitable distribution, and reversed and remanded for a determination of whether a marital estate existed. In doing so, the trial court was directed to properly consider Mrs. Flechas' non-economic contributions. While the appellate court focused primarily on Mrs. Flechas' role as a homemaker, it also factored in the sacrifices she made to further the marriage. Thus, the appellate court ordered the lower court to, among other things, make specific findings of fact and conclusions of law with regard to Mrs. Flechas' non-economic contribution to the marital estate.

The Pennsylvania case of *Gill v. Gill*[95] represents another case in which the court considered the dependent spouse's sacrifices for the good of the marriage. At the time of divorce, after twenty-eight years of marriage, the marital assets totaled over four million dollars, of which three million consisted of the business titled in the husband's name. The wife was awarded thirty-eight percent of the marital estate in equitable distribution and over $30,000 a year in alimony until she reached age 65. She argued on appeal that this award was insufficient given the length of the marriage and the fact that she had relinquished her career as a school teacher and other career opportunities to stay home, raise the children and maintain the home. Although she had an undergraduate degree in education, she only taught for two years. Thus, she argued that she had sacrificed her career to be a corporate wife and homemaker to allow the husband's business to succeed. The Pennsylvania Superior Court noted her sacrifice but disagreed that either it or the length of the marriage entitled her to a greater share of the assets. When added to the alimony award, the appellate court concluded that the award was sufficient.[96]

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95 677 A.2d 1214 (Pa. Super. Ct. 1996).

96 *Id.* at 1217.

E. *Contributions of the Homemaker.*

In cases in which the dependent spouse has not contributed to the financial accumulation of the estate through direct involvement in finances, a role as corporate spouse or personal sacrifices, the spouse still may have contributed to the acquisition of the marital property through other non-economic means. As homemaker or caretaker to the parties' children, the dependent spouse may have relieved the independent spouse of obligations so that he or she had the time and energy to invest in making the business a success. Similarly, the very acts of homemaking and child rearing are of such importance to the marital unit that these activities, in and of themselves, can be deemed to contribute to the marriage. Perhaps for this reason, some jurisdictions specifically list the "contributions of a party as a homemaker" as a factor to be considered in equitable distribution.[97]

In the Mississippi case of *Flechas,*[98] Mrs. Flechas acted as the homemaker and managed the house. She testified that when she moved into the husband's home, the residence was in such disarray that she had to contribute "much time and labor to refurbishing the home the couple shared, including extensive painting and other refurbishing activities."[99] She also served as surrogate mother to the husband's son who was a difficult youth. Although the husband's assets had increased by more than one million seven hundred thousand dollars during the six year marriage, the chancellor failed to consider the wife's non-economic contribution and denied her a portion of the increased assets.

On appeal, the Mississippi Court of Appeals ruled that the chancellor erred in concluding that Mrs. Flechas made no contribution. In reaching its decision, the court reasoned, "One type of contribution, such as financial, has *equivalent* value to another, such as domestic."[100] The court further concluded that "[a]lthough contributions of domestic services are not made directly to a retirement fund, they are nonetheless valid material contributions which indirectly contribute to any number of mari-

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97 For example, Pennsylvania courts consider the contributions of a homemaker. *See supra*. discussion in text at note 15.

98 *Flechas*, 724 So.2d 948.

99 *Id.* at 952.

100 *Id*. at 953 (emphasis added).

tal assets, thereby making such assets jointly acquired."[101] Thus, the court of appeals reversed the chancellor's decision, and directed that a determination be made of whether a marital estate existed. In doing so, the chancellor was ordered to make specific findings regarding the wife's non-economic contributions.

The homemaker spouse's contributions were also highlighted in the contributions of the homemaker spouse in the Pennsylvania case of *Fonzi v. Fonzi.*[102] The wife had made significant contributions as both a corporate spouse and a homemaker/mother. In analyzing the wife's homemaker contributions, the court noted that, while the husband worked hard to develop and succeed at his own business during the thirty year marriage, the wife raised four children virtually alone, including one daughter who died at age sixteen. The trial court divided the three million eight hundred thousand dollar estate equally between the parties.

Mr. Fonzi appealed, arguing that he should be awarded a greater share of the marital assets because he was the sole contributor to the creation of the marital estate. The intermediate appellate court rejected this contention, finding that the lower court had not abused its discretion in concluding that Mrs. Fonzi made a substantial contribution as homemaker.

In the New York case of *Capasso v. Capasso*[103], in addition to reversing the trial court's decision because of its failure to properly consider the wife's financial contribution (as discussed above), the New York appellate court also reversed on the basis of the trial court's failure to properly consider the wife's noneconomic contributions. Citing earlier New York decisions, the court emphasized that:

> [m]arriage is an economic partnership . . . with a significant noneconomic component. . . .'The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition."[104]

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101 *Id*.

102 633 A.2d 634 (Pa. Super. Ct. 1993).

103 506 N.Y.S.2d 686 (1986).

104 *Id*. at 690.

Similar support was given to the efforts of the homemaker spouse in the Missouri case of *Goller v. Goller*[105]. In *Goller*, the wife requested that following a thirty-two year marriage during which marital property in excess of two million dollars was accumulated, the assets should be equally divided between the parties. Mrs. Goller asserted that her nonmarital contributions had been extensive. Following their marriage, Mrs. Goller supported the couple by working as a secretary while the husband completed his military service and attended law school. The wife continued to work after the birth of their first child, stopping to become a full-time mother and homemaker after the birth of their third child. The parties, ultimately, had six children. Relying on the husband's direct financial contribution, the trial court awarded the wife thirty-six percent of the marital estate.

The wife appealed claiming that it was an abuse of discretion to concentrate so fully on the husband's direct financial contributions and ignore her non-monetary contributions. The appellate court agreed and remanded the matter for a full consideration of the equitable distribution factors. In reaching its conclusion, the appellate court noted that the parties had shared the responsibilities of marriage. The wife had worked outside the home during the marriage's early years while the husband was in the service and attending law school. After the birth of the parties' third child, the wife worked within the home and the husband worked outside the home. This arrangement appeared to be by agreement. In short, the court found the marriage to have been a "partnership".[106]

F. *The Potential Role of Other Factors.*

While "contributions" are highlighted in this article as being a primary consideration in determining the equitable distribution award in large estate cases, other statutory factors have captured the attention of the reviewing courts. Two factors that deserve some attention are the length of the marriage and the parties' individual potentials following the entry of the divorce decree.

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105 758 S.W.2d 505 (1988).

106 *Id*. at 509.

1. *Length of Marriage*

The length of the marriage is a factor listed in every equitable distribution statute and is cited by courts in every case reviewed. However, it is difficult to quantify the effect on equitable distribution of a marriage's length. Larger awards do not necessarily correlate with long marriages. For example, six years of marriage were considered a significant amount of time in *Flechas,*[107] while after twenty-nine years of marriage, the dependent spouse in the Massachusetts case of *Rosenberg v. Rosenberg*[108] received only thirty-four percent of a twenty- one million dollar estate; this despite the court's language that:

> When the entire marital estate is as large as it is in this case . . . need, even as related to station in life, recedes as a consideration; equitable distribution of the marital assets becomes the main task. Such an approach is consistent with the view that the dissolution of a long term marriage . . . somewhat resembles the dissolution of a partnership, and that careful thought must be given to the various contributions of the partners to the marital enterprise."[109]

Some courts have de-emphasized the importance of the length of a marriage. In *Capasso,*[110] the appellate court, in reversing the trial court, found that the trial court may have been "unduly influenced by a perspective which led it to characterize this marriage of almost 12 years . . . as one of 'relatively short duration.'"[111] Other courts give great weight to long marriages. For example, in the Oregon case of *Kathrens and Kathrens,*[112] which involved a thirty year marriage and a marital estate of five million dollars, the court of appeals stated that as a "general rule, when marriages of long duration are dissolved, the parties are entitled to share in the marital assets equally."[113]

Moving towards an equal division where there has been a lengthy marriage also appears to be the general rule in Minnesota. In the Minnesota case of *Miller v. Miller,*[114] which involved a 20-year marriage and a marital estate in excess of fourteen mil-

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107 *Flechas*, 724 So.2d 948. *See supra* discussion in text at note 94.
108 595 N.E.2d 792 (Mass. App. Ct. 1992).
109 *Id.*
110 *Capasso*, 506 N.Y.S.2d 686.
111 *Id*. at 691.
112 615 P.2d 1079 (Or. Ct. App. 1980).
113 *Id*. at 1083.
114 352 N.W.2d 738 (Minn. 1984).

lion dollars, the court found that "equal division of the wealth accumulated through the joint efforts of the parties is appropriate on dissolution of a long term marriage."[115] Similarly, in the North Dakota case of *Fox v. Fox*,[116] which involved a 32-year marriage, the North Dakota Supreme Court noted that "a lengthy marriage generally supports an equal division of all marital assets."[117] Thus, while it is hard to predict the effect the length of marriage will have on the ultimate distribution, it is a factor that should not be ignored. Certainly, there is much to be argued that in a long marriage parity in the division of the accumulated estate is justified.

2. *Future Potential*

A very different factor from "contributions" is the future economic potential of each party after the entry of the decree. The contribution factor reviews the history and actions of the parties, while an analysis of the parties' potential looks to the future. In *Goller,*[118] in addition to considering the shared enterprise concept of marriage, the Missouri appellate court also emphasized that a guiding principle of equitable distribution is that "property division should be utilized as a means of providing future support for an economically dependent spouse."[119] In that case, the wife had been out of the work force for twenty-seven years, she was over age fifty-five and had only a high school education. The husband, on the other hand, was a successful attorney who earned, at the time of division of property, over $150,000 per year. The *Goller* court emphasized that this discrepancy in the future outlook for each of the parties had to be considered in fashioning the equitable distribution award.

A similar look at the parties' anticipated future circumstances was performed in the New York case of *Selinger v. Selinger.*[120] This case involved a 20-year marriage and a marital estate of sixteen million dollars. The trial court had awarded the wife one-third and the husband two-thirds of the marital estate based

115 *Id*. at 742.
116 592 N.W.2d 541 (N.D. 1999).
117 *Id.* at 545.
118 *Goller*, 758 S.W.2d 505.
119 *Id.* at 508.
120 648 N.Y.S.2d 470 (Mo. Ct. App. 1996).

upon its review of the parties' respective contributions to the creation of the estate. The New York appellate court reversed, finding that while the trial court "properly considered the modest nature of the plaintiff's contributions to the marriage and the defendant's business . . . it failed to consider that the parties were married for 20 years, that the plaintiff had not worked outside of the home in that amount of time, and that the plaintiff was 51 years old at the time of the trial."[121] The appellate court then held that the wife was not entitled to more than one-third of the business interest, but she was entitled to one half of the remaining marital assets. The court concluded that "[s]uch a distribution of marital property is more equitable than the one imposed by the Supreme Court, which failed to consider the plaintiff's age, lack of work experience, and economic future.[122]

IV. Arguments Asserted by the Independent Spouse

As demonstrated by the cases cited in Section III, it would appear that while the courts refer positively to the contributions of the dependent spouse, the partnership nature of marriage, the length of marriage and the parties' potential futures, the end result in these large estate cases is generally that the dependent spouse receives one-half or less — and usually less — of the marital property. Interestingly, the typical independent spouse's arguments appear to be greeted with much less favor by the courts. Notwithstanding this lack of positive response, the result remains that the independent spouses usually retain the majority of the estate.

A. *I Created the Wealth, I Shall Keep It.*

Independent spouses often argue that they should receive the majority of the marital estate because it was through their extraordinary efforts or "spark" that the large estate was created. This concept was recognized in the Pennsylvania trial court opinion of *Anastasi v. Anastasi,*[123] where the trial court awarded the

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121 *Id*. at 473.

122 *Id*.

123 No. 80-11898 (C.P. Montco. Sept. 30, 1982), *aff'd*, 484 A.2d 810 (Pa. 1984).

dependent spouse 24% and the independent spouse 76% of the marital estate. The court explained: "[w]e believe this distribution to be an appropriate reflection of the Husband's input into the development of his business. As the amount of the property to be divided increases, the work product of the provider should be given greater cognizance."[124]

The Massachusetts Court of Appeals in *Bacon v. Bacon*[125] took a similar position concerning contributions. In this rare case in which the husband was the dependent spouse, the court assessed the value of the marital estate at slightly less than four million dollars, primarily made up of assets acquired by the wife through gift or inheritance. In reaching its decision to affirm an award to the husband of $200,000 and $20,000 for his counsel fees, the court noted the discrepancy in the parties' contributions to the estate. The appellate court agreed with the trial court that "an imbalance in contributions may have an effect on the distribution."[126] Quoting a commentator, the court wrote:

> Disparity of contribution within the marriage may be addressed by a close judicial examination of particular facts on the case presented. Such an examination should reveal whether the marriage has been a true partnership characterized by team effort, or whether the burdens have been unequally allocated. An imbalance in the assumption of responsibilities and burden[s] is an indication that one spouse has failed to contribute. The discretion to make an equitable rather than an equal division of property enables the trial judge to deal flexibly with the problem of imbalance.[127]

Other cases, while not so clearly stating this philosophy for large estate cases, have nonetheless concluded that the independent spouse should benefit from his or her overwhelming financial contributions. The Florida case of *Lester v. Lester*[128] involved a twenty-three year marriage and an eleven million dollar marital estate. The wife received property and cash in equitable distribution of three million five hundred thousand dollars. The husband had founded a highly successful tool and die busi-

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124 *Id.*

125 524 N.E.2d 401 (Mass. App. Ct. 1988).

126 *Id*. at 402.

127 *Id.* at 401 (quoting Inker & Clower, TOWARDS A NEW JUSTICE IN MARITAL DISSOLUTION: THE MASSACHUSETTS STATUTORY SCHEME AND DUE PROCESS ANALYSIS, 16 Suffolk U.L. Rev. 907, 935-936 (1982)).

128 547 So.2d 1241 (Fla. Dist. Ct. App. 1989).

ness, which substantially increased in value during the course of the marriage. The trial court found that the wife had not contributed to the growth in value or the operation of the business, holding that the growth was directly attributable to the husband's talents, the efforts of one of the husband's employees and increased business from the husband's pre-marital clientele.[129]

The court of appeals agreed, specifically stating that "her role was that of an ornament."[130] She was not considered to have significantly contributed as a homemaker or directly to the marital estate in other non-monetary ways. Her business contributions were similarly minimized. Although she was nominally an officer of her husband's corporation, she was found to have played virtually no part in running the business or attracting clients.

A less harsh, but somewhat related, position was enunciated by the Michigan Court of Appeals in *Byington v. Byington.*[131] In that case, the issue was whether a two million dollar employment compensation package was marital property. The husband became eligible to receive the compensation after the parties announced their separation but before the entry of the divorce decree. In Michigan, assets acquired through the date of entry of decree are marital property. Public manifestation of the intent to divorce may be relevant to the allocation of the assets but not to the question of whether an asset is marital. Because entitlement to the compensation package pre-dated the decree, the compensation package was considered to be marital. This, however, did not end the inquiry. The court noted that on remand the trial court might conclude that based upon the husband's contributions and the absence of contributions by the wife, a division of property might be justified that "in effect, awards most or all of the [husband's] compensation package to [husband]".[132]

In contrast to the above cases which suggest that the independent spouse should receive a greater distribution on account of his or her extraordinary contributions, the Pennsylvania Superior Court in *Fonzi*[133] rejected outright the husband's claim that

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129 *Id*. at 1242.

130 *Id*. at 1243.

131 568 N.W.2d 141 (Mich. Ct. App.1997).

132 *Id.* at 147.

133 *Fonzi*, 633 A.2d 634.

he should receive the majority of the marital estate because he was the primary breadwinner. Both the trial and appellate courts acknowledged that the husband had worked hard to make his company highly successful. However, the appellate court balanced this effort against the wife's contribution as a homemaker, parent and corporate spouse. The court concluded that an equal division of the three million eight hundred thousand dollar estate was appropriate.

In the Missouri case of *Goller,*[134] the Missouri Court of Appeals also rejected the trial court's reliance on the relative financial contributions of the parties. The trial court had concluded that in this type of equitable distribution case, "[t]he other factors are not really of any persuasive weight, other than contribution."[135] The appellate court disagreed and remanded the case for consideration of all of the statutory factors for equitable distribution, not just a party's contributions to the creation of the estate.

Businessmen husbands faced similar outright rejections of their claim to the majority of their marital estates on the basis of their substantial contributions in the cases of *Finley v. Finley*[136] from Indiana, *Szemborski v. Szemborski*[137] from Florida and *Miller*[138] from Minnesota. In each case the husband argued that he was singularly responsible for the economic wealth of the parties. In *Szemborski*, the husband presented an argument similar to that enunciated above in the *Anastasi* case that: "the pattern in cases with long term marriages and significant disparity in wage earning between the spouses is to equitably distribute, often substantially, in favor of the spouse whose career contributed the greatest earnings to the accumulation of marital assets."[139] The courts denied these arguments, finding in all three cases that the wives had made significant contributions of their own as homemakers and corporate spouses. However, in both *Finley* and *Szemborski* the husbands still received the majority of the marital estate: with the husband receiving sixty-four percent in *Finley*

134 *Goller*, 758 S.W.2d 505.

135 *Id*. at 508.

136 422 N.E.2d 289 (Ind. Ct. App. Ct. 1981).

137 512 So.2d 987 (Fla. Dist. Ct. App. 1987).

138 *Miller*, 352 N.W.2d 738.

139 *Szemborski*, 512 So.2d at 989.

and fifty-seven percent in *Szemborski.* An equal division was affirmed in *Miller*, in accordance with Minnesota's apparent general practice that in long term marriages, the distribution should be equal.

B. *Enough is Enough.*

A second argument proffered by independent spouses is that the dependent spouse for various reasons already has enough assets and, therefore, should not receive more from the marital estate. For example, the dependent spouse might have significant separate property or the spouse because of his or her actions might not be deserving of more property. Alternatively, the assets provided might already be sufficient to provide for that party's reasonable needs. Under this theory, at some point, the dependent spouse is alleged to have enough and the independent spouse should retain the rest.

The Dependent Spouse Already Has Significant Separate Property

The Pennsylvania trial court opinion of *S.M. v. J.M.*[140] considered the equitable distribution rights of a wife who had significant assets of her own following a seven year marriage. The precise issue before the court was whether the appreciation of corporate stock could be treated differently than other premarital assets. The trial court concluded that it could and awarded the wife twelve percent of the stock appreciation. In reaching this decision, the trial court analyzed the wife's substantial separate assets and minimal contributions to husband's business or the appreciation of the stock. First, the trial court pointed out the parties were only married for seven years during which they lived separate lives. The wife took care of the house and her two children with the assistance of paid employees. She also had a degree from the University of Pennsylvania and had been employed as an interior decorator. Most significantly, the wife enjoyed a high standard of living prior to her marriage, including travel, private schools for her children, private clubs, all of which was supported by her own employment and passive income.

140 No. FD89-8502 (CP Allegheny, June 28, 1999).

The parties' separate estates appreciated at about the same rate, with the wife's estate estimated at more than two million dollars. While the wife contributed to the purchase of the marital residence, the husband contributed to everything else. She also did not contribute in any way to the appreciation of the stock. Thus, the trial court concluded that she had a significant estate even before she was given the assets awarded in the final decree. Considering these assets, enough was enough.

The Dependent Spouse's Actions Limited Her Entitlement

No alimony was awarded to the wife in the New Jersey case of *Reid v. Reid*[141] where the wife received four million four hundred thousand dollars from the marital estate and the wife had committed marital misconduct by embezzling from the parties' business venture. On appeal, the wife argued that she deserved alimony in addition to her property distribution. In making its determination, the appellate court found that it could not ignore the wife's embezzlement and misappropriation of marital assets which "significantly impacted on her husband."[142] The court also observed that the history of the marriage did not reflect an emotional or financial partnership. The parties were considered more like "individual investors" who happened to marry. Thus, the appellate court held that the wife deserved no additional financial benefits.

In the New York case of *LeRoy v. LeRoy,*[143] a wife's substantial business error was considered, in part, by a trial court in finding that the wife was entitled to a less than an equal share of a forty-seven million dollar estate. This case involved the twenty-eight year marriage of Kay LeRoy and Warner LeRoy. Mr. LeRoy, a highly successful restauranteur/entrepreneur, was the force behind such restaurant ventures as New York's Maxwell's Plum, Tavern on the Green and the renovated Russian Tea Room. He also founded a New Jersey amusement park. During the course of the marriage, the trial court found that Mrs. LeRoy had been the caretaker for the children, including home schooling them for a period of time, and that she had entertained and

141 708 A.2d 74 (N.J. Super. Ct. App. Div. 1998).

142 *Id.* at 79.

143 7/15/99 N.Y.L.J. 26 (Supreme Court, New York County, 1999), *aff'd* 712 N.Y.S. 2d 33 (2000).

otherwise served as a corporate spouse, including having relocated as necessary for the husband's business ventures. She also had some involvement with the husband's restaurants. She helped locate and acquire the Tiffany Glass which became the famous ceiling at Maxwell's Plum and helped to develop the Tavern on the Green's signature dessert. She also assisted in the development of the Tavern's gift shop.

While crediting her contributions during the early years of the marriage, the trial court found that from the period of 1984 onward, the wife made no "significant contribution to the LeRoy 'empire.'"[144] In fact, the trial court found that the wife could have been more supportive of husband during that time period because the children were of sufficient age to be independent. Most critically, the wife showed a lack of business sense. This appears to have been the deciding factor for the court, which stated:

> Most telling in this regard was the terrible gaffe admittedly committed by Mrs. LeRoy, at the time of Mr. LeRoy's illness, when she unwittingly spread the terrible rumor, conveyed to potential investors in the Russian Tea Room, that Mr. LeRoy was dying. Such a mistake bespeaks a lack of business savvy which belies Mrs. LeRoy's claim to an equal share in the appreciation of the LeRoy holdings. Accordingly, notwithstanding that Mr. & Mrs. LeRoy worked together for a substantial part of 28 years, it is the Court's opinion that Mrs. LeRoy should be awarded only a 40% share in the LeRoy holdings.[145]

Forty percent of the estate resulted in an equitable distribution award to the wife of slightly less than nineteen million dollars. In addition, based upon the wife's monthly expenses, the court ordered the husband to pay maintenance of approximately $61,000 per month.

On appeal, the equitable distribution award was affirmed. The appellate court found that the forty percent distribution, when viewed in conjunction with the maintenance award, was not inequitable.[146]

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144 *Id.*

145 *Id.*

146 *LeRoy*, 712 N.Y.S. 2d App. 33.

The Award Provides Sufficient Assets and Income to Support the Dependent Spouse

In *Avramis,*[147] the New York Appellate Court concluded that the wife's four million dollar share of a nine million dollar estate was sufficient. The wife claimed that the award was not equitable because she did not receive enough of the income producing properties and the award failed to include maintenance. The appellate court disagreed with both of the wife's contentions. The court reasoned that while the wife was entitled to receive an award that reflected her significant contributions to the parties' economic partnership during the marriage, "equitable" does not necessarily mean "equal."[148] Given that Mrs. Avramis' four million dollar share was a "sizeable" portion of the marital estate, she was not entitled to additional income producing properties.[149] Further, since she had acquired numerous business skills during the course of her marriage and her claims of necessary monthly expenses were deemed incredible, it was appropriate to deny the wife maintenance.

Because the property distribution provided enough income to meet the dependent spouse's reasonable needs, spousal maintenance was denied in the Minnesota case of *In re Lyon.*[150] In this case, which involved a thirty-two year marriage, each of the parties received approximately three million six hundred thousand dollars upon divorce. The wife also received an alimony award of $6,500 per month. The husband objected to the alimony award claiming that the wife had failed to demonstrate a need for the award. The husband argued that the income on the wife's share of the marital property was sufficient to meet her reasonable needs. The appellate court agreed, finding that the wife could earn, conservatively, $200,000 per year from her property. Since this was more than sufficient to meet her yearly needs of $78,000, there was no need for the alimony. She had received enough.

A similar needs analysis was performed in the Florida case of *DiPrima v. DiPrima*[151] where the wife received approximately

147 *Avramis*, 664 N.Y.S.2d 885.
148 *Id*. at 886.
149 *Id.* at 886.
150 439 N.W.2d 18 (Minn. 1989).
151 435 So.2d 876 (Fla. Dist. Ct. App. 1983).

$650,000 and the husband received almost two million six hundred thousand dollars from the marital estate. She also was awarded $3,000 per month alimony and $500 per month child support. Based upon this award, the appellate court concluded that, although it might have been more generous to the wife had it been the trier of fact, the property awarded to the wife would allow her to continue to "live in substantially the same manner as she was accustomed during the marriage."[152] Therefore, the award was sufficient and not an abuse of discretion.

The sufficiency of the award to maintaining the wife's lifestyle was also considered the critical factor in the Iowa case of *In re Marriage of Wallace.*[153] There, the marital estate equaled fifteen million dollars, primarily as a result of the husband's inheritance or receipt by gift from his family of stock. In dealing with this type of passively acquired wealth, the court considered as a general rule that "if the total assets are so great as to enable each partner to continue to live the same lifestyle with something less than half of the total, then the division should be made so as to provide for that end without depriving the original recipient of the property of anything more than is necessary to achieve it."[154] For this reason the court affirmed an award of two million three hundred thousand dollars to the wife, finding that the income that could be earned from the one million dollar cash component of the award would be sufficient to maintain her lifestyle in a comfortable fashion.[155]

Finally, in *Bacon,*[156] the Massachusetts Court of Appeals approved an award providing the husband with only $200,000 out of an estate worth almost eight million dollars. The wife had received these assets from a family trust and other benefits from her family and the husband was found to have made minimal contributions to the marriage. When considered in conjunction with the husband's employment income of approximately $40,000 per year and his rent-free accommodations of an apartment, the court concluded that the award permitted the husband

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152 *Id*. at 878.

153 315 N.W.2d 827 (Iowa Ct. App. 1981).

154 *Id.* at 831.

155 The wife also received property held in her own name, the marital residence, personalty, a condominium, and three automobiles.

156 *Bacon*, 524 N.E.2d at 401.

to maintain an upper middle class lifestyle for himself. This was considered sufficient.

C. *Each Asset Does Not Have To Be Divided in the Same Percentage.*

In effecting the equitable distribution, the courts are not required to treat every asset in the same manner. A spouse may receive one hundred percent of one specific asset and only a tiny percentage of another. Similarly, a distinction may be drawn between liquid and non-liquid assets with one party specifically preferring one type of asset. In recognition of these distinctions, independent spouses frequently argue that they should receive the entire business interest. Since this is often the largest single asset in the estate, this can lead to disproportionate divisions greatly in favor of the independent spouse.

For example, in the Pennsylvania case of *White v. White,*[157] the husband had a lumber business and related business interests representing over three million five hundred dollars of the almost five and one-half million dollar estate. The husband was awarded the business interests and directed to pay the wife over a period of ten years a cash award of one million six hundred thousand dollars. She also received approximately $300,000 in real and personal property, resulting in a sixty-four percent to thirty-six percent distribution in the husband's favor.[158]

A similar award provided the husband with all of the marital stock in the Indiana case of *Burkhart.*[159] There, corporate stock holdings equaled approximately two million seven hundred thousand dollars in an estate worth three million two hundred thousand dollars. Rather than divide the stock in kind, which was considered an option by the court, the award permitted the husband to retain all of the stock and make a cash payment to the wife of the value of a small percentage of the stock. The appel-

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157 555 A.2d 1299 (Pa. Super. Ct. 1989).

158 Because of the nature of husband's business and the size of the periodic payments to wife, the Pennsylvania Appellate Court recognized that the husband might have to partially liquidate his business holdings in order to meet his financial obligations to the wife. To the extent that he would have to do so, the tax consequences of the liquidation had to be considered. For this reason, a remand was ordered.

159 *Burkhart*, 349 N.E.2d 707.

late court noted that this type of distribution was actually in the best interests of the husband. While it would have been easier for the court to simply award the wife outright a block of stock, the trial court found that:

> "the long-term interests of the parties would be better served if the Husband were allowed to keep the C/U stock, but then pay a substantial cash award over time. In this way the transfer restrictions would not be a problem, the adverse tax consequences would be avoided, and the Husband would retain his voting control over all 319,437 shares of stock.[160]

The perceived difficulties that would arise if the wife received an in-kind distribution of a business formed the rationale behind the decision in the Florida case of *Marston v. Marston*.[161] In this smaller estate case involving a net worth of slightly more than one million dollars, the husband's accounting practice and two closely held corporations in which he held a minority interest made up almost sixty percent of the estate. The husband argued that it would be "disastrous" for the wife to receive any of the business interests because the interests were held by a partnership and were minority interests. Since the husband did not receive net profits from these interests, if retained by the wife, she, similarly, would not receive any income from them. Moreover, as a minority shareholder she would be subject to being "squeezed out" by the other partners. The trial and appellate courts agreed with this assessment and awarded her assets totaling seventeen percent of the estate. To partially make up for the low property distribution, the court also awarded the wife permanent alimony of $3,500 per month.

Finally, in the Pennsylvania trial court opinion of *S.M. v. J.M.,*[162] the court explained the rationale behind its awarding the wife twelve percent of the appreciation of corporate stock. The appellate court had remanded the matter back to the trial court to specifically address whether the appreciation could be treated differently than other premarital assets. The trial court concluded that different assets can be divided differently and that, in this case, because of the wife's significant separate estate and her

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160 *Id*. at 714.

161 484 So.2d 32 (Fla. Dist. Ct. App. 1986).

162 No. FD89-8502 (CP Allegheny, June 28, 1999).

lack of contribution to the overall marital estate, a twelve percent interest in the stock appreciation was a sufficient award.

V. Windfalls and Equal Distribution

Although dependent spouses have presented numerous arguments supporting claims for equal distribution of the marital estate, these arguments are frequently unsuccessful. One area, however, in which equal distribution appears likely is where the marital estate arose from totally fortuitous circumstances, such as the winning of a lottery. In this circumstance, it has been considered equitable to divide the winnings equally. For example, in the New York case of *Ullah v. Ullah,*[163] the husband purchased a winning lottery ticket resulting in an eight million dollar award. Upon the parties' divorce, the husband claimed that the lottery award was his separate property. The court rejected this contention, finding that the parties had treated the winnings as joint income. The court concluded that an analysis of relative contributions had no relevance to this type of equitable distribution. Because the award was a result of "fortuitous circumstances and not the result of either spouse's toil or labor, [the court found] that an equal division of this jackpot was entirely appropriate."[164]

Applying a different analysis, the New Jersey Appellate Court arrived at a similar result in *DeVane v. DeVane.*[165] In that case, the wife won a three million six hundred thousand dollar lottery prize. In affirming the trial court's decision to divide the award equally between the spouses, the New Jersey court noted two different theories concerning the distribution of lottery awards. The first, represented by the holding in *Ullah*, treated the award as a lucky event not created by either parties' efforts. Therefore, an equal award was mandated.

The second approach, which followed a theory espoused by the Maryland court in *Alston v. Alston,*[166] provided that the equitable distribution factors would be considered as in any other equitable distribution matter. The court recognized that under

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163 555 N.Y.S.2d 834 (1990).

164 *Id.* at 835.

165 655 A.2d 970 (N.J. Super. Ct.1995).

166 629 A.2d 70 (Md. Ct. App.1993).

some circumstances it would be inequitable for one party to share in the award. For example, in *Alston*, the husband purchased the lottery ticket many years after the parties had separated and even after the wife's divorce complaint had been filed. In that instance, equity required that the husband retain the entire lottery award. The New Jersey court in *DeVane* decided that it would follow this second approach and consider all of the equitable distribution factors.[167] In contrast to the facts in *Alston*, however, the wife won the lottery in *DeVane* during the marriage. After a consideration of all the relevant factors, the court determined that an equal division was appropriate.

Thus, where mere luck is involved, courts appear more inclined to treat the parties equally. Neither party can assert a strong argument that individual contributions resulted in the magnitude of the marital estate based on the minimal effort of buying a lottery ticket. It is only where other considerations, like the prior separation of the parties, become implicated that the distribution will likely favor one of the parties over the other.

VI. Conclusion

Equitable distribution matters provide great opportunities for domestic relations lawyers to develop creative arguments on behalf of their clients. As the size of the marital estate increases and the stakes get higher, the opportunities for creative lawyering also increase. Because of the abuse of discretion standard and the vagueness of the statutory factors for equitable distribution, unlike in support cases, no firm guidelines exist that limit the arguments or the court's ability to fashion an equitable remedy.

While each practitioner will certainly develop arguments to meet a case's particular circumstances, this article demonstrates that some of the potentially successful arguments include:

For the Dependent Spouse

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167 The New Jersey Court did depart from the theory presented in *Alston* in one significant manner. The *Alston* Court placed primary importance on the manner and timing of how the asset was obtained. *Alston*, 629 at 76. The *DeVane* Court held that no one factor should be emphasized over the others. Instead all the factors should be considered to fashion a result which met the unique needs of the parties. *DeVane,* 655 A.2d at 972.

- Since marriage is a partnership, upon its dissolution each partner should get an equal half of the partnership assets;
- The role played by the corporate spouse was essential to the breadwinner's success — without it, the large marital estate would simply not exist;
- The spouse was a "homemaker plus", doing everything necessary to run the household and raise the family plus making financial and business contributions;
- The dependent spouse sacrificed so that the other spouse could succeed; these sacrifices justify receiving a larger portion of the marital estate; and
- The homemaker's contributions are so significant in their own right that they equal the breadwinner's contributions;

For the Independent Spouse

- The breadwinner's efforts were so extraordinary and unique that an estate of enormous wealth was created. The creator should reap the benefit of these efforts.
- With such a large estate, providing the dependent spouse with a minority of the assets still results in a lifetime of financial security; there is no need to provide excess and unnecessary amounts;
- The dependent spouse has enough separate assets, that only a minority of the larger estate is necessary to meet all reasonable needs;
- The dependent spouse's actions actually detracted from the other spouse's ability to establish the significant estate so he or she is not deserving of a substantial portion of the estate; and
- While it is proper to divide some of the marital estate equally, the business assets generated by only one of the parties should be retained only by that active party.

After these arguments are submitted, their success can only by measured by how each party fares in the final calculation of the equitable distribution award. Courts have enunciated opinions supporting one of the spouse's positions, when the final numbers reveal that the result is just the opposite. Obviously, it is the results that count. The cases reviewed by these authors suggest that unless the dependent spouse has made an extraordinary non-financial contribution or a significant financial contribution, the independent spouse quite frequently winds up with the majority of the marital estate.