Toward a More Equitable Distribution of Property upon Divorce: A Critique of Recent Developments in the Law of Marital Property in West Virginia

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TOWARD A MORE EQUITABLE DISTRIBUTION OF PROPERTY UPON DIVORCE: A CRITIQUE OF RECENT DEVELOPMENTS IN THE LAW OF MARITAL PROPERTY IN WEST VIRGINIA

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I. INTRODUCTION

The doctrine of equitable distribution, upon which the domestic relations law of nearly all jurisdictions is based, had its ideological beginnings in the divorce reform movement of the 1960s. Although

the early reformers' efforts focused largely on the elimination of fault in divorce actions, another important goal of the movement was to make the laws regarding property distribution gender-neutral.²

The new doctrine appeared to address both of these concerns by requiring that marital assets be divided in an equitable manner upon divorce regardless of title ownership, possession, or fault.³ Based on the theory that marriage is a voluntary partnership with each partner contributing equally to the marital estate, the doctrine of equitable distribution proceeds on the presumption that each partner is thus entitled to an equitable share of the estate upon divorce in order to avoid the unjust enrichment of the spouse with title to or possession of the property.⁴

Another of the predominant goals underlying the doctrine of equitable distribution is that of the final separation of the parties — that once each spouse receives his or her equitable share of the marital assets, he or she will then be financially self-sufficient and free to form other lasting relationships.⁵ This goal of final separation contravenes the traditional common-law approach to spousal maintenance in which a husband was obligated, through the imposition of alimony, to support his wife even after they divorced, although the support alimony would be terminated if the wife remarried.⁶

This traditional approach was founded on the notion that the man is predominantly responsible for the financial well-being of his family — with the concomitant inference that the woman is dependent upon the man for economic support even after he is no longer her husband, until the time she finds another man to support her.⁷ With the advent of equitable distribution statutes, however,

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2. Reynolds, supra note 1, at 833 n.30.
4. Id.
5. See Reynolds, supra note 1, at 835.
the traditional status-based approach to property allocation by the long-term "sharing" of assets under alimony provisions was supplanted by the modern equality-based idea of marriage as a partnership, the assets of which could be easily, cleanly, and equitably partitioned between the parties upon divorce.\textsuperscript{8}

In 1978, the West Virginia Supreme Court of Appeals recognized marriage as a partnership or shared enterprise: "[t]he law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership."\textsuperscript{9} Three years later, the court adopted a constructive trust approach to the distribution of assets upon divorce in order to secure for the spouse seeking relief an interest in property toward which he or she had made material economic contributions during marriage.\textsuperscript{10} At the heart of the court's holding was the policy of preventing the unjust enrichment of the spouse with title to the property: "[a] wife should be entitled to a trust in property to the extent that the husband is unjustly enriched by her contribution."\textsuperscript{11} However, the court noted that a constructive trust should not be imposed in situations in which a spouse has made mere noneconomic contributions to the marriage, such as the traditional domestic services of wife, mother, and housekeeper.\textsuperscript{12}

Two years later, in the 1983 case of \textit{LaRue v. LaRue}, the court adopted the doctrine of equitable distribution, holding that any division of marital property upon divorce is to be centered around the equitable concept that each marital partner should receive the benefit of his or her economic or noneconomic contributions toward the accumulated assets of the marriage.\textsuperscript{13} Thus, the \textit{LaRue} court extended its protection against unjust enrichment to wives, mothers, and housekeepers by recognizing that contributions of domestic serv-

\begin{itemize}
\item \textsuperscript{8} \textit{Id}.
\item \textsuperscript{9} Dyer \textit{v. Tsapis}, 249 S.E.2d 509, 511 (W. Va. 1978).
\item \textsuperscript{10} Patterson \textit{v. Patterson}, 277 S.E.2d 709 (W. Va. 1981), \textit{partially overruled by LaRue v. LaRue}, 304 S.E.2d 312 (W. Va. 1983).
\item \textsuperscript{11} \textit{Patterson}, at 716.
\item \textsuperscript{12} \textit{Id.} at 712.
\item \textsuperscript{13} LaRue \textit{v. LaRue}, 304 S.E.2d 312 (W. Va. 1983).
\end{itemize}
ices are as worthy of consideration in the distribution of the marital estate as are economic contributions.\textsuperscript{14}

As a result of the \textit{LaRue} decision, the West Virginia Legislature in 1984 passed a comprehensive bill which not only codified the court's holding but also sought to establish precise parameters for the equitable distribution of property in West Virginia.\textsuperscript{15} Section 48-2-32 of the \textit{West Virginia Code} explicitly establishes the presumption that all marital property shall be divided equally between both spouses, subject to certain discretionary factors.\textsuperscript{16} Furthermore, since only marital property is subject to equitable distribution under section 48-2-32, the statutory distinction between marital property\textsuperscript{17} and separate property\textsuperscript{18} is carefully delineated.

It was inevitable, however, that ambiguities would remain when these definitions were applied to the various circumstances involved in specific cases brought before the court. Questions concerning how

\textsuperscript{14} See id. at 322.
\textsuperscript{16} W. Va. Code § 48-2-32 (1986) provides, in pertinent part: "(c) In the absence of a valid agreement, the court shall presume that all marital property is to be divided equally between the parties . . . ." See infra note 53 for further discussion of § 48-2-32.
\textsuperscript{17} W. Va. Code § 48-2-1(e) (1986) provides, in pertinent part:

"Marital property" means:

(1) All property and earnings acquired by either spouse during a marriage . . . except that marital property shall not include separate property as defined in subsection (f) of this section; and

(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property . . . , or (B) work performed by either or both of the parties during the marriage.
\textsuperscript{18} W. Va. Code § 48-2-1(f) (1986) provides, in pertinent part:

"Separate property" means:

(1) Property acquired by a person before marriage; or

(2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage; or

. . . .

(4) Property acquired by a party during the marriage by gift, bequest, devise, descent or distribution; or

. . . .

(6) Any increase in the value of separate property . . . which is due to inflation or to a change in market value resulting from conditions outside the control of the parties.
to classify and distribute property which has, through time, use, or circumstance, lost those characteristics which would clearly indicate its "marital" or "separate" identity were certain to arise.

The purpose of this Note, therefore, is to examine, from a historical perspective, the West Virginia Supreme Court of Appeals interpretation of the definitions of marital and separate property under the equitable distribution statutes — specifically, those interpretations with respect to gifts between spouses and gifts to the marital estate. Such an examination will demonstrate how the court has progressively broadened the scope of marital property in an attempt to fashion more equitable remedies to the always-difficult problem of the distribution of assets upon the dissolution of a marriage. Even so, the court has remained quite conservative in its consideration of long-term equity between divorcing spouses, and thus many other avenues remain to be explored by the court before truly equitable solutions to this problem can be realized.

This Note will begin with a survey of the court’s difficulties in reaching an equitable result in the distribution of interspousal gifts. The next section contains an examination of the court’s holding regarding the distribution of separate property that has been jointly titled subsequent to the marriage, as well as an examination of the underlying theory upon which the court’s holding is based. The fourth section demonstrates how the court has recently expanded its definition of marital property with regard to not only jointly titled assets, but also assets that have been retained by one spouse in a separately-held business venture — again with an examination of the theory underlying the court’s decision. The fifth and sixth sections will critique both the specific holdings discussed in the previous sections as well as the prevailing general application of equitable distribution statutes. In the final section, a more liberal approach to equitable distribution will be advanced for the court’s consideration.

II. EQUITABLE DISTRIBUTION OF INTERSPOUSAL GIFTS

A. LaRue v. LaRue: Presumption of Gift

The history of how the West Virginia Supreme Court of Appeals has considered the equitable distribution of property transferred from one spouse to the other is troubled. The court’s first articulation
concerning how West Virginia trial courts should characterize and equitably distribute interspousal gifts came in *LaRue v. LaRue.*

In the divorce action giving rise to the *LaRue* case, the trial court awarded Mrs. LaRue only alimony and an allowance for health insurance, although she had performed capably as a wife, mother, and homemaker throughout the LaRues' thirty-year marriage. On the other hand, Mr. LaRue was permitted to retain the entire interest in both the marital home and the couple's jointly held bank accounts, whose funds he had withdrawn shortly before the divorce action was filed.

In reversing the trial court's decision and ordering the equitable distribution of the couple's marital assets, the *LaRue* court held, in part, that in calculating the amount of equitable distribution due from one spouse to the other, the trial court may consider the value of any gifts given to one spouse by the other spouse during the marriage. However, the court made clear, this holding should not be construed as weakening the presumption of a gift between husband and wife, and the burden of rebutting this presumption remains with the spouse claiming that there was no intention that a gift of the property be conferred upon his or her spouse. Simply put, in the context of the *LaRue* case, the trial court may consider the marital home and the joint bank accounts as "gifts" in arriving at the amount of the equitable distribution award ultimately due Mrs. LaRue if Mr. LaRue is unable to rebut the presumption that he intended these properties as gifts to his ex-wife.

The stated purpose of this holding is to provide for the situation in which a spouse retains his or her interest in jointly held property

20. *Id.* at 315.
21. *Id.*
22. *Id.* at 315, 326. While unclear from the court's opinion, it appears that Mr. LaRue also retained the bulk of the couple's personal property. See *id.* at 315.
23. *Id.* at 321, 323, 326.
24. *Id.* at 321 n.14, 326. See also W. Va. Code § 48-3-10 (1931), amended by 1984 W. Va. Acts 391:

> Where one spouse purchases real or personal property and pays for same, but takes title in the name of the other spouse, such transaction shall, in the absence of evidence of a contrary intention, be presumed to be a gift by the spouse so purchasing to the spouse in whose name the title is taken.
when the presumption of gift has not been rebutted, while this spouse is also entitled to some equitable distribution. 25 Yet while the court’s holding on this issue may sound both simple in method and laudable in motive, it proved to be rather confusing in application when the court attempted to explain how the equitable distribution of gifts would operate in the division of the LaRues’ joint bank accounts.

Noting that a rebuttable presumption of a gift in the creation of a joint bank account had previously been recognized by the West Virginia Supreme Court of Appeals, 26 the court explained that if, on the one hand, Mr. LaRue is not able upon remand to rebut the presumption of gift arising from the creation of the joint bank accounts, then Mrs. LaRue will be entitled to one-half of their value which could be offset as a “gift credit” in Mrs. LaRue’s ultimate equitable distribution award. 27 If, on the other hand, the presumption of a gift of one-half the value of the joint bank accounts is rebutted by Mr. LaRue, or if Mrs. LaRue can show that some portion of the joint bank accounts came from her economic contribution, Mr. LaRue’s retention of the bank accounts will provide no offset against the amount of equitable distribution found to be due — that is, he will not be entitled to a “gift credit” deduction on the ultimate equitable distribution award. 28

However, as the opinion is written, it is unclear whether Mr. LaRue’s retention of the bank accounts, by rebutting the presumption of a gift, will shield this money from Mrs. LaRue in the ultimate equitable distribution award found due — that is, in the parlance of West Virginia’s post-LaRue equitable distribution statute, will the bank accounts be considered Mr. LaRue’s separate property and thus not be subject to equitable distribution? Although this would appear to be the intended result of the court’s holding, it is not difficult to foresee inequitable results arising from this, especially if the value of the joint bank accounts is substantial and the spouse

25. LaRue v. LaRue, 304 S.E.2d 312, 326 (W. Va. 1983).
26. See id. See also Simmons v. Simmons, 298 S.E.2d 144, 147 (W. Va. 1982) (“[O]nce funds are deposited in a joint banking account, they are presumed to be jointly owned . . . . [W]ithdrawal of the funds by the donor depositor does not conclusively rebut the presumption of gift . . . .”).
27. LaRue, 304 S.E.2d at 326.
28. Id. at 326 n.22.
rebutting the presumption of gift was in a position to control the acquisition and disposition of the funds in the accounts.

Thus, in trying to predict how jointly held property would be equitably distributed under the obtuse language of the LaRue holding, it appears that the spouse entitled to equitable distribution of jointly held property may be allowed to take a presumptive one-half of the property in dispute irrespective of the property's characterization by the court as either a gift or not a gift. That is, if it is found that the creation of the joint bank accounts was intended to confer a gift of one-half of the amount deposited therein upon Mrs. LaRue, then she will take the property as a gift, and the court may allow Mr. LaRue to credit this amount against the ultimate equitable distribution award owed to Mrs. LaRue.29 If, however, it is found that the creation of the joint bank accounts was not intended to confer a gift of one-half of the funds deposited therein upon Mrs. LaRue, but that for equitable reasons, the funds should not be characterized as solely the property of Mr. LaRue — or if it is found that Mrs. LaRue contributed to the accounts — then the court may require the accounts to be valued as part of the LaRues' net assets now subject to equitable distribution.30 In this manner, Mrs. LaRue may still be entitled to a presumptive one-half of their value under the newly-recognized doctrine of equitable distribution.31 Either way, under the LaRue holding, Mr. LaRue may be required to restore to his wife one-half of the money in their jointly owned bank accounts.

B. Hamstead v. Hamstead: An Inequitable Solution Under the Statute

The court did not have the opportunity to further apply and clarify its holding on this issue, however, because soon after the LaRue decision, equitable distribution was statutorily established — in part, at least, to clear up some of the confusion resulting from

29. Id. at 326.
30. Id. at 326 n.22.
31. See id. This is predicated on the presumption that all of the funds in the account were neither acquired by the parties prior to the marriage nor obtained during the marriage by way of inheritance or gifts from third parties. Id. at 321.
the court's previous decisions. Unfortunately, on this issue, the confusion only became worse.

In the 1987 case of *Hamstead v. Hamstead*, the court re-examined its *LaRue* holding regarding the classification of interspousal gifts. In *Hamstead*, the appellant, Mrs. Hamstead, assigned as error the trial court's ruling that certain items of personal property — jewelry, fur coats, an automobile, and furniture bought by her from proceeds of stock given to her by Mr. Hamstead during their marriage — as well as jointly owned real estate were to be considered marital property for purposes of equitable distribution. Instead, Mrs. Hamstead argued, since her husband had conveyed these items to her as gifts during the course of their marriage, these gifts should not fall within the definition of marital property, but should instead be considered as separate property, not subject to equitable distribution under the statute.

The court did not agree with Mrs. Hamstead, however. Instead, the court based its holding on section 48-2-1(e)(1), which states that all property and earnings acquired by either spouse during a marriage, except property specifically excluded by section 48-2-1(f), are to be considered as marital property for purposes of equitable distribution at the time of divorce.

Yet while section 48-2-1(f)(4) specifically states that "[p]roperty acquired by a party during marriage by gift ..." is to be considered as "separate property," the court apparently chose not to rely on this provision in reaching its decision. Instead, the court

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32. See also Crandall, supra note 15, at 87.
33. *Hamstead v. Hamstead*, 357 S.E.2d 216 (W. Va.), overruled, Roig v. Roig, 364 S.E.2d 794 (W. Va. 1987). Note that in *Hamstead*, the court also held that W. Va. CODE § 48-2-33(a) (1986) requires full disclosure of one spouse's financial assets to the other spouse at the time of divorce, and contemplates a meaningful hearing on the subject of equitable distribution of property at which the spouse submitting financial data may be cross-examined concerning the source and amounts of assets. *Hamstead*, 357 S.E.2d at 218. This holding has not been overturned. See Lambert v. Lambert, 376 S.E.2d 331, 332 (W. Va. 1988).
34. *Hamstead*, 357 S.E.2d at 218-19.
35. *Id.* at 219; see also § 48-2-1(f)(4) (1986) (defining "separate property" as "[p]roperty acquired by a party during marriage by gift, bequest, devise, descent or distribution.").
cited language used in a case pre-dating both the LaRue decision and the statutory adoption of equitable distribution:

Transfers between related persons can be challenged not only by the persons involved, but by third-parties as well. The presumption concerning gift has its most forceful effect when a transfer is challenged by a third-party, particularly after the death of one of the related persons. The court cannot be blind to the obvious fact that most married persons do not contemplate divorce throughout the entire course of a marriage, and that transfers of property between spouses is usually intended for the joint benefit of both. While we must retain the presumption of gift in order to avoid difficult third-party claims (since spouses usually do intend to confer the benefit of property on their other spouse in the event of their death), the presumption of gift is probably best rebutted in a suit between spouses by a clear showing of unjust enrichment. Most people do not intend unjustly to enrich the other man.38

Thus, the Hamstead court makes clear that although the transfers of property as "gift" made by Mr. Hamstead to his wife during the marriage might survive claims by third-parties, the presumption of gift in interspousal transfers of property during marriage as stated in LaRue has no effect in excluding the transferred property from the marital pool of assets to be equitably distributed under the statute: "[t]he fact that the assets have been acquired by one spouse and 'given' to the other does not alter the inclusion of these assets in the 'marital property' pool."39

Yet while the court's holding in Hamstead may seem to run counter to its LaRue decision regarding interspousal transfers of property and their classification as "gift," the effect of the holdings is actually similar. For example, in LaRue, as noted above, if the presumption of gift is not rebutted, then the donee spouse can take one-half of the jointly held property, and the donor spouse is awarded

38. Patterson v. Patterson, 277 S.E.2d 709, 716 (W. Va. 1981) (emphasis added), partially overruled by LaRue v. LaRue, 304 S.E.2d 312 (W. Va. 1983); see also LaRue, 304 S.E.2d at 335 (W. Va. 1983) (Neely, J., concurring): [The] presumption [that any transfer of property between married persons is a gift] ... confounds all human experience; it is far more reasonable to presume that the titling of marital property in the name of one spouse is an expedience, and that mutual benefit is intended ... It follows, then, that upon the termination of a marriage the circumstances that justified titular ownership in the name of one spouse ceases to exist, and the implicit expectations upon which the transfer was made are entirely confounded.

this amount as a "gift credit" to be applied to the ultimate equitable
distribution award. In Hamstead, though there may in fact be a
"gift" of the property to the donee spouse, by not excluding the
"gift" from the marital pool of assets to be ultimately distributed,
the donor spouse again is awarded a "gift credit" equal to one-half
of the value of the "gift" property which has been, in effect, given
back to the donor spouse by the Hamstead court. However, this
result was neither equitable nor fair, and the West Virginia Supreme
Court of Appeals subsequently realized its error.

C. Roig v. Roig: The Correct Application of the Statute

Nine months later, in Roig v. Roig, the West Virginia Supreme
Court of Appeals reversed its Hamstead holding. In Roig, the ap-
pellant, Mrs. Roig, asserted that the trial court erred in including
in the marital estate the value of $15,000 of jewelry and furs that
she alleged were gifts to her from her ex-husband and her ex-hus-
band's aunt, citing section 48-2-1(f)(4), which defines separate prop-
erty as "[p]roperty acquired by a person during marriage by gift,
bequest, devise, descent or distribution."

40. See LaRue, 304 S.E.2d at 326.
41. See Hamstead, 357 S.E.2d at 219. In effect, Mr. LaRue and Mrs. Hamstead are arguing
the same point: any transfers of property from one spouse to the other are intended as gifts and
must be treated as such. However, they are not in agreement regarding who should retain the property
upon divorce. Mr. LaRue obviously wants to retain it, thus not allowing his ex-wife to profit from
his former largesse. See LaRue, 304 S.E.2d at 335 (Neely, J., concurring). Mrs. Hamstead argues
that the court should not give protection to the donor spouse by lawfully divesting the donee spouse
of a valid inter vivos gift, and thus she should be allowed to retain property given her by her ex-
husband during the marriage. See Hamstead, 357 S.E.2d at 219.
42. Note, however, that in McComas v. McComas, 358 S.E.2d 217, 221 (W. Va. 1987) — a
case which post-dates Hamstead — the court once again applied the presumption-of-gift rule it ar-
ticulated in LaRue to remove jointly held property from the marital pool of assets:
[w]here one spouse transfers, delivers, or conveys his or her separately-owned property to
the other spouse, the transaction gives rise to a presumption that the transfer was intended
as a gift . . . [This presumption] may be rebutted . . . by evidence of a contrary intent or
by evidence that the spouse whose property was transferred was ignorant or unaware of
the transaction.

Id.

The McComas court, for some reason, chose not to apply its holding in Hamstead that the
presumption of gift in interspousal transfers of property has no effect in excluding this property from
the marital pool. See Hamstead, 357 S.E.2d at 219.
44. Id. at 797.
Significantly, Mrs. Roig also brought the court’s attention to section 48-3-10 of the *West Virginia Code*, which provides:

Where one spouse purchases real or personal property and pays for the same, but takes title in the name of the other spouse, such transaction shall, in the absence of evidence of a contrary intention, be presumed to be a gift by the spouse so purchasing to the spouse in whose name the title is taken: Provided, that in the case of an action under the provisions of article two [§ 48-2-1 et seq.] of this chapter wherein the court is required to determine what property of the parties constitutes marital property and equitably divide the same, the presumption created by this section shall not apply, and *a gift between spouses must be affirmatively proved.*

Faced with the plain meaning of section 48-3-10, the *Roig* court admitted its error in deciding *Hamstead*, stating that its *Hamstead* decision was predicated on a reading of section 48-2-1(f)(4) alone, and that standing alone, the word “gift” is used in conjunction with other words that relate only to transfers from persons outside the marital partnership — that is, “... gift, bequest, devise, descent, or distribution.” However, with its attention now directed to section 48-3-10, the court concluded that the legislature obviously intended to allow one spouse to transfer property to the other spouse by irrevocable gift, thereby removing the assets so transferred from inclusion in the marital pool of assets subject to equitable distribution and bringing the gift within the section 48-2-1 (f)(4) exception to marital property.

To exclude interspousal gifts from the marital property pool under the *Roig* decision, the spouse who would claim the gift must now affirmatively prove that the property was intended as an ir-

47. Note that only 7 days prior to its *Hamstead* decision (March 11, 1987; *Hamstead* was decided on March 18, 1987), the West Virginia Supreme Court of Appeals decided Wachter v. Wachter, 357 S.E.2d 38, 41 (W. Va. 1987), in which the appellant claimed that she did not intend for a gift of money to be made to her husband for the purchase of certain real property. The court, unbelievably, refers to W. Va. Code § 48-3-10 (1986), yet only so far as it is identical to W. Va. Code § 48-3-10 (1931). The court omits by ellipsis the added proviso which provides that gifts between spouses must be affirmatively proved. See Wachter, 357 S.E.2d at 41 n.3.
revocable gift.49 The court noted that in this regard, there are certain types of property (for example, jewelry and fur coats) that can be proven to be irrevocable gifts by mere circumstantial evidence; however, when real property, stocks, bonds, or other stores of family wealth are claimed as “gift,” much more than the simple fact that property was transferred from one spouse to the other will be required to establish a qualified gift under section 48-2-1(f)(4).50

Thus, the effect of the court’s Roig holding is the abrogation of both its LaRue and Hamstead holdings: there is no presumption of gift in interspousal transfers of property. However, if an interspousal gift is affirmatively proven, then it will be excluded from the marital pool of assets subject to equitable distribution upon divorce.51

III. EQUITABLE DISTRIBUTION OF GIFTS TO THE MARITAL ESTATE

A. Whiting v. Whiting: A Statutory Preference for Marital Property

Prior to the enactment of West Virginia’s equitable distribution statute, there was a presumption that where property was jointly titled, the purchaser intended one-half of the money paid and the one-half interest conveyed by joint titling to be a gift to the other

49. See id.; see also Loudermilk v. Loudermilk, 397 S.E.2d 905 (W. Va. 1990) (the court concluded that property transferred to husband from wife was not intended as a gift, but rather as a distribution of marital assets in contemplation of divorce, and was thus held to be marital property subject to equitable distribution); Vance v. Vance, 375 S.E.2d 427 (W. Va. 1988), overruled on other grounds, Whiting v. Whiting, 396 S.E.2d 413, 418 (W. Va. 1990) (since the husband did not meet the burden of proof of establishing a gift from his wife of her interest in the couple’s ambulance business, the business was held to be marital property for purposes of equitable distribution).

50. Roig, 364 S.E.2d at 798.

51. Interestingly, Justice Neely anticipated the Roig holding in his concurring opinion in LaRue, where he counselled that the presumption of gift should be eliminated, or at least qualified, as it applies to interspousal gifts of a nonpersonal nature, while in no way weakening the continued vitality of the presumption of gift when the interspousal transactions are challenged by “disgruntled children, greedy relatives, or creditors.” LaRue v. LaRue, 304 S.E.2d 312, 336 (W. Va. 1983) (Neely, J., concurring). Yet Justice Neely was not the sole prescient member of the court. In Fischer v. Fischer, 338 S.E.2d 233, 235 (W. Va. 1985), the majority of the court held that although certain cattle were purchased by Mrs. Fischer and raised by Mr. Fischer, proceeds from the sale of the cattle could not be awarded solely to Mr. Fischer absent compelling evidence of a gift. Although the record is unclear as to whether Mr. Fischer claimed the cattle to be a gift to him, it is interesting to note that the court, as in Roig, requires evidence of a gift to be presented on this issue. See Roig, 364 S.E.2d at 798.
spouse. In the 1990 case of Whiting v. Whiting, the West Virginia Supreme Court of Appeals announced its decision regarding how such property should be characterized under West Virginia's equitable distribution statutes.

At issue in Whiting is whether Mr. Whiting's act of having the title to property owned by him prior to marriage placed in the name of Mrs. Whiting as joint tenant after their marriage had the effect of converting his separate interest into marital property. In its discussion of the case, the Whiting court noted that section 48-2-1(e)(1), in defining all property and earnings acquired during a marriage as marital property (except for certain limited categories of property which are considered as separate), sets forth an express statutory preference for marital property. Thus, given this preference, any transfer of property owned by one spouse into joint title subsequent to marriage is to be considered as a presumptive gift to the marital estate, since the character of the ownership interest in the property will have been fundamentally altered by the transfer of title. The jointly titled property must now be considered as "marital" and subject to equitable distribution under the Whiting court's interpretation of the statute.

However, the court went on to make clear, the presumption of a gift to the marital estate may be overcome by a showing that the

52. W. Va. Code § 48-3-10 (1931); see supra note 24 and accompanying text; see also Dodd v. Hinton, 312 S.E.2d 293, 295 (W. Va. 1984).

53. Whiting v. Whiting, 396 S.E.2d 413 (W. Va. 1990). Note that the court in Whiting also set forth a three-step process for the distribution of property under § 48-2-32. Id. at 416. The first step is to differentiate between the parties' marital and separate property. Id. The second step is to place a value on the marital property. Id. at 417. Under § 48-2-32(d)(1), the measure of value is the net value of the marital property, ordinarily as of the date of the commencement of the divorce action. See also Tankersley v. Tankersley, 390 S.E.2d 826 (W. Va. 1990). The final step is the division of the marital property between the parties. Whiting, 396 S.E.2d at 417. Under § 48-2-32(a), there is a presumption of equal division of the marital estate. Under section 48-2-32(c)(d)(2), provisions are made for any unequal division. See also Romine v. Romine, 375 S.E.2d 432 (W. Va. 1988); Somerville v. Somerville, 369 S.E.2d 459 (W. Va. 1988).

54. Whiting, 396 S.E.2d at 419.

55. Id. at 421.

56. See id. at 419, 421. The court noted that any interest Mr. Whiting acquired in the property as a result of the purchase two days after his marriage to the appellant would fall within the § 48-2-1(e) definition of marital property. Id. at 419. However, the one-half interest in the property he claims to have acquired upon the death of his first wife could be considered separate property at the time of his marriage, within the meaning of § 48-2-1(f)(1). Id.
transferring spouse did not intend to transfer the property to joint
ownership or was induced to do so by fraud, coercion, duress, or
deception, with the burden of proof resting with the spouse who
would claim that there was no gift intended.\textsuperscript{57}

The \textit{Whiting} court’s reasoning in reaching its decision is sound.
Invoking its decision in \textit{Roig}, the court noted that it is reasonable
to conclude that the legislative rejection of the presumption of in-
terspousal gifts under section 48-3-10 was intended to prevent the
automatic creation of separate property interests during marriage
merely by reference to the manner in which the property was titled.\textsuperscript{58}
Thus, the holding in \textit{Whiting} fills the gap left by the \textit{Roig} decision,
since otherwise, absent affirmative proof of an unequivocal gift of
separate property under \textit{Roig}, any jointly held property would be
held to be the separate property of only one spouse, despite docu-
mentary proof of co-ownership and a statutory preference for mar-
ital property.\textsuperscript{59}

\textbf{B. The Theory of Transmutation by Joint Titling}

Although the court’s holding in \textit{Whiting} is consistent with both
the act of making a joint title and the concept of marriage as a
partnership or shared enterprise, it nonetheless abrogates the express
statutory language which defines property “acquired by a person
before marriage” as separate property.\textsuperscript{60} Instead, the court chose to
adopt a more equitable approach to property distribution based on
the theory of transmutation in which the initial statutory classifi-
cation of the property as “separate” may be frustrated by a party’s
actions which demonstrate an intent to “transmute” the entire prop-
erty to “marital” by titling the property jointly.\textsuperscript{61}

For example, as in the facts involved in the \textit{Whiting} case, a
spouse may acquire property before marriage, bringing the property
within the statutory definition of “separate property” under section

\begin{itemize}
\item \textsuperscript{57} \textit{Id}. at 421.
\item \textsuperscript{58} \textit{Id}.
\item \textsuperscript{59} See \textit{id}.
\item \textsuperscript{60} See \textit{id}; see also \textsc{W. Va. Code} \textsection 48-2-1(f)(1) (1986).
\item \textsuperscript{61} Joan M. Krauskopf, \textit{Classifying Marital and Separate Property Combinations and Increase in Value of Separate Property}, 89 \textsc{W. Va. L. Rev.} 997, 1002 (1987).
\end{itemize}
48-2-1(f)(1). When he or she subsequently marries and transfers the title to the property so that his or her spouse becomes joint owner, then under the Whiting decision the property is presumed to be a gift to the marital estate, and the initial statutory classification of the property as “separate” is frustrated by the party’s intent to “transmute” the entire property to “marital” classification by titling the property jointly.62

However, in West Virginia, a single piece of property can have a dual character — part separate and part marital.63 The joint titling of separate property gives rise only to a rebuttable presumption of a gift to the marital estate under the Whiting decision, and if this presumption is rebutted, then the property will retain its characterization as “separate” and will be considered as “marital” only to the extent that marital funds or efforts were devoted to it.64

This result is consistent with section 48-2-1(e)(2), which provides for a marital property component to separate property to the extent that the value of the separate property is increased by the expenditure of marital resources.65 Thus, in this specific instance, both the statute and the Whiting decision permit a tracing of the parties’ respective contributions in order to determine the marital and non-marital components of the property for purposes of equitable distribution.

Such a tracing of the parties’ contributions is known as the source of funds rule.66 However, the Whiting court makes clear the source

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62. See id. at 1002-03; see also Whiting v. Whiting, 396 S.E.2d at 413, 421 (W. Va. 1990).
63. Krauskopf, supra note 61, at 1002; see also Shank v. Shank, 387 S.E.2d 325, 327 (W. Va. 1989) (in which the court held that West Virginia is a “dual property” jurisdiction in which property can be characterized as part separate and part marital).
64. See Krauskopf, supra note 61, at 1002; see also Whiting, 396 S.E.2d at 421.

   (2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage.

66. Krauskopf, supra note 57, at 1000 (“source of funds” rule is defined as one which classifies a particular piece of property depending upon the source of funds or effort which created its value).
of funds rule is ordinarily not available to characterize as "separate" property that property which has been transferred to joint title during the marriage, since tracing the sources of funds is incompatible with the partnership concept of marriage.\textsuperscript{67}

C. Judicial Critique of Whiting v. Whiting

Justice Neely dissents quite strongly to the majority opinion in \textit{Whiting}. While noting that most spouses use, title, and transfer property for the benefit of the marriage premised on their belief that the marriage will continue, he contends that these same spouses do not, however, intend to unjustly enrich their partners in the event that the marriage fails: "most people jointly title separate property . . . conditioned on the couple's remaining married."\textsuperscript{68} By creating a presumption in favor of marital property at the time of divorce based on mere title, spouses who, by keeping property in only their names, refuse to allow the marital unit to use their separate property will be rewarded, while spouses who allow the marital unit to use their separate property will be punished.\textsuperscript{69}

\textsuperscript{67} Whiting v. Whiting, 396 S.E.2d 413, 423 (W. Va. 1990) ("The law of tracing actually discourages sharing and rewards spouses who keep a running account of what is theirs.") (quoting \textit{L. Golden, Equitable Distribution of Property} § 5.29 (1989)).

Note, however, that there are times in which such tracing of funds may be appropriate. \textit{Id.} Along with the instances in which the presumption of gift to the marital estate can be rebutted, \textit{Id.} at 421, the origins of property may be traced in order to establish that the property is indeed to be considered separate under one of the means listed in § 48-2-1(f), \textit{see id.} at 423, or to aid the trial court in determining an "equitable" division of marital property when the presumption of an equal division should not apply. \textit{Id.; see also W. Va. Code} § 48-2-32(a)-(c) (1986); Romine v. Romine, 375 S.E.2d 432 (W. Va. 1988); Somerville v. Somerville, 369 S.E.2d 459 (W. Va. 1988).

The court has recently, however, created another narrow — but significant — exception to its escheat rule of the source of funds rule in \textit{Whiting}. In Charlton v. Charlton, No. 19763, 1991 WL 258812, at *6 (W. Va. Dec. 6, 1991), the court held that where a spouse inherits property and entrusts the investment of that property to the other spouse who is more financially knowledgeable, and the property itself is not used for marital purposes, the fact that the property is titled in the joint names of the spouses will not convert it to marital property. The source of funds rule, therefore, may be applied to keep such property from being included in the distributable pool of assets in this limited circumstance.

The court bases its opinion on the "critical factor" that Mr. Charlton had a fiduciary responsibility to his wife, who was "ignorant in this area" and entrusted her inheritance to her husband, who then placed Mrs. Charlton's inheritance in joint accounts. This, however, appears to be a weak basis upon which to create an exception to the court's well-reasoned \textit{Whiting} decision. See Justice Neely's dissenting opinion, \textit{Id.} at *8, *10, for a biting critique of the \textit{Charlton} decision.

\textsuperscript{68} \textit{Whiting}, 396 S.E.2d at 426-27 (Neely, J., dissenting).

\textsuperscript{69} \textit{Id.} at 427.
While the former Chief Justice’s contentions may be sociologically sound, they are not well-grounded in law. Indeed, he appears to be overstating his case vis-à-vis express statutory language which includes in the definition of “marital property”:

(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property, or (B) work performed by either or both of the parties during the marriage.  

Under the statute’s broad view of marital property, any attempt to find marital “use” of separate property should be predicated on a standard of “use” that would encompass much more than a showing of affirmative utilization of the property by the parties. Thus, it appears that even those spouses who keep the property titled in their own names run the risk of having that property fall within the statute’s definition of marital property unless they vigilantly and vigorously endeavor to keep this separate property separate, since the mere act of keeping property titled separately will not per se prove that the marital unit has not “used” the property. In fact, the court is likely to find, given its reasoning in Whiting, that the property has been transmuted into marital property through the combined, permissive acts of both parties in relation to the property.

Justice Neely further points to the statutory language defining marital property as “[a]ll property and earnings acquired during [the] marriage,” and separate property as “[p]roperty acquired . . . before marriage,” concluding that the legislature intended that the classification of property depend upon how and when the property is “acquired” and not how it is titled. However, the Whiting ma-

71. See id.; see also Whiting, 396 S.E.2d at 421.
74. Id. § 48-2-1(f)(1) (emphasis added).
75. Whiting, 396 S.E.2d at 429.
majority obviously chose to interpret these provisions quite liberally in this regard, in keeping with the equitable considerations underlying them.\textsuperscript{76}

Finally, Justice Neely invokes the language of section 48-3-10, which provides that "gift[s] between spouses must be affirmatively proved."\textsuperscript{77} Here, the language clearly indicates that the gifts contemplated in the meaning of the statute must be gifts between spouses. The ordinary meaning of the words implies that the gifts be \textit{inter vivos} transfers of property from one spouse to the other and not gifts to the marital estate intended for the benefit of both spouses. Further evidence that the above reading is the intended reading comes earlier in the statutory section: "[w]here one spouse purchases . . . property and pays for the same, \textit{but takes title in the name of the other spouse . . . .}"\textsuperscript{78} Clearly, the legislature did not intend for this provision to apply to separate property subsequently transferred to joint title — the situation precisely at issue in \textit{Whiting}.

IV. \textbf{EQUITABLE DISTRIBUTION OF PROPERTY AFTER WHITING V. WHITING}

A. Hamstead v. Hamstead: \textit{Broadening the Scope of Marital Property}

The \textit{Whiting} decision has been tested a number of times in its short life, and the court has stood steadfastly behind its principle of broadening the scope of marital property.\textsuperscript{79} In fact, in \textit{Hamstead v. Hamstead}, the court significantly expands the circumstances under which separate property can be transmuted into marital property.\textsuperscript{80}

\textsuperscript{76} See id. at 421.
\textsuperscript{77} W. Va. Code § 48-3-10 (1986).
\textsuperscript{78} Id. (emphasis added).

The facts involved in the *Hamstead* case are rather dense. The Hamsteads were married in 1975, at which time the value of Mr. Hamstead's law partnership totalled $1,346.10.81 In 1980, Mr. Hamstead established a legal corporation, Hamstead & Hamstead, L.C., and issued $5,000 worth of capital stock to himself in exchange for setting up the corporation.82 Mr. Hamstead later received an inheritance upon the death of his father, which included corporate stocks worth $268,000, which he subsequently transferred to the corporation in exchange for a promissory note for $270,000.83 At the time Mrs. Hamstead filed for divorce in 1984, the corporation's net worth totalled $423,898.41.84

The trial court ruled that both the law firm and the shares of stock that had been transferred to the firm were the sole separate property of Mr. Hamstead, and thus were not subject to equitable distribution.85 Mrs. Hamstead appealed this ruling, arguing that since nearly the entire net worth of the corporation had been accumulated during her marriage to Mr. Hamstead, the corporate assets should be distributed under the statute defining “[a]ll property and earnings acquired by either spouse during marriage” as marital property.86

The *Hamstead* court, agreeing with Mrs. Hamstead, found the value of the corporation to fall within the statutory definition of “marital property” since not only was the capital stock issued to Mr. Hamstead in 1980 in exchange for professional services rendered during the marriage, but “almost” the entire net worth of the corporation was derived “in substantial part” from the retention of Mr. Hamstead's earnings by the corporation to which he contributed legal services throughout the marriage.87

81. *Hamstead*, 400 S.E.2d at 282.
82. Id.
83. Id.
84. Id.
85. Id.
87. *Hamstead*, 400 S.E.2d at 284. Note that the court had been faced with classifying as marital
What is interesting about this holding is that the court apparently discounted as inconsequential the value of the law practice (approximately $1,350) which existed at the time of the Hamsteads’ marriage.\textsuperscript{88} It appears that the concern with protecting the marital partnership is so strong here that the court will allow the separate property that Mr. Hamstead brought to the marriage to be obverted in order to classify the entire net worth of the corporation as marital property.\textsuperscript{89}

It seems, then, that the original value of the separate property will not be allowed to take precedence over any substantive increase in the value of marital property when it is clear that subsequent marital efforts were devoted exclusively to the enterprise that produced that value.\textsuperscript{90} However, the court may have had difficulty reaching this same conclusion if the value of Mr. Hamstead’s law practice prior to his marriage had been more substantial.\textsuperscript{91}

\textit{B. The Theory of Transmutation by Commingling}

The greater significance of the \textit{Hamstead} decision is the court’s rejection of Mr. Hamstead’s contention that since a substantial portion of the value of Hamstead \& Hamstead, L.C. was attributable to the stocks he inherited from his father — “separate property” under the statute — which were later deposited in the corporation

\textsuperscript{88} See \textit{Hamstead}, 400 S.E.2d at 282. The facts in \textit{Shank} can be distinguished from those in \textit{Hamstead}, however, because in \textit{Hamstead}, Mrs. Hamstead claims that the entity in which the earnings were retained was marital, not separate, property. See \textit{Hamstead}, 400 S.E.2d at 282. Furthermore, in \textit{Shank}, the court found that any increase in the value of Mr. Shank’s property was due to the passive appreciation of the property rather than any marital efforts, and thus should be considered separate property under § 48-2-1(f)(6). \textit{See Shank}, 387 S.E.2d at 328; \textit{see also} Rogers v. Rogers, 405 S.E.2d 235 (W. Va. 1991).

\textsuperscript{89} \textit{See Krauskopf, supra} note 61, at 1027.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} Note that in Kimble v. Kimble, No. 20059, 1991 WL 221997, at *4 (W. Va. Nov. 1, 1991), the court did not allow the $100,000 original value of the funeral business owned by Mr. Kimble prior to marriage to be distributed as marital property even though $40,000 of marital funds had been used to improve the property: “[o]bviously, the pre-marriage value of the assets remains the separate property of Mr. Kimble and such amount is not subject to equitable distribution.” \textit{Id.} at *4. The $6,000 net increase in the value of the business was held to be a marital asset; also, Mrs. Kimble was reimbursed for the amount of separate funds that she contributed to “Mr. Kimble’s business.” \textit{Id.} at *3. The court made no reference to its \textit{Hamstead} holding in the \textit{Kimble} case in this regard.
in exchange for a $270,000 note payable to Mr. Hamstead, the corporation should be considered as separate property, not subject to equitable distribution.\(^92\)

Although this exchange appears to fall within the statutory provision defining "'[p]roperty acquired by a person during marriage in exchange for separate property'" as separate property,\(^93\) the court did not agree. Instead, the court found that the substitution of the $270,000 note for the stocks "essentially altered" the character of the stocks as separate property, thereby taking Mr. Hamstead’s exchange of the property out of the purview of the statute:

What, in effect, the corporation did was to use its credit to purchase the stocks from [Mr. Hamstead], and the purchase price was paid in the form of the note which was payable to him separately. The unpaid balance of the note remains a charge against the corporation’s assets . . . . Rather clearly [the stocks] were purchased by the corporation for $270,000 and were not a simple contribution by [Mr. Hamstead].\(^94\)

Such an alteration of the nature of the stocks, brought about by their deposit in the corporation in exchange for the note, results in their now being characterized as marital property.\(^95\) This method of transmutation of separate property into marital property is known as "commingling," in which the act of placing separate property into the marital pool of assets results in the transformation of the separate property into marital property.\(^96\) The court’s decision on this point clearly indicates that a spouse will not be permitted merely to pass separate property through a corporation which is part of the marital estate in exchange for another form of separate property without the marital estate being benefitted from the exchange by the consequent transmutation of the separate property into marital property.\(^97\)

\(^94\) Hamstead, 400 S.E.2d at 284.
\(^95\) See id.
\(^96\) Krauskopf, supra note 61, at 1006.
\(^97\) See id. at 1007 ("Combining separate and marital funds to acquire investments, such as . . . shares of stock, often results in classifying the entire amount as marital.").
Yet while the court did not explicitly acknowledge the theory that the commingling of separate and marital assets will transmute the separate property into a gift to the marital estate, the court did suggest, through negative implication, that this was its intention. In holding that the note acquired by Mr. Hamstead after the marriage in exchange for the stocks should be considered separate property, the court stated that when an individual during marriage has property which is separate property and then exchanges that property for other property which is titled in his name alone, and which is not commingled with marital property, then that other property acquired as a result of the exchange is itself separate property under the statute.98

Thus, under *Hamstead*, transmutation does not occur when separate property is merely exchanged for other property, and the contribution of only separate property can be identified in the acquisition of the "new" property. However, transmutation of separate property into marital property will occur when marital and separate funds are commingled in the process of acquiring the "new" property, since it can be inferred that the separate property owner is considering the welfare of the marital unit by commingling the funds, thereby giving rise to the presumption of a gift to the marital estate, as under *Whiting*.99

V. CRITIQUE OF THE WHITING AND HAMSTEAD DECISIONS

The implication under the *Hamstead* court's holding that the mere commingling of funds will transmute separate property into marital property creates a potential danger to separate property owners, since it appears that neither titling nor record-keeping will provide the necessary indicia of intent not to transmute — transmutation appears to occur automatically once the properties are commingled.100 Considered from this perspective, the *Hamstead* decision may

98. *Hamstead* v. *Hamstead*, 400 S.E.2d 280, 284 (W. Va. 1990); see also *Holstein* v. *Holstein*, No. 19835, 1991 WL 269838, *2 n.2* (W. Va. Dec. 19, 1991) (the court, in holding that separate funds placed in a joint bank account are presumed to be marital property, noted: "It is apparent that the [separate] funds became commingled to some extent with other marital funds.").


100. *Id.* at 1007-08.
have the effect that former Chief Justice Neely warned of in his dissent in *Whiting*: those spouses who refuse to allow the marital unit the use of their separate property will be rewarded, and the interspousal sharing of property will be discouraged.\(^{101}\) This result would obviously subvert two of the principle tenets of equitable distribution: the policy of treating marriage as a "business partnership," and the goal of encouraging the prosperity of the marital estate.

Yet, given the realities of marriage, these fears appear to be overstated. Most married persons simply do not contemplate divorce throughout the course of their marriage, and it is most likely that spouses will continue to share their property and earnings during marriage quite freely and to the benefit of the marital estate, in spite of the dangers that the *Whiting* and *Hamstead* decisions present to spouses who own separate property.

Such continued sharing of resources is at the center of the public policy which encourages marital prosperity; however, when a marriage has fallen into disharmony and divorce ensues, these recent decisions will ensure that each spouse receives his or her equitable share of the marital assets under the state's current equitable distribution laws.

**VI. The Inequities of Equitable Distribution**

Still, the *Whiting* and *Hamstead* decisions can provide only short-term solutions to the much larger gender-based problem of the very real inequities that exist in men's and women's financial positions following divorce.\(^{102}\) While the expansion of rights for women through an equitable allocation of marital property appears to be a sound public policy decision, concern for the inherent imbalances in the economic and social status of men and women has been subordi-

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nated to the desired end of "self-sufficiency" for both parties after divorce. Consequently, many needs of the economically-weaker spouse remain unfulfilled even after the equitable distribution of marital property.

Specifically, the kind of property subject to equitable distribution is often insufficient to provide long-term economic maintenance. Traditional family assets of real and personal property are generally of lesser cumulative value than benefits derived from work, and the mere equitable distribution of these tangible assets upon divorce cannot take the place of lost income, fringe benefits, and pension rights. In fact, in one year, the average divorcing couple can earn more money than the value of their total assets, and, if these assets are distributed under a statute with a presumptive fifty/fifty apportionment, then the couple's combined earning capacity has become at least twice as valuable as the half-shares of the equitably distributed assets. It is not difficult to conclude, then, that access to future income is a property right and one which should be recognized by the courts when fashioning equitable remedies to property division.

Yet the manner in which courts tend to distribute property under the statutes demonstrates that ensuring access to future income for both spouses is rarely a factor taken into account when making such decisions. In equitable distribution awards, the wife is more likely to be allowed to retain the marital home and furnishings, while the husband is granted the business, financial assets, and other real estate. Consequently, the wife who does not work outside of the home receives only a lump-sum property settlement, while the husband's business or earning capacity continues to produce income year after year, and thus the property retained by the husband after the divorce is of a greater cumulative value than the wife's share.

106. Id. at 77.
107. Id. at 60.
Even the wife who works outside the home is not shielded from the effects of this substantive inequality. Women continue to have only limited access to meaningful labor force participation. Work available to women is generally of a more marginal character than that available to men — that is, the jobs to which women have the most access are those with low status and compensation, with few or no fringe benefits, pension rights, seniority, or opportunity for promotion. As one forward-thinking judge has noted:

We cannot proceed in a divorce case on the assumption of “legal equality of employment” beyond the extent to which it appears that such an assumption is justified in the particular case, that is, the individual woman in the case at bar has attained access or can obtain access to the job market to be self-supporting . . . . Just as it is unacceptable for the law to force all women into the mold of homemaker, it is similarly unacceptable to treat all women upon divorce as per se self-sufficient breadwinners in an open, full-employment job market.

The majority of courts, however, remains disinclined to confront the economic realities which exist in the marketplace for women. Furthermore, men, especially those in the throes of a divorce, are as a class reluctant to acknowledge that they have benefited specifically from their wives’ employment choices and generally from market discrimination against women, and thus they remain unwilling to acknowledge their wives’ continued financial dependency upon them post divorce. Indeed, even the proponents of equitable distribution are loathe to admit to the continuing responsibility on the part of the husband to their ex-wives, since the continued “need” or “dependency” of women carries with it negative symbolic connotations about the status of women which oppose the preferred view of women as equal partners within marriage and independent, equal economic actors outside of it.

109. Id. at 195.
111. Note, however, Justice Neely’s dissenting opinion in Charlton v. Charlton, No. 19763, 1991 WL 255812, at *8 (W. Va. Dec. 6, 1991): “[i]f the majority had said today that because they believe women are so disadvantaged in our society . . . [that] they will torture our law to temper the wind for the shorn lady lambs, they would at least have stood squarely on the rock of history and I would not be invited to ridicule.”
112. Fineman, supra note 7, at 289 n.16.
113. Id. at 291.
Yet, equality cannot be mandated by ideological fiat, and however distasteful an acknowledgement of "need" may be to courts, men, and advocates of gender equality, to proceed on the assumption that "equality" now exists is to detrimentally ignore the material reality of many divorcing women. In truth, the circumstances of most divorcing women fall somewhere in between the antithetical positions of equality and need. Therefore, a preferable approach to property distribution is the creation of a broad range of acceptable outcomes which would accommodate a variety of differences among divorcing women in various circumstances.

VII. TOWARD A MORE EQUITABLE DISTRIBUTION OF PROPERTY

The burden of the implementation and success of any alternative distribution scheme must be borne either by the economically-stronger spouse or by society at large. If the responsibility of ensuring equality of economic circumstances between divorcing men and women is assumed by society, one possible approach would be to provide economic credit for job training, education, and child care either through direct grants in aid or a negative income tax structure. Furthermore, when the marital pool of assets is too small for the divorcing couple to maintain separate households, rent subsidies or other direct economic assistance would help to provide relief.

Another, rather sweeping approach would be for courts to shift their focus from considering property as a mere tangible asset to considering it as a flexible legal construct — one which would encompass a recognition of a spouse's substantial economic interest in any future benefits which arise from economic activities engaged in by either party during marriage. This approach is derived from the doctrine of factual expectancy long-recognized in insurance law, under which a party with no enforceable legal or equitable interest in real property may nonetheless insure the property against loss provided that the party has a lawful and substantial economic interest in the preservation of the property.

114. Id. at 287, 291.
115. See id. at 291 n.23.
If a similar approach to the definition of distributable property in domestic relations law were adopted, courts would then have a legal basis upon which to acknowledge a wife's interest in her husband's future income. Also, by allowing a wife to realize a return on her long-term investment in the marriage, further credence would be given to the partnership or shared enterprise concept of marriage upon which the doctrine of equitable distribution is based.

However, such drastic shifts in public policy and jurisprudential doctrine are in large part unnecessary. In the majority of states with equitable distribution statutes, mechanisms for allocating property in a manner to address need are already in place. Indeed, the primary legislative reason to opt for equitable, rather than equal, division is to reserve discretion for the court to divide the property unequally in the face of meritorious facts.

Under West Virginia's equitable distribution statute, for example, although there is a presumption that marital property is to be divided equally between the parties, discretion is left to the court to alter this distribution after a consideration of certain discretionary factors, such as the extent to which a party has contributed to the marital pool of assets by monetary or nonmonetary contributions. More significantly, however, the court may also consider:

[T]he extent to which [a] party expended his or her efforts during the marriage in a manner which limited or decreased such party's income-earning ability or increased the income-earning ability of the other party, including, but not limited to:

(A) Direct or indirect contributions by either party to the education or training of the other party which has increased in income-earning ability of such other party; and

(B) Foregoing by either party of employment or other income-earning activity through an understanding of the parties or at the insistence of the other party.

118. Reynolds, supra note 1, at 841 & n.70.
119. Id. at 849; see, e.g., W. Va. Code § 48-2-32(d)(2) (1986); the court may...equitably adjust the definition of the parties' interest in marital property, increasing the interest in marital property of a party adversely affected...who should otherwise be awarded less than one half of the marital property, to an interest not to exceed one half of the marital property.
121. Id. § 48-2-32(c)(3).
Thus, the West Virginia equitable distribution statute does, at least implicitly, address need by permitting the consideration of certain "need" factors to arrive at equitable solutions to the various present and future circumstances of the parties.

However, courts to whom such discretion is given, including the West Virginia trial and appellate courts, rarely deviate from the presumptive fifty/fifty division of property, and in cases where the division is unequal, the deviation is slight — usually a sixty/forty ratio — and merely symbolic.\textsuperscript{122} Distribution of property in significantly unequal proportions seems to occur only when the disparity of the parties' circumstances is truly extraordinary.\textsuperscript{123} Thus, although most equitable distribution statutes do recognize post-divorce need as a lawful basis for an unequal distribution of marital assets, the fact that such distribution is merely discretionary leads to a \textit{de facto} policy which implies that the continued dependency of the economically weaker spouse need not be a significant concern of the court.\textsuperscript{124}

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize{122. Reynolds, \textit{supra} note 1, at 855, 861-62.}
\item \footnotesize{123. See, \textit{e.g.}, Bradley v. Bradley, 336 S.E.2d 658 (N.C. 1985) (in which the court approved an unequal division benefiting a wife with multiple sclerosis).}
\item \footnotesize{124. Reynolds, \textit{supra} note 1, at 903. Note that the West Virginia court has upheld discretionary awards of "rehabilitative alimony" under \S\ 48-2-15 to -16. See Molnar v. Molnar, 314 S.E.2d 73 (W. Va. 1984). Such an alimony award is generally granted for a limited time where a younger dependent spouse entered the marriage with marketable skills which then deteriorated through nonuse, or where a dependent spouse is obviously capable of self-support but requires some training or academic study before complete financial independence can be achieved. \textit{Id.} at 76. In granting rehabilitative alimony, the trial court must consider: (1) whether such alimony should be granted in view of the length of the marriage and the age, health, and skills of the dependent spouse; (2) the amount and duration of the alimony award must be determined if feasible; and (3) consideration should be given to continuing jurisdiction to reconsider the amount and duration of the alimony award. \textit{Id.} at 78.}
\end{enumerate}
\end{footnotesize}
However, there are several remedies available which, if adopted, will begin to redress the inequalities which continue to exist under current equitable distribution laws. In states with equitable distribution statutes like West Virginia’s in which the “need” factors to be considered by the court are both discretionary and ambiguously articulated, state legislatures should amend their statutes so that explicitly enumerated factors such as age, health, standard of living, occupation, amount and sources of income, and vocational and educational training of the spouses are required to be considered in any decision on the equitable distribution of property.\textsuperscript{125} Also, states should adopt maintenance statutes coexistent with their equitable distribution statutes which would require the court to grant a maintenance order for either spouse if the spouse seeking maintenance is found to lack sufficient property and income to provide for his or her reasonable postdivorce needs.\textsuperscript{126} Finally, state appellate courts must set the standard of strict judicial enforcement of the plain meaning and unambiguous language of their equitable distribution laws, thus making clear that providing for the continuing needs of divorced spouses is a significant public concern.\textsuperscript{127}

VIII. Conclusion

The doctrine of equitable distribution arose out of the recognition that women are equal partners in a marriage and must be compensated as such upon divorce. Courts have generally made good faith attempts to comply with equitable distribution laws and have, in such cases as Whiting and Hamstead, deliberately broadened the scope of equitable distribution in order to allow more property into the distributable pool of assets.

Yet mere expansion of the definition of marital property does not address the needs that exist after property has been distributed,
nor does it acknowledge the sacrifices that many women make which, although beneficial to the marital partnership, are detrimental to their own future interests. Consequently, equitable distribution statutes, as they now exist, either ignore or gloss over the continued “dependency” or “need” of the economically-weaker spouse for whom an equitable distribution of marital assets upon divorce is an inadequate safeguard against future economic needs.

Remedies which are more truly “equitable” do exist, however. Social programs specifically designed to address these spouses’ needs might be enacted; the prevailing concept of “property” could be expanded to include intangible assets such as future income and benefits, which could then be awarded as spousal maintenance in addition to the distribution of tangible assets. Also, existing statutes could be amended to require courts to consider explicitly-enumerated “need” factors in making property award decisions, so that the usual perfunctory fifty/fifty division of the property will give way to more equitable distribution awards.

Although avenues of redress are waiting to be explored, the burden of gender-inequality continues to remain with those least able to bear it. The equitable distribution of marital property as it now exists must therefore be seen as only an intermediate goal in the struggle for a substantive equality of status and opportunity for men and women.

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