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## The Distrubution of Marital Real Property upon Divorce in West Virginia: The Need for Legislative Reform

John F. Cyrus

*West Virginia University College of Law*

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# THE DISTRIBUTION OF MARITAL REAL PROPERTY UPON DIVORCE IN WEST VIRGINIA: THE NEED FOR LEGISLATIVE REFORM

## INTRODUCTION

The position of the wife at common law is best summarized by the time-worn principle of "unity of person": the husband and wife were regarded as one person—and that person was the husband.<sup>1</sup> Upon marriage, ownership or control of the wife's property was vested in her husband. The husband, in return, fulfilled his role as protector and supporter of his spouse.<sup>2</sup> The adoption of the Married Woman's Property Acts<sup>3</sup> during the middle of the nineteenth century theoretically placed men and women on equal terms with regard to the acquisition, ownership and control of real property. However, society continued to view the respective roles of the married couple according to traditional status-based concepts. The husband carried the legal obligation to support the wife according to her needs,<sup>4</sup> while she performed the domestic chores attendant to the maintenance of the marital home and family. In the typical instance, the legal right of the wife to acquire property was virtually meaningless. The wife's "employment" was confined to the home, her "wages" were the comfort and support provided by the husband. Thus, a woman's opportunities to acquire property were severely limited.

If, at the time of divorce, title to the marital home was solely in the name of the husband, the property rights of the non-owning wife consisted solely of her common law right of dower. The domestic labors performed by the wife during the course of the marriage were considered the quid pro quo in return for her maintenance; they did not entitle her to a legal or equitable interest in the property.<sup>5</sup> The courts were not blind to such inequities

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<sup>1</sup> F. POLLOCK & F. MAITLAND, II *THE HISTORY OF THE ENGLISH LAW* 406 (2d ed. reissued, 1968).

<sup>2</sup> See generally H. CLARK, *LAW OF DOMESTIC RELATIONS*, ch. 7 (1968) [hereinafter cited as CLARK].

<sup>3</sup> In W. Va., the Act is embodied in W. VA. CODE §§ 48-3-1 to 25 (1976 Replacement Vol.).

<sup>4</sup> Cecil v. Knapp, 143 W. Va. 896, 105 S.E.2d 569 (1958).

<sup>5</sup> Wood v. Wood, 126 W. Va. 189, 28 S.E.2d 423 (1943). See also CLARK, *supra*

and they seized upon the awarding of alimony as a vehicle to compensate the wife.<sup>6</sup> However, title to real property remained sacrosanct and the courts were not disposed to violate the separate property of the parties.

As discussed below, the award of alimony is neither a proper nor effective way to achieve a fair and equitable distribution of assets upon divorce. Accordingly, and in recognition of the modern marriage as partnership, the majority of common law property states have empowered their divorce courts to effect an equitable distribution of marital property regardless of how title is held.<sup>7</sup> A small minority of common law property states, however, tenaciously cling to the doctrine of inviolability of title and do not allow judicial distribution of separately titled real property except in the rare cases involving disputes over equitable ownership.<sup>8</sup> West Virginia is among this minority.<sup>9</sup>

The purpose of this Note is first to illustrate, by the use of hypothetical cases, the impotence of the current West Virginia divorce laws concerning the distribution of marital real property and the unavoidable inequities which may result under the system. Second, a skeletal outline of remedial legislation will be proposed and examined.<sup>10</sup>

### THE PARTNERSHIP CONCEPT OF MARRIAGE AND WEST VIRGINIA

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note 2.

<sup>6</sup> See, e.g., *Tuning v. Tuning*, 90 W. Va. 457, 111 S.E. 139 (1922).

<sup>7</sup> CLARK, *supra* note 2, at 449-50. See also Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 11 FAM. L. Q. 59, 61 (1977). By last count, divorce courts in thirty-seven common law property states have jurisdiction to equitably distribute property regardless of title. Freed & Foster, *Divorce in the Fifty States: An Overview as of 1978*, 13 FAM. L. Q. 105, 117 (1979) [hereinafter cited as Freed & Foster].

<sup>8</sup> The states where divorce courts have no power to distribute property and where title is determinative (subject to equitable title disputes and constructive trusts) are Florida, Mississippi, New York, Pennsylvania, Virginia, and West Virginia. Freed & Foster, *supra* note 7.

<sup>9</sup> W. VA. CODE §§ 48-2-15, 48-2-21 (1976 Replacement Vol.); *McKinney v. Kingdon*, 251 S.E.2d 216 (W. Va. 1978).

<sup>10</sup> The concept of inviolability of separate property is not limited solely to real property, nor is the scheme of remedial legislation incompatible with marital personal property such as jointly acquired but separately titled savings accounts or bonds. However, the scope of this Note will be confined to a discussion of real property. While this limitation is prompted by several considerations, it is suffi-

## DIVORCE LAWS: IRRECONCIABLE DIFFERENCES

Marriage is no longer looked upon as a conjugal relationship in which the husband and wife perform traditional and separate roles, but rather it is viewed as a partnership between co-equals. The partnership concept is best illustrated by the relatively recent and dramatic increase of marriages where both parties, whether from necessity or choice, work outside the home and share the homemaking duties. Even in those marriages in which the parties assume the more traditional roles, each spouse views his or her contribution as part of a joint effort toward the family well-being. Property acquired during the course of the marriage is typically looked upon as joint property regardless of how title is taken or whose income is used. Indeed, if, as in the typical case, the marital home is purchased from the salary of the husband, it is ludicrous to believe that if title is taken as joint tenants the wife would thank her spouse for his "gift" to her.<sup>11</sup> The fact that the wife's efforts and labors are by and large unsalaried in no way lessens the value of her services. Quite to the contrary, it has been judicially noted that the monetary value of the fulltime homemaker may very well be greater than that of those who work outside the home.<sup>12</sup>

The partnership concept of marriage reflects the views of many married couples and society in general. This concept has long been recognized by the foremost scholars of domestic relations law as being the proper basis for the relationship between the husband and wife because it yields the most equitable distribution of marital property upon divorce.<sup>13</sup> Clearly, this position

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cient to note but two: first, in today's typical marriage, the real property acquired by the couple represents their predominant economic asset; second, the sanctity of title to real property has been consistently upheld by the West Virginia courts. As discussed in the text, the laws governing the disposition of real property upon divorce both illustrate and perpetuate the concept of marriage as a status-based relationship, a view which is inconsistent with present social realities.

<sup>11</sup> W. VA. CODE § 48-3-10 (1976 Replacement Vol.); *Coffman v. Coffman*, 108 W. Va. 285, 150 S.E. 744 (1929).

<sup>12</sup> *Lacey v. Lacey*, 45 Wis.2d 378, 173 N.W. 2d 142 (1970).

<sup>13</sup> *Daggett, Division of Property upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 225 (1939) [hereinafter cited as *Daggett*]; *Foster & Freed, Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L. Q. 169 (1974); CLARK, *supra* note 2, at 449-52. It is interesting to note that the partnership concept of marriage was argued, albeit unsuccessfully, in West Virginia as

has been accepted by the community property states<sup>14</sup> and the large majority of the common law property states.<sup>15</sup> Central to the partnership concept is the recognition of the value of the non-monetary contributions of the domestic spouse to the acquisition of marital property. It cannot be ignored that in many cases the housewife plays an active role in the furtherance of her husband's career either by means of encouragement or actual participation, or by her efforts within the home which free the husband to concentrate fully on income production.<sup>16</sup> Thus, it is not from her *status* as a wife that the domestic courts of these states will award the woman an interest in marital property regardless of title, but rather from a pragmatic recognition of the value of her contribution as an *individual* partner of the marital team which requires that the wife have a vested interest therein.<sup>17</sup>

In response to society's changing views of marriage and the acceptance of divorce without stigma, West Virginia has departed from the strict traditional concept in several important areas.<sup>18</sup>

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early as 1930 in *Burdette v. Burdette*, 109 W. Va. 95, 153 S.E. 150 (1930). The court rejected the wife's contention that twenty five years as a wife and housekeeper should entitle her to a one-half vested interest in the marital home acquired during coverture.

<sup>14</sup> Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and the Commonwealth of Puerto Rico. Freed & Foster, *supra* note 7, at 116.

<sup>15</sup> *Id.* at 117.

<sup>16</sup> While it is recognized that the positions may be reversed where the husband is the domestic spouse and the wife is the breadwinner, it must be conceded that these cases would represent a small minority. Thus, for the sake of simplicity, the "domestic spouse" will appear in the feminine gender unless otherwise specified.

<sup>17</sup> See, e.g., *Smith v. Smith*, 497 S.W.2d 418 (Ky. 1973).

<sup>18</sup> As amended in 1969, the West Virginia divorce laws now provide that either the husband or wife may receive alimony. W. VA. CODE § 48-2-15 (1976 Replacement Vol.) reads in relevant part that "upon ordering a divorce, the court may make such order as it shall deem expedient, concerning the maintenance of the parties, or either of them; . . ." W. VA. CODE § 48-2-16 (1976 Replacement Vol.) allows alimony, support or maintenance to be paid by a spouse rather than solely by the husband. See also *Murredu v. Murredu*, 236 S.E.2d 452 (W. Va. 1977).

In the same year, the legislature also expanded the traditional grounds for divorce to include a limited no-fault provision. W. VA. CODE § 48-2-4(a)(7) (Cum. Supp. 1979) provides that a divorce may be granted:

Where the parties have lived separate and apart in several places of abode without any cohabitation and without interruption for two years,

These changes have not, however, had an effect upon the laws governing the distribution of marital real property upon the dissolution of marriage. In this realm of divorce law, West Virginia remains committed to the common law notion of sanctity of separate title. Compensation to the non-owning spouse is provided not as an entitled share arising from the contributions of the individual, but rather as based upon traditional concepts of his or her status in the relationship. Compensation based on the status concept of marriage is typically provided through alimony and/or dower rights. However, neither alimony nor the inchoate right of dower provides full and effective relief.

Before illustrating the unavoidable inequities which may arise under the current system, it is necessary to examine briefly the West Virginia law controlling the acquisition and ownership of real property during marriage and the distribution of the same upon divorce. The purpose of the Married Woman's Property Act<sup>19</sup> was to protect the property of the wife (which was usually

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whether such separation was the voluntary act of one of the parties or by the mutual consent of the parties; . . .

In 1977, the requirement of a two-year separation was reduced to one year. *Id.* At the same time the legislature broadened the existing grounds for divorce to include a true no-fault provision based upon irreconcilable differences. W. VA. CODE § 48-2-4(a)(10) (Cum. Supp. 1979).

In a series of recent decisions, the West Virginia Supreme Court of Appeals has displayed an equally progressive trend. In *McKinney v. Kingdon*, 251 S.E.2d 216 (W. Va. 1978), the court upheld an equitable distribution of separately owned personalty in which the lower court decreed a transfer of possession and ownership to the wife of the family automobile, even though title rested solely in the name of the husband. While the majority took obvious pains to limit the holding to the facts of the case and to the "unique kind of personal property" involved, the liberal interpretation of the equitable powers of the domestic relations courts is nonetheless encouraging.

In *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978), the court reinterpreted W. VA. CODE § 48-3-19 (1976 Replacement Vol.) as abrogating the defense of interspousal immunity in suits between the husband and wife. *Coffindaffer* overruled *Campbell v. Campbell*, 145 W. Va. 245, 114 S.E.2d 406 (1960) and *Poling v. Poling*, 116 W. Va. 187, 179 S.E. 604 (1935). In so ruling, the court gave literal effect to the language of W. VA. CODE § 48-3-19 (1976 Replacement Vol.) which provides in pertinent part:

A married woman may sue or be sued alone in any court in this state that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman . . .

<sup>19</sup> W. VA. CODE §§ 48-3-1 to 25 (1976 Replacement Vol.).

acquired by inheritance or gift) from the debts or control of the husband.<sup>20</sup> This protection of the separate estates of the parties is clearly evident in the West Virginia divorce statutes which prohibit the court from transferring separately titled realty to the non-owning spouse<sup>21</sup> absent a showing of true equitable title in the latter.<sup>22</sup>

The courts have resorted to a series of well-known presumptions to resolve disputes over the true ownership of property acquired during the marriage. The basic premise of these presumptions is stated as follows:

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 a contrary intention, be presumed to be a gift by the spouse so purchasing to the spouse in whose name the title is taken.<sup>23</sup>

If the presumption of gift is rebutted, a resulting or constructive trust is declared in favor of the non-owning spouse which enables the court to compel transfer of title.<sup>24</sup> While apparently gender-neutral in terms, the presumption of gift between spouses has been applied in a manner decidedly advantageous to the wife. The courts undoubtedly recognized the advantage an income-producing husband would have over the housewife in acquiring title to property. To offset the disabilities of the domestic wife, the courts have not imposed the requirement, demanded of a husband, of clear and convincing evidence to rebut the presumption of gift.<sup>25</sup> Rather, "as a matter of fairness," the evidentiary re-

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<sup>20</sup> W. VA. CODE § 48-3-1 (1976 Replacement Vol.).

<sup>21</sup> W. VA. CODE § 48-2-15 (1976 Replacement Vol.); *Wood v. Wood*, 126 W. Va. 189, 28 S.E. 2d 423 (1943); *McKinney v. Kingdon*, 251 S.E.2d 216 (W. Va. 1978).

<sup>22</sup> W. VA. CODE § 48-2-21 (1976 Replacement Vol.).

<sup>23</sup> W. VA. CODE § 48-3-10 (1976 Replacement Vol.).

<sup>24</sup> W. VA. CODE § 48-2-21 (1976 Replacement Vol.).

<sup>25</sup> *Boyd v. Boyd*, 109 W. Va. 766, 155 S.E. 303 (1930). In *Boyd*, the husband paid the full purchase price and took title jointly with his wife. He later conveyed to her the full legal title. In a subsequent suit to establish his equitable ownership, the husband offered the testimony of two witnesses to the latter conveyance to the effect that the true motive of the husband in the conveyance was to avoid any possible attachment during suits against him in his capacity as a union official. The court held the presumption of gift in the second conveyance had been rebutted, but reversed the lower court's finding of a resulting trust in favor of the hus-

quirements are lessened so as to allow the wife to destroy the presumption of gift upon a showing of such facts as ignorance that the title was taken in the husband's name or a subsequent expenditure of her money in improvements on the property.<sup>26</sup> The motives of the positions are commendable; indeed, absent legislative changes, they are necessary. However, noble goals achieved by ignoble means are of dubious worth. Implicit in the different standards imposed upon the parties is the acceptance of marriage not as a partnership, but as one of status based on sex. By bending the law in favor of the wife, West Virginia courts achieve a temporary satisfaction of justice, but prevent a recognition of the worth of the individual within the partnership.

Judicial deference to traditional roles of marriage is not limited solely to presumption of gift cases involving funds. The duties and rights imposed on the parties by West Virginia law are reflective of a heretofore consistent view of the traditional marriage. For example, the husband is looked upon as the head of the family and has the right to choose the location of the marital home; the wife has a duty to follow the reasonable request of the husband. Failure of the wife to do so, provided the husband's actions were reasonable, may result in a finding of desertion by the wife.<sup>27</sup> The husband has the duty to support and maintain the wife according to the style to which she is accustomed and to the extent consistent with his financial ability. Formerly, it was held

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band as equitable owner in fee. *See also*, *Everly v. Schoemer*, 139 W. Va. 392, 80 S.E.2d 334 (1954).

<sup>26</sup> *Hummel v. Marshall*, 95 W. Va. 42, 46, 120 S.E. 164, 166 (1923); *Whitten v. Whitten*, 70 W. Va. 422, 74 S.E. 237 (1912). In *Whitten*, the court clearly evinced the relaxed standards necessary for the wife to rebut the presumption of gift in a broadly worded syllabus point:

Money of a wife, invested in land in the husband's name, is presumptively a gift, and, in the absence of facts and circumstances rebutting the presumption, such as violation of a prior or contemporaneous agreement to take the title in the wife's name, ignorance of its having been taken in the husband's name, subsequent expenditure of the wife's money in improvements thereon, an effort on her part to obtain the title after discovery of its condition, control of the property as her own against the husband, or the like, there is no resulting trust in her favor. *Id.* at 422-3.

<sup>27</sup> *Walker v. Walker*, 109 W. Va. 662, 155 S.E. 903 (1930); *Ball v. Ball*, 154 W. Va. 739, 179 S.E.2d 221 (1971) (while the husband does have the right to determine the matrimonial domicile, he must act reasonably. If able, he must provide the wife with a separate home apart from his parents or relatives.).



that "this obligation exists regardless of whether or not his wife is destitute and in necessitous circumstances."<sup>28</sup> On the other hand, the wife has the duty to maintain the marital home, and her labors therein do not entitle her to an interest in the property when title rests solely in the husband's name.<sup>29</sup> Indeed, as recently as 1949, it has been held in this state that "a wife, in the absence of an agreement, is not entitled to the earnings from her services either in the household or in her husband's business."<sup>30</sup>

It is obvious that an approach to marriage which incorporates the above status concept serves to perpetuate an outmoded judicial deliniation of the married couple according to sex, and reflects neither the view embraced by the modern married couple nor by society in general. The philosophical change within society has not gone unnoticed by the West Virginia Supreme Court of Appeals. In the recent case of *Dyer v. Tsapis*,<sup>31</sup> Justice Neely writing for an unanimous court noted that "[t]he law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership."<sup>32</sup> This statement, albeit dicta, raises a curious anomaly as to the non-owning spouse: the law is seemingly willing to treat her or him as a partner of the marital team, yet it is seemingly unable to grant to this spouse any interest in the separately owned property which was acquired through the joint efforts of the team. Compensation for the efforts of the non-owning spouse must be realized, *if at all*, through the guise of alimony or inchoate rights of dower. These remedies have their origins in the traditional concepts of obligations and rights and are susceptible to several limitations. As discussed below, these remedies are improper vehicles by which to effect a fair and equitable distribution of property upon divorce.

#### ILLUSTRATIONS: THE INADEQUACY OF WEST VIRGINIA LAWS

The following hypotheticals are designed to illustrate the unavoidable inequities which could arise under the current West Virginia law governing the disposition of real property upon dis-

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<sup>28</sup> *Bundy v. Bundy*, 197 Va. 795, 798, 91 S.E.2d 412, 414 (1956). See also *Brady v. Brady*, 151 W. Va. 900, 158 S.E.2d 359 (1967).

<sup>29</sup> *Wood v. Wood*, 126 W. Va. 189, 28 S.E.2d 423 (1943).

<sup>30</sup> *Wilcoxon v. Carrier*, 132 W. Va. 637, 649, 53 S.E.2d 620, 626 (1949).

<sup>31</sup> 249 S.E.2d 509 (W. Va. 1978).

<sup>32</sup> *Id.* at 511.

solution of marriage. As a note of caution, it is not contended that our system of divorce laws work injustice in every case. It is recognized that the distribution of marital property is commonly effected by an agreement between the parties under which an owning spouse, whether motivated by a sense of fairness or a desire to hasten the proceedings with a minimum of bitterness,<sup>33</sup> may voluntarily transfer the separately titled property to, or otherwise compensate, the non-owning spouse. Absent such a voluntarily-reached property settlement, however, injustice may result from the conflict between the partnership concept and the traditional status-based remedies.

*Illustration No. 1.* Shortly after marriage, H and W purchase a home, title to which is taken in the name of H. H is the sole wage earner and pays the monthly mortgage installments. W performs the traditional duties of a housewife and mother to their son. The marriage lasts 20 years, the last 5 years of which W assists H in his business. At the time of their divorce, the son has left home and is self-sufficient. Although the couple has not been able to accumulate any appreciable savings during the marriage, H is now earning a good salary and his economic future appears bright. Both parties are 42 years old and in reasonably good health. H is granted a divorce on the grounds of adultery.

*Discussion.* The above illustration which is based primarily upon the facts presented to the West Virginia court in *Wood v. Wood*,<sup>34</sup> clearly exemplifies the plight of the non-titled spouse. W has no interest in the marital home. Any contribution made by her towards the acquisition of such property is presumed to be a gift.<sup>35</sup> The fact that she has invested 20 years in the maintenance of a home and family is judicially ignored when determining any rights of ownership in the marital home. Thus, the court views this situation as "merely a normal and ordinary case of property accumulated during matrimony, by the concurring labor, management and savings of both husband and wife, the title to which has been taken and is held by only one spouse. Such an arrange-

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<sup>33</sup> *Corbin v. Corbin*, 206 S.E.2d 886 (W. Va. 1974). The court noted that "[a]s a practical matter a satisfactory property settlement arrangement is frequently a condition precedent to an agreement not to contest an action for divorce by the party against whom the divorce is sought . . ." *Id.* at 904.

<sup>34</sup> 126 W. Va. 189, 28 S.E.2d 423 (1943).

<sup>35</sup> *Id.*

ment does not amount to, or result in, joint ownership, either legal or equitable."<sup>36</sup>

Let us assume that the court is sympathetic to the wife, notwithstanding her indiscretion which led to the divorce. As shown above, the court is unable under current law to award her an interest in the marital property based upon her contributions as an individual; therefore it must rely upon the status-originated remedies of alimony and dower.

Alimony developed as an award arising from the traditional concept of status-based roles within the marriage. While the broad discretionary powers of the domestic courts of this state to determine the quantum of the alimony award are statutorily derived and defined,<sup>37</sup> alimony itself "did not originate in any statute but stems from the legal obligations of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position."<sup>38</sup> In its traditional sense alimony was seen as a right of the wife.<sup>39</sup> Upon a finding of fault on the part of the husband and a granting of a divorce to the wife, the courts were able to employ the device of alimony for both punitive and compensatory purposes.<sup>40</sup> In those cases where the husband held title to the real property accumulated during marriage, the courts were often able to provide the wife with "adequate" compensation for her contribution to and sacrifices during the marriage. This concept of alimony as a form of compensation is indeed still viable in this state. The West Virginia Supreme Court of Appeals recently stated that "a trial court is entitled to take into consideration in awarding alimony both the age and family obligations of a woman as well as the degree to which she has relied to her detriment in choosing to be a housewife and mother rather than to pursue her own independent career."<sup>41</sup> However, alimony as a form of compensation is subject to both limitations and possible terminations.

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<sup>36</sup> *Id.* at 194-95, 28 S.E.2d at 425-26 (emphasis added).

<sup>37</sup> W. VA. CODE §§ 48-2-15 to 16 (1976 Replacement Vol.).

<sup>38</sup> Cecil v. Knapp, 143 W. Va. 896, 904, 105 S.E.2d 569, 574 (1958).

<sup>39</sup> *Id.* See also Beard v. Worrell, 212 S.E.2d 598 (W. Va. 1974).

<sup>40</sup> Dyer v. Tsapis, 249 S.E.2d 509, 511 (W. Va. 1978). See generally Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CINN. L. REV. 133 (1974) [hereinafter cited as *The Economics of Divorce*].

<sup>41</sup> Corbin v. Corbin, 206 S.E.2d 898, 903-04 (W. Va. 1974).

Most notable among the shortcomings of "compensatory" alimony is the concept of fault upon which an award must be predicated. It is well-settled in this state that a wife forfeits her right to alimony if her husband is granted a divorce because of her misconduct.<sup>42</sup> The forfeiture is absolute and the domestic relations courts may not abuse their discretionary powers by awarding alimony to the party at fault.<sup>43</sup> Thus, the wife in illustration one above is barred from recovery alimony.<sup>44</sup> The result is that alimony is an improper and potentially inadequate means by which to effect the equitable dissolution when the marital real property is separately titled.

The spectre of fault further arises in respect to the wife's inchoate right of dower. Although the rights to dower are extinguished upon divorce, the court is empowered by statute to award compensation for the inchoate right of dower lost through the divorce.<sup>45</sup> As with alimony, however, only an "innocent party" may be entitled to such compensation.<sup>46</sup> In some cases, inchoate dower compensation may serve as a convenient tool to compensate the non-owning spouse for her contributions to the acquisition of the separately titled property. However, in cases where the contribution of the non-owning spouse are equal to, or perhaps greater than that of the other, the actuarially determined award is inadequate.<sup>47</sup> As the United States Supreme Court observed, "the in-

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<sup>42</sup> Cecil v. Knapp, 143 W. Va. 896, 105 S.E.2d 569 (1958).

<sup>43</sup> *Id.*; Beard v. Worrell, 212 S.E.2d 598, 604-06 (W. Va. 1974). W. VA. CODE § 48-2-4(a) (Cum. Supp. 1979) enumerates the various grounds for divorce as follows: (1) adultery; (2) final conviction of a felony; (3) abandonment or desertion for six months; (4) cruel or inhuman treatment; (5) habitual drunkenness subsequent to marriage; (6) drug addiction; (7) separation (either voluntary or by mutual consent) for one year; (8) incurable insanity; (9) child abuse or neglect; and (10) irreconcilable differences.

<sup>44</sup> Even in the recently established hybrid "no fault" divorce based upon voluntary separation of the parties under W. VA. CODE § 48-2-4(a)(7) (Cum. Supp. 1979), an award of alimony must be based upon a finding of "inequitable conduct", which, although somewhat less serious than conduct which could serve as a basis for the more traditional fault-based divorce, is nonetheless described as a "significant wrong." Dyer v. Tsapis, 249 S.E.2d 509, 512 (W. Va. 1978). This recent case further stressed that "a totally blameless party can never be charged with alimony." *Id.* at 513.

<sup>45</sup> W. VA. CODE § 48-2-20 (1976 Replacement Vol.).

<sup>46</sup> *Id.*

<sup>47</sup> The method of computing the value of an inchoate right of dower is set

choate rights granted a wife in her husband's property . . . do not even remotely reach the dignity of co-ownership."<sup>48</sup> In addition, for the guilty wife whose misconduct served as grounds for the divorce, even her rights of dower which arose incident to the marriage are lost.

Our 42 year old wife of 20 years has no interest in the marital home, and is barred from receiving both alimony and dower compensation. Upon the divorce, she will take only her personal effects. By adherence to the inviolability of title doctrine, the statutorily vested equitable powers of the courts fail in this instance to achieve an equitable result. Viewing the marriage as a partnership,<sup>49</sup> the considerable contribution of a housewife and mother over a 20 year span would clearly entitle her to a vested interest in the marital home acquired through the joint efforts of the couple regardless of the fact that title rests in the name of the husband.

By changing the facts in the illustration so that the husband is guilty of the misconduct and the wife granted the divorce, the court is able to award alimony and inchoate dower compensation to the non-owning spouse. As previously discussed,<sup>50</sup> one of the determining factors taken into consideration by the court in setting the amount of the alimony award is the separate estate, both real and personal, of each spouse. It is in this respect that the separately titled marital home, while not subject to judicial divi-

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forth in W. VA. CODE § 43-2-4 (Cum. Supp. 1979). An example of the application of this intricate formula is supplied in W. VA. CODE § 43-2-5 (Cum. Supp. 1979). The present value of the wife's inchoate right of dower in real estate worth \$150,000 where the husband's age is forty and the wife's age is thirty-five is determined to be \$5,316.45.

<sup>48</sup> *United States v. Davis*, 370 U.S. 65, 70 (1962).

<sup>49</sup> In addressing a fault-based alimony problem in *Dyer v. Tsapis*, Justice Neely made the following observation:

The law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership. As might be expected in the midst of such change, there is tension between the old and new approaches. 249 S.E.2d at 511.

This characterization may well reflect the trend in this state; however, as evidenced by the above illustrations, the ownership of separately titled but jointly acquired property remains immune from the "partnership." The observation more accurately describes the majority of common law property states. *Supra* note 7.

<sup>50</sup> See text accompanying note 37 *supra*.

sion, comes before the scrutiny of the court.<sup>51</sup> When combined with other relevant factors and circumstances surrounding the divorce, the court arrives at what is considered an equitable award of alimony, in the best interests of both parties. However, the resulting award confuses the ideal purpose of alimony with property which the domestic relations court should be empowered to distribute equitably.<sup>52</sup> The frailties of alimony may prevent adequate or permanent compensation for that which should be a recognized interest in the marital property.

By way of illustration, consider the circumstances of our aggrieved hypothetical wife: middle-aged, no marketable skills, unpropertied and completely dependent upon her husband for support. In properly exercising its discretion to determine the amount of the award, the court may consider the length of the marriage, the wife's contributions to the home and family and the career opportunities which she chose to forego.<sup>53</sup> Even assuming that the wife is granted an award by which she is able to continue her comfortable, though modest lifestyle, alimony is an improper means by which to attempt to compensate for her personal sacrifices and contributions to the family well-being. First, alimony is subject to various circumstances which can result in a modification or termination of the periodic payments. It is a universal practice to draft into the alimony decree that payments will cease upon the remarriage of the receiving spouse.<sup>54</sup> Since alimony is not considered a property right, death of the recipient automati-

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<sup>51</sup> W. VA. CODE §§ 48-2-15, 16 (1976 Replacement Vol.); see also *McKinney v. Kingdon*, 251 S.E. 2d 216 (W. Va. 1978); *Games v. Games*, 111 W. Va. 327, 161 S.E. 560 (1931).

<sup>52</sup> An excellent discussion of the blurring of the purposes and distinctions between property and alimony awards is found in *The Economics of Divorce: supra* note 40, at 151-154.

<sup>53</sup> *Corbin v. Corbin*, 206 S.E.2d 898 (W. Va. 1974); *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978). The amount of the alimony award to the hypothetical wife will undoubtedly be that which was described so vividly in *Corbin*:

a woman who has entered middle age, who has invested the best years of her life in furtherance of her husband's career, and who is burdened with the onerous task of child raising may be entitled in the sound discretion of the trial judge to be supported in her accustomed life style if the husband's assets are sufficient to justify the award. 206 S.E.2d at 904 (emphasis supplied).

<sup>54</sup> Virginia statutorily provides that alimony will cease upon the remarriage of the recipient. VA. CODE § 20-110 (1975 Replacement Vol.).

cally terminates the obligation of the paying spouse. Further, it was recently held that, absent compelling circumstances to the contrary, alimony will generally terminate upon the death of the payor.<sup>55</sup> If termination of alimony payments occurs within a relatively short period after the divorce<sup>56</sup> in the hypothetical illustration, it cannot be argued that the wife received compensation commensurate with her contribution to the property acquired through the joint efforts of the marital partnership.

Second, and more importantly, the *primary* purpose of alimony should not be as compensation for a wife's sacrifices and investment to the family well-being.<sup>57</sup> Instead, alimony should be regarded as an allowance for the spouse's support, an amount determined after analyzing the competing equities, in an effort to dissolve the marriage with a minimum of social and financial disruption.<sup>58</sup> Economic realities and prevention of unjustifiable

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<sup>55</sup> *In re Estate of Hereford*, 250 S.E.2d 45 (W. Va. 1978).

<sup>56</sup> Another possible source of termination of alimony (which apparently has not yet been ruled upon in West Virginia) is a postmarital cohabitation with a man by the recipient former wife. As the cohabitation could possibly lessen the economic needs of the former spouse, the payor could petition the court for a reduction or termination of the periodic alimony payments. W. VA. CODE §§ 48-2-15 to 16 (1976 Replacement Vol.). For thorough discussions of the effects of postmarital cohabitation or other sexual activities on alimony, see W. Wadington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 265-77 (1977); Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse Upon His or Her Right to Continue to Receive Alimony*, 17 J. OF FAM. LAW 249 (1978-9).

<sup>57</sup> See, e.g., *Corbin v. Corbin*, 206 S.E.2d 898 (W. Va. 1974). This is not to say that alimony should never be regarded as compensatory. For example, where the marital assets are negligible or otherwise inadequate, compensatory alimony may be necessary to meet the demands of justice. See, e.g., *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973) (wife who put husband through medical school was awarded alimony of approximately \$100,000 over a ten year period).

<sup>58</sup> See generally, *The Economics of Divorce*, *supra* note 40, at 158-59. Such an approach was adopted to some degree by the court in *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978), in determining an award of alimony when the divorce is granted on the no-fault ground of voluntary separation. In such a case the wife has a duty to mitigate her damages by becoming self-sufficient to the extent possible. To aid the domestic courts in arriving at a just award, the court cited with approval the six factors contained in § 308(b) of the UNIFORM MARRIAGE AND DIVORCE ACT, reprinted in 5 FAM. L.Q. 205, 233 (1971) [hereinafter referred to as UMDA]: 1) the financial resources of the party seeking maintenance; 2) the time necessary for the dependent spouse to acquire job skills and suitable employment; 3) the standard of living established during the marriage; 4) the duration of the

hardship should be foremost among considerations in determining the amount of the award.<sup>59</sup> On the other hand, true compensation for the contributions of the domestic spouse, based upon an acceptance of the concept of marriage as a partnership, is realized only upon an equitable distribution of the marital property acquired through the joint efforts of the couple. Viewing the marriage as a partnership, an equitable distribution would not arise out of the traditional concept of marital duties and obligations, nor would it be affected by an a priori finding of fault, or be subject to a premature termination by death or remarriage. Such a distribution would enable the court to achieve truly equitable results.

One final aspect of alimony requires a brief examination. Nowhere is the distinction between alimony awards and property division so inexorably confused than in the area of lump-sum alimony.<sup>60</sup> This form of alimony differs from the more common periodic payments in that it is essentially an award of a definite sum which, although frequently payable in periodic installments,<sup>61</sup> is neither modifiable by the court nor terminable upon remarriage or death.<sup>62</sup> The finality of a lump-sum alimony award has led many courts to conclude that it creates a vested right in the recipient and, therefore, must be considered as a property settlement.<sup>63</sup> While the West Virginia statute governing the award of

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marriage; 5) the age and health of the dependent spouse; and 6) the needs and ability to pay of the supporting spouse. *Id.* at 513, n.9.

It should be noted that the stated intention of § 308 of the UNIFORM MARRIAGE AND DIVORCE ACT is "to encourage the court to provide for the financial needs of the spouses by property disposition rather than an award of maintenance." The court should make such an award of maintenance *only* if the available property is insufficient to provide adequate support. 5 FAM. L.Q. 205, 234.

<sup>59</sup> *Fox v. Fox*, 9 Ill. 2d 509, 138 N.E.2d 547 (1956). An expansive reading of the recent case of *Dyer v. Tsapis* would place West Virginia in accord. 249 S.E.2d 509 (W. Va. 1978).

<sup>60</sup> Lump-sum alimony is also referred to as gross sum in lieu of periodic alimony.

<sup>61</sup> See, e.g., *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967).

<sup>62</sup> CLARK, *supra* note 2, at 456.

<sup>63</sup> In *Cann v. Cann*, 334 So.2d 325 (Fla. App. 1976), the court succinctly defined the majority approach:

Lump sum alimony, sometimes known as alimony in gross, is essentially payment of a definite sum and is in the nature of a final property settlement. Hence, an award of lump sum alimony creates a vested right



alimony has been interpreted as permitting the payment of lump-sum alimony,<sup>64</sup> the actual use of this type of award has been exceedingly rare and limited to a finding of exceptional circumstances.<sup>65</sup> Although the reasons for the reluctance of West Virginia courts to make lump-sum alimony awards is a matter of speculation, the following explanations seem plausible. First, domestic relations courts are well aware of the continuing jurisdiction retained attendant to an award of traditional alimony in periodic payments by which they are able to effect modification or termination of the payments as equity demands.<sup>66</sup> As lump-sum alimony is final and not subject to modification, changes in the parties' needs or economic positions, which otherwise would serve as proper grounds for an adjustment in the amount of the award, would be without remedy. Second, in each West Virginia case allowing lump-sum alimony, the amount of the award has been secured by a lien on the husband's property.<sup>67</sup> Considering the current view of the inviolability of separate title, it is not an unreasonable inference that the courts would be adverse to lump-sum alimony where the property might, of necessity, be sold in order to meet the judgment.<sup>68</sup> Finally, the courts may naturally

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which survives death and is not modifiable nor terminable upon the divorced wife's remarriage. *Id.* at 328.

*Accord*, Hager v. Hager, 293 Ala. 47, 299 So.2d 743 (1974); Webb v. Webb, 262 Ark. 461, 557 S.W.2d 878 (1977); Singer v. Singer, 440 S.W.2d 783 (Ky. 1969). *Contra*, Gray v. Gray, 57 Ill. App. 3d 430, 373 N.E.2d 317 (1978).

<sup>64</sup> Tuning v. Tuning, 90 W. Va. 457, 111 S.E. 139 (1922) (construing W. VA CODE § 48-2-15 (1976 Replacement Vol.)).

<sup>65</sup> In *Tuning*, *Id.* at 460, 111 S.E. at 140, the award of a lump sum was justifiable upon a showing that the husband was trying to liquidate all assets so as to place them beyond the reach of the ex-wife.

<sup>66</sup> W. VA. CODE § 48-2-15 (1976 Replacement Vol.) which provides for the continuing jurisdiction of the court, reads in pertinent part:

the court may, from time to time afterward, on the verified petition of either of the parties, revise or alter such order concerning the maintenance of the parties, or either of them, and make a new order concerning the same, as the altered circumstances or needs of the parties may render necessary to meet the demands of justice, . . .

<sup>67</sup> Tuning v. Tuning, 90 W. Va. 457, 111 S.E. 139 (1922); Burdette v. Burdette, 109 W. Va. 95, 153 S.E. 150 (1930).

<sup>68</sup> Stefonick v. Stefonick, 118 Mont. 486, 167 P.2d 848 (1946) The court clearly favored the payment of periodic alimony rather than lump-sum where there was no complaint as to the husband's industry or financial ability, and where a judicially forced sale of the husband's real estate would be required in order to meet the judgment.

be inclined to adhere to the more familiar and controllable award of periodic alimony.<sup>69</sup> For the purposes of this Note, it is sufficient to view lump-sum alimony as a form of alimony, which, while immune from premature termination, is still subject to the disabilities of fault discussed above.

*Illustration No. 2.* H and W are married shortly after graduation from college. Both are employed, although neither commands an imposing salary. They move into a house inherited by W from her grandmother. The house is sound, but sorely in need of repairs. Excluding living expenses, car payments, and other necessities, their combined incomes are totally committed to the complete renovation of the house. Notwithstanding inflation, in the short span of four years they are able to increase the value of the house from \$30,000 to \$75,000. However, the flames of passion have subsided, and a mutually agreed-upon separation ensues. One year later, W sues for divorce under West Virginia's hybrid "no-fault" provision of voluntary separation.<sup>70</sup> The couple has no savings; the only asset they own other than personal items and separate automobiles is the house. H does not contest the divorce but petitions the court for an equitable division of the marital assets.

*Discussion.* Other than an inchoate right of dower, H has no interest in the property. His labors and expenditures toward the improvement of the property are considered a gift to W.<sup>71</sup> If H attempted to rebut this presumption of gift, case law in this state indicates that he would be successful only upon a showing of an

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<sup>69</sup> In *Burdette v. Burdette*, 109 W. Va. 95, 153 S.E. 150 (1930), the court modified a lump-sum award so as to allow either party the right to apply for a change in the amount of the monthly payments as future conditions would require.

<sup>70</sup> W. VA. CODE § 48-2-4 (a)(7) (Cum. Supp. 1979) provides, in pertinent part, that a divorce may be ordered:

[W]here the parties have lived separate and apart in separate places of abode without any cohabitation and without interruption for one year, whether such separation was the voluntary act of one of the parties or by the mutual consent of the parties. . . .

The "hybrid" aspect of this statute is that while the ground for divorce is simple separation, a determination of "inequitable conduct" is required as the basis for an award of alimony. *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978). See also note 44, *supra*.

<sup>71</sup> *Spradling v. Spradling*, 118 W. Va. 308, 190 S.E. 537 (1937).

express agreement between the marital couple.<sup>72</sup> The couple probably referred to the renovated house in terms of "ours" rather than "hers"; thus, it is extremely unlikely that they would have considered the ramifications upon divorce of the wife's separate title so as to execute an agreement or to change the title to one of joint ownership.

The above illustration is presented not only to demonstrate that the husband may be the unknowing victim of an unjust division of property but also to focus upon an issue which has been the source of significant controversy among the proponents of the partnership theory of marriage:<sup>73</sup> what real property should be subject to an equitable division upon dissolution of the marriage? In other words, what is "marital real property"? Obviously, real property owned by either the husband or the wife prior to the marriage should not be subject to an equitable claim by the other merely upon the acquisition of a marriage certificate. While property acquired during coverture through the joint efforts of the marital partnership would clearly fall within the scope of "marital property," difficulties arise when considering property acquired by gift, devise, or descent which increases in value due to the joint efforts of both parties. It is evident that implementation of a system providing for an equitable division of property must be accompanied by specific criteria in order to minimize these difficulties and produce uniform results.<sup>74</sup>

### SOLUTIONS

In view of the change in societal attitudes away from a traditional view of spousal roles in marriage and toward a general ac-

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<sup>72</sup> *Everly v. Schoemer*, 139 W. Va. 392, 80 S.E.2d 334 (1954).

<sup>73</sup> Illustrative of the disagreements over the scope of marital property is whether increases in value of property acquired prior to marriage should be included in marital property. In the initial Uniform Marriage and Divorce Act, UMDA *supra* note 58, such increases in value were excepted from the definition of marital property. This exception was rejected by the Family Law Section of the American Bar Association; Proposed Revised Uniform Marriage and Divorce Act, reprinted in 7 FAM. L. Q. 135 (1973) [hereinafter referred to as PROP. REV. UMDA]. See also, Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAM. L. Q. 169, 175 (1973).

<sup>74</sup> See the excellent discussions in *The Economics of Divorce*, *supra* note 40, at 153-55 and in Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L. Q. 169 (1974).

ceptance of marriage as a partnership, the current laws governing the disposition of property upon divorce are desperately in need of modernization. Clearly, legislative reform based upon the partnership concept and an explicit recognition of the value of the services of the homemaker spouse is the most desirable method by which to remedy the unavoidable inequities illustrated in the foregoing sections. The relatively recent changes in the laws governing the grounds for divorce and the removal of sex from alimony qualifications are encouraging,<sup>75</sup> although it has been noted that "it may be easier to overcome conservative and religious scruples regarding grounds for divorce than to substantially revise a sacrosanct common law system of marital property law in a lawyer dominated legislature."<sup>76</sup> Nevertheless, remedial legislation in the form of a comprehensive statute which clearly sets forth that property which is to be considered a marital asset and which establishes criteria to be used in determining an equitable division would tend to achieve a desired degree of uniformity in results. Several states have vested their domestic relations courts with a general power to divide the property of the parties, regardless of how title is held, controlled only by a "regard for equity and the circumstances of the parties."<sup>77</sup> Without a more detailed set of guidelines, however, it has been forcefully argued that domestic relations judges would be unduly influenced by irrelevant considerations (most notably that of "fault") which would result in a blurring of the distinction between alimony awards and property divisions.<sup>78</sup> Obviously, no fixed formula for an equitable division

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<sup>75</sup> See note 17, *supra*.

<sup>76</sup> Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L. Q. 169 (1974).

<sup>77</sup> See, e.g., S.D. CODIFIED LAWS ANN. § 25-4-44 (1976 Rev.). It is interesting to note that prior to February 1, 1978, Wisconsin had employed similar broad statutory language in vesting the domestic relations courts of that state with the power to equitably distribute the property of the parties. WIS. STAT. ANN. § 247.26 (West 1957). However, on February 1, 1978 a more comprehensive and detailed law governing the distribution of property upon divorce became effective. WIS. STAT. ANN. § 247.255 (West Cum. Supp. 1979-1980). The revised law directs the court to consider 12 enumerated factors as guidelines in determining the distribution. The stated purpose of the revised act "is to promote an equitable and reasonable adjudication of the economic and custodial issues involved in marriage relationships." WISC. STAT. ANN. § 245.105 (West Cum. Supp. 1979-1980).

<sup>78</sup> Daggett, *supra* note 13, at 229. See also *The Economics of Divorce*, *supra* note 40, at 141-45; Covey, *The Exercise of Judicial Discretion in the Award of*

of property can be consistently applied to the countless situations which appear before our divorce courts and necessitate the exercise of judicial discretion. On the other hand, Harriet Spiller Daggett, an early advocate of the partnership concept in division of marital property observed that "[t]o throw the whole burden upon the discretion of the court is to open greater doors to instability than ever."<sup>79</sup> The purpose of a remedial statute should be to strike a balance between the two extremes by providing sufficient guidelines which direct the focus of the court.

A further advantage of comprehensive legislative reform is that such legislation would preclude piecemeal judicial modernization of the divorce laws regarding property division.<sup>80</sup> While it

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*Alimony*, 6 LAW & CONTEMP. PROB. 213 (1939). This premise was expressly adopted by the Wisconsin legislature. The recently enacted statute specifically prohibits consideration of marital misconduct in contrast to the prior law which allowed the court to weigh fault in determining an equitable division. Compare WIS. STAT. ANN. § 247.255 (West Cum. Supp. 1979-1980) with *Mason v. Mason*, 44 Wis.2d 362, 171 N.W.2d 364 (1969).

<sup>79</sup> Daggett, *supra* note 13, at 229.

<sup>80</sup> Judicially-effected remedies have been proposed in several common law property jurisdictions. Among these remedies, it would appear that the use of constructive trusts has been focused upon as being most viable. The theory proceeds on the premise that, by a relaxation of the strict principles governing constructive trusts, an equitable trust could be imposed upon the separately titled property of one spouse in order to avert unjust enrichment on dissolution of the marriage. Central to this theory is that the marriage constitutes a confidential relationship existing between the spouses and results in a lack of "arms-length" dealings. Foster & Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L. Q. 55 (1976).

In this state, an adoption of such an approach would entail a deletion of the well established element of fraud, misrepresentation, concealment or undue influence which is presently required for the court to declare a constructive trust. *Annon v. Lucas*, 155 W. Va. 368, 185 S.E.2d 343 (1971). Even conceding the unlikely event that this vital element could be dropped, application of the revised standard for constructive trusts would run afoul of the well entrenched presumptions concerning interspousal gifts. See note 23 *supra*. These reasons, coupled with the well-settled state of the current common law approach to marital property, have prompted the leading commentators to conclude that the doctrine of constructive trusts is an inadequate remedy to cure, with a desired degree of certainty, the injustices which may result under the current system. See Foster & Freed, *supra* note 7.

A second judicially created remedy is the "special equity" theory. This theory has been employed in Florida to grant the wife an interest in the separately titled marital property where, although barred from alimony, her contributions to the economic well being of the marriage exceeded the normal marital duties. See Comment, *Special Equities in Dissolution Proceedings*, 27 U. MIAMI L. REV. 177

is not the stated purpose of this Note to propose a definitive statutory scheme by which reform may be effected, the following considerations should be necessarily addressed in any such legislative enactment.

1. *Marital Property.* The immediate problem confronting any revision in the current laws would be a determination of what property would be divisible upon divorce. Based upon the underlying principle of marriage as a partnership, any real property acquired during the course of marriage and by virtue of the joint efforts of the marital unit should be deemed marital property, divisible by the court regardless of how title is held. Property which is not acquired by the efforts of the marital unit should remain

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(1972). The use of the "special equity" theory was recently employed by the Supreme Court of South Carolina in *Wilson v. Wilson*, 270 S.C. 194, 241 S.E.2d 566 (1978). The couple had built the family home upon land separately owned by the husband. Construction costs were paid out of the joint funds of the parties. The wife had knowledge of the state of the title and further could not show any actual contribution to the acquisition of the land. Upon these facts, the court found that a resulting trust could not be established in favor of the wife. However, the court noted that during the twenty-four years of marriage, the wife had been continuously employed and her modest salary had been used for household expenses. The court found that the wife had contributed materially to the financial success of her family and thereby aided the acquisition of property by her husband by freeing his earnings for investments. Under these circumstances, the court held that the wife was entitled to share in the equitable ownership of the separately titled real property and remanded the case for a determination of the percentage to which she was entitled.

Implicit in the holding is a rejection of the presumption of interspousal gift even though the wife knew of the nature of the title. See text accompanying note 26 *supra*. However, it appears that the award of a special equity was based solely upon the monetary contributions of the wife.

In light of the recent reaffirmations of the inviolability of title of real property in *McKinney v. Kingdon*, 251 S.E.2d 216 (W. Va. 1978), it is extremely doubtful that the West Virginia court would be disposed to adopt what would amount to a radical departure from current law. Moreover, it would be exceedingly difficult to formulate a consistent set of principles to govern the imposition of a special equity. Most importantly, a remedy which is invoked only when the contributions of the spouse exceed normal marital duties ignores the significant nonmonetary contributions of the domestic spouse.

A third equitable remedy is based upon a finding of "implied partnership." This doctrine has been used in Florida, but has been applied only in family owned business situations. For a thorough discussion, see Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221 (1974).

the separate property of the titled individual. Specifically excluded from marital property should be that property acquired by one spouse before marriage, or individually received during coverture by gift, devise, bequest, or descent, or directly traceable to any of these sources.<sup>81</sup> However, marital property should include any increase in the value of such property which is shown to result from the joint efforts of the parties.<sup>82</sup> Thus, the non-owning spouse in Illustration No. 2 would be entitled to an interest in the appreciation of the wife's separate property.<sup>83</sup> Marital property would also exclude that property set aside or vested in one spouse by a valid agreement between the parties, or upon a clear showing of a valid interspousal gift.<sup>84</sup>

2. *Factors in Determining the Division.* What is envisioned in allowing an equitable division of property in West Virginia is not a community property system with a presumption of equality in ownership. A true division is one based upon the contribution of the marital parties and the circumstances attendant to the marriage, and is therefore incapable of a reduction to a fixed formula.<sup>85</sup> In determining the amount of the interest assignable to

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<sup>81</sup> This exclusion has been adopted by a large majority of the states providing for an equitable distribution of property. *See, e.g.*, KY. REV. STAT. § 403.190 (Cum. Supp. 1978); ME. REV. STAT. ANN. tit. 19, § 722-A(2) (Cum. Supp. 1979-1980); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(e) (Cum. Supp. 1979); MO. ANN. STAT. § 452.330 (Vernon 1977); UMDA § 307 *supra* note 58. *But see*, *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974) (any property, regardless of source, acquired during coverture is subject to division).

<sup>82</sup> Inclusion of such increases in value resulting from the joint efforts of the marital unit is consistent with the adoption of the underlying premise of marriage as a partnership. *See, e.g.*, KY. REV. STAT. § 403.190 (Cum. Supp. 1978); *Moyers v. Moyers*, 372 P.2d 844 (Okla. 1962); PROP. REV. UMDA, *supra* note 70. The majority of states, however, have specifically excluded the increase in value of such non-marital property. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1513(b)(3) (Cum. Supp. 1978); ILL. ANN. STAT. ch. 40, § 503(a)(5) (Smith-Hurd Cum. Supp. 1979); ME. REV. STAT. ANN. tit. 19, § 722-A(2)(E); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(e) (Cum. Supp. 1979); MO. ANN. STAT. § 452.330.2(5) (Vernon 1977); UMDA, § 307, *supra* note 58.

<sup>83</sup> *Smith v. Smith*, 497 S.W.2d 418 (Ky. 1973); *Moyers v. Moyers*, 372 P.2d 844 (Okla. 1962).

<sup>84</sup> KY. REV. STAT. § 403.190(2)(d) (Cum. Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(e) (Cum. Supp. 1979); WIS. STAT. ANN. § 247.255 (West Cum. Supp. 1979-1980); UMDA § 307, *supra* note 58.

<sup>85</sup> *Rothman v. Rothman*, 37 N.J. 219, 320 A.2d 496, 503 n.6 (1974) (wherein the court specifically rejected formulas, noting instead the necessity of balancing

each party, the court must have wide discretion.<sup>86</sup> The following list of relevant considerations is in no way exhaustive; the weight given to a specific factor will vary according to the circumstances of each case.

The court should consider, *without regard to fault*,<sup>87</sup> all rele-

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the equities in each individual case); Other states have adopted a presumption of equality between the parties in the division of marital property. See, e.g., *Sahs v. Sahs*, 48 Ill. App. 3d 610, 363 N.E.2d 156 (1977); Wis. STAT. ANN. § 247.255 (West Cum. Supp. 1979-1980).

<sup>86</sup> The method of award should be expressly set forth. Whereas it is common practice for those states authorizing equitable divisions of property upon divorce to empower their domestic courts to compel a transfer of title according to the demands of equity and fairness, Maryland's recently enacted statute prohibits the courts from judicially requiring a change of title. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-04(a) (Cum. Supp. 1979). Under this latter system, the court makes a monetary award in accordance with the judicially determined interest due the non-owning spouse. Further, the court has the power to specify a method of payment of the monetary award. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05(b) (Cum. Supp. 1979). A desirable effect of this system would be that in many cases where the immediate economic circumstances of the parties were not pressing (such as in Illustration No. 2 above), the court could satisfy the equitable interests of both parties without disturbing title. However, this limitation may serve to inhibit the courts in those cases where circumstances dictate a transfer of title. Further, adherence to a strictly monetary award system will undoubtedly necessitate, in some instances, a forced sale of the property to satisfy the award. On the other hand, a combination which would allow the court to compel titular ownership or, in the alternative, a monetary award (either periodic or lump-sum) would be most flexible to meet the demands of justice according to the particular circumstances.

<sup>87</sup> There has been considerable controversy over whether marital misconduct should be considered in the property division. Those favoring consideration of fault have followed the logic in arguments such as that proffered by Inker, Walsh, & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 11 FAM. L. Q. 59, 67 (1977).

If contribution is to be considered, failure to contribute must also be acknowledged. Fault may be one indicium of noncontribution. That one party, whether male or female, is the achiever, while the other is adulterous, disloyal, dishonest, cruel, or otherwise objectionable may well be relevant.

See also, MO. ANN. STAT. §452.330.1(4) (Vernon 1977); *Butcher v. Butcher*, 544 S.W.2d 249 (Mo. Ct. App. 1976); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05(b)(4) (Cum. Supp. 1979).

The above argument is not without merit; however, the dangers of including fault within the relevant factors in consideration of the property division clearly outweigh any possible insight derived from a determination of fault. First, the assignment of property is neither a reward for faithful service nor a punishment for marital misconduct. To cast a determination of fault into the process of arriv-



vant factors including:

a. The contributions, both monetary and non-monetary, of each spouse to the acquisition of the marital property, including the contribution of a spouse as a homemaker.

b. The value of the specific marital property and the circumstances attendant to its acquisition.

c. The duration of the marriage.

d. The economic circumstances of each spouse at the time when the division is to be made, including the present and future employability and earning capacities of each party.

e. The age and physical and mental condition of the parties.<sup>88</sup>

f. Any award or other provision made by the court with respect to possession and use of the family home incident to the custody of children or any award of alimony.<sup>89</sup>

g. Such other factors as the court deems necessary or appro-

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ing at an equitable division of property would tend to blur the distinction between alimony and property awards. Second, a true determination of fault is not easily gained. As recently characterized by one court:

[F]ault may be merely a manifestation of a sick marriage. The spouse who by his or her actions gives cause or grounds for divorce may not be responsible for the breakdown of the marriage and may merely be reacting to a situation which is not of his or her making. Marriage is such an intricate relationship that often it is difficult, if not impossible, to ascertain upon whom the real responsibility for the marital breakup rests. *Chalmers v. Chalmers*, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974).

See also, KY. REV. STAT. § 403.190 (1) (Cum. Supp. 1978); WIS. STAT. ANN. § 247.255 (West Cum. Supp. 1979-80); *The Economics of Divorce*, *supra* note 40, at 141-45; Daggett, *supra* note 13, at 231 (emphasizing the inherent untrustworthiness of evidence of marital misconduct as well as its basic irrelevance to the equitable property division).

<sup>88</sup> The two preceding criteria would weigh heavily in determining the method of division, i.e., whether possession would be advisable, or whether a periodic or lump sum monetary award would be required, etc.

<sup>89</sup> The inclusion of the consideration of alimony is not intended to distort the distinction in purposes between alimony and property division. However, the division of property will obviously affect the amount of, or even the necessity of alimony. For example, if the couple had acquired income-producing property, an award of this property to the spouse capable of receiving alimony may very well eliminate the necessity of alimony. See, e.g., *Cool v. Cool*, 203 Kan. 749, 457 P.2d 60 (1969). See also, UMDA § 308, *supra* note 58.

priate to consider in order to achieve a fair and equitable division of the marital property.

Under the flexible system outlined above, the domestic relations court could retain the broad discretionary powers currently enjoyed under the present laws. While the proposal is focused on the marital property which is jointly acquired but separately titled, it is also applicable to property held as joint tenants with the right of survivorship. In this respect, each spouse would share equally in the division of such property. Thus, the domestic wife would not lose the benefits of the traditional presumption of a gift where the title is taken jointly but paid by the income-producing husband.

Simply put, the proposed system would recognize the contribution of the individual partner, regardless of the role assumed within the marital unit, while disregarding the inviolability of title now present in the current law.

#### CONCLUSION

In recent years, West Virginia divorce laws have experienced significant and progressive changes from both legislative and judicial quarters. These steps towards the modernization of the laws governing the grounds for divorce and alimony are consistent with the views and demands of today's society. However, with regard to the laws governing the ownership of property upon divorce, West Virginia jealously guards the sanctity of title. The inflexibility of the laws in this area are reflective of an obsolete concept of marriage as a relationship based upon status and traditional roles and obligations. The rigidity of this approach could result in unavoidable injustice. What is needed is a legislative reform to humanize the laws regarding the distribution of property, a reform which would embrace as its underlying premise the concept of marriage as a partnership and a recognition of the contributions of both spouses. To borrow the poignant words of one jurist:

This has nothing to do with feminism, sexism, male chauvinism or any other trendy social ideology. It is ordinary common-sense, basic decency and simple justice.<sup>90</sup>

*John F. Cyrus*

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<sup>90</sup> *In re Marriage of Brantner*, 67 Cal. App.3d 416, 420, 136 Cal. Rptr. 635, 637 (1977) (also quoted in *Dyer v. Tsapis*, 249 S.E.2d 509, 511 (W. Va. 1978)).

