

Chapter 9

EQUITABLE DISTRIBUTION

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§ 9-1. Introduction.

Since the adoption of the equitable distribution statute in 1971, which made marital property subject to equitable distribution and excluded separate property, lawyers and judges have had to learn a great deal about the meaning of the word "property." The definition of property has expanded a great deal as courts have had to consider whether particular assets were property subject to division upon divorce. The judiciary has been responsible for defining, explaining and applying the doctrine of equitable distribution. When the Divorce Reform Act was enacted on September 13, 1971, the equitable distribution provision was inserted during passage with virtually no discussion or antecedent history.¹

What is property? A starting point to answer this question is the New Jersey statute, which defines "personal property" as including goods and chattels, rights and

¹ See Carr v. Carr, 120 N.J. 336, 348, 576 A.2d 872 (1990); Brandenburg v. Brandenburg, 83 N.J. 198, 204, 416 A.2d 327 (1980).

credits, money and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrance upon, property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, in whole or in part, and everything except real property as therein defined which may be the subject of ownership. "Real property" is defined as including lands, tenements and hereditaments, which are things that can be inherited, and all rights thereto and interests therein.² Beyond those starting points, the definitions of particular items of personal and real property and the determination whether they can or cannot be included as assets subject to equitable distribution have developed largely on a case-by-case basis. The New Jersey Supreme Court has held that an expansive interpretation should be given to the word "property."³

The Common Law System

The common law system is a title system of property ownership. Historically, title to real property belonged to the person who held title, regardless of whether that person was married. If the person holding title was a single woman, her title was as complete as a man's. However, if she was a married woman, the common law imposed restrictions upon her ownership of property during coverture, which were removed in the late nineteenth century with the passage of the Married Woman's Act⁴ and subsequent legislation.⁵ The common law title system applies today in New Jersey, except where a divorce is granted and equitable distribution of property is sought. At that point our law has had engrafted upon it community property concepts stemming from the civil law systems of Spain, Mexico and France, which were first adopted in the eight states commonly known as community property states and the Commonwealth of Puerto Rico. The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

Community Property Concepts

The community property system is based on a partnership or shared enterprise concept of marriage. The community property concept is that husband and wife form a community and that all property acquired by their joint efforts shall be owned in common, with a right equally to succeed to such marital property after dissolution of the marriage. Under the community property regime, all property acquired during the marriage, except property acquired by gift or inheritance, is the property of both spouses, unless they make a special contract not to be bound by its provisions. In some states they are entitled to equal shares and in other states they are entitled to equitable shares. Some community property states have statutes with equitable distribution provisions similar to the New Jersey statute.

Property acquired prior to marriage, property acquired by the gift of a third party and property acquired by inheritance are considered separate property rather than

²N.J.S.A. 1:1-2.

³Mahoney v. Mahoney, 91 N.J. 488, 495, 453 A.2d 527 (1982).

⁴Rev. Stat. 1874, p. 468.

⁵See Romeo v. Romeo, 84 N.J. 289, 295, 418 A.2d 258 (1980).

community property. Separate property belongs to the person having title to such property.

The community property system has played an important role in the evolving common law concept of equitable distribution of property upon divorce. This was particularly true in the early years when there were no New Jersey precedents for interpreting our statute and there was no legislative history. But at that time there was a well-developed body of community property case law, with both majority and minority positions on different topics. The relevance of community property state decisions continues where the issues are of novel impression in New Jersey. As recently as 1988, in the important New Jersey Supreme Court decision in *Landwehr v. Landwehr*,⁶ involving the question whether personal injury claims were subject to equitable distribution, the court pointed out that its holding barring equitable distribution was supported by the majority of community property states.

The Uniform Marriage and Divorce Act

The Uniform Marriage and Divorce Act (UMDA) was approved by the American Bar Association in February, 1994.⁷ The UMDA was not enacted by the New Jersey Legislature, but it had an important influence on the Judiciary. The equitable distribution criteria, set forth in UMDA § 307, were cited with approval by the New Jersey Supreme Court in the landmark decision of *Painter v. Painter*.⁸ These criteria are:

- The contribution of each spouse to acquisition of the marital property, including the contribution of a spouse as homemaker;
- The value of the property set apart to each spouse;
- The duration of the marriage; and
- The economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period of time to the spouse having custody of the children.

In addition, the UMDA § 307 exclusion of fault as an equitable distribution factor was adopted by the New Jersey Supreme Court in the companion case of *Chalmers v. Chalmers*,⁹ decided the same day as *Painter*.

Presumptions

All property in existence at the time the divorce complaint is filed is presumed to be marital property subject to equitable distribution.¹⁰ The burden of establishing the immunity of an asset from equitable distribution rests with the party asserting the immunity.¹¹

⁶111 N.J. 491, 502, 545 A.2d 738 (1988).

⁷60 A.B.A.J. 446, 451 (April 1974).

⁸65 N.J. 196, 211-12, 320 A.2d 484 (1974).

⁹65 N.J. 186, 194, 320 A.2d 478 (1974).

¹⁰*Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484 (1974).

¹¹*See Weiss v. Weiss*, 226 N.J. Super. 281, 291, 543 A.2d 1062 (App. Div. 1988); *Landwehr v. Landwehr*, 111 N.J. 491, 545 A.2d 738 (1988).

A 1988 amendment to the equitable distribution statute creates a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the parties were married.¹²

§ 9-2. The New Jersey Equitable Distribution Statute.

The New Jersey equitable distribution statute, which took effect on September 13, 1971, is very brief and had no legislative history to help explain it.¹³ It provided only a very general indication of what was to be treated as marital property subject to equitable distribution and of what was to be excluded as separate property. As a result, its meaning has been fleshed out in many important judicial decisions and in amendments, the most important of which specifies the factors to be considered in equitable distribution.¹⁴

Division of Property Legally and Beneficially Acquired

In all actions where a judgment of divorce or divorce from bed and board is entered, the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.¹⁵

Conversely, if no judgment of divorce or divorce from bed and board is entered, the court may not make an equitable distribution award. Under certain circumstances, such as the death of one spouse while the divorce action is pending, the court may provide equitable relief to the surviving spouse by applying the doctrines of constructive trust, quasi-contract or *quantum meruit*.¹⁶

Equitable Distribution Period

The span of time embraced by the equitable distribution statute extends from the marriage of the parties to the date of the filing of the divorce complaint.¹⁷

Inheritances and Third-Party Gifts Excluded

All property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift from a third party, devise, or intestate succession is not subject to equitable distribution. However, interspousal gifts are subject to equitable distribution.¹⁸

¹²N.J.S.A. 2A:34-23.1.

¹³N.J.S.A. 2A:34-23.

¹⁴N.J.S.A. 2A:34-23.1.

¹⁵N.J.S.A. 2A:34-23.

¹⁶See *infra* Section 9-24, Death While Divorce Is Pending. See also Carr v. Carr, 120 N.J. 336, 576 A.2d 872 (1990).

¹⁷Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974); Scherzer v. Scherzer, 136 N.J. Super. 397, 400, 346 A.2d 434 (App. Div. 1975), *certif. denied*, 69 N.J. 391, 354 A.2d 319 (1976).

¹⁸N.J.S.A. 2A:34-23.

When to Request Equitable Distribution

The application for equitable distribution by plaintiff or defendant must be made as a part of the divorce action, not afterwards, where the divorce action is brought in New Jersey and the defendant is personally subject to the jurisdiction of the court. Failure to do so will result in the waiver of equitable distribution.¹⁹ However, a different rule applies where one spouse obtains an *ex parte* judgment of divorce in a foreign jurisdiction without the foreign court obtaining personal jurisdiction over the other spouse who resides in New Jersey.

A foreign divorce may serve as the basis for an equitable distribution of marital property in this state, in addition to a grant of alimony or maintenance.²⁰ Similarly, in *Squitieri v. Squitieri*,²¹ where the husband filed a divorce complaint with time priority in Florida but failed to personally serve the wife there and the wife filed for divorce in New Jersey where the husband was personally served, the court held that New Jersey would proceed with equitable distribution in New Jersey in accordance with *Woliner*, being the sole court to have jurisdiction for that purpose.

Constitutionality

Marriage is a social relationship subject in all respects to the police power of the state. A state may enact a statute with retroactive effect to promote the public health, safety, morals or general welfare, in the exercise of its police power, as was done with the equitable distribution law. The equitable distribution statute does not unconstitutionally deprive an individual of property without due process of law in violation of the Fourteenth Amendment of the U.S. Constitution and Article 1, § 1 of the New Jersey Constitution.²² In *Painter v. Painter*,²³ the New Jersey Supreme Court balanced this exercise of the police power in the public interest against the individual loss that may be sustained by a spouse whose property is allocated to the other spouse incident to a dissolution of the marriage and found the loss to be slight when balanced against the probable benefit to the public welfare inherent in the legislation. It is a valid exercise of the police power.

In *Painter* the Court also rejected the claim that the equitable distribution statute was impermissibly vague and violative of due process, noting that similar statutes in other states had been upheld. In *Scalangi*, the court rejected the argument that the statute was unconstitutional insofar as it applied to marriages and separate estates created prior to September 13, 1981, the effective date of the statute, stating that the holding in *Rothman* was dispositive of that issue.

¹⁹*Sibilia v. Sibilia*, 123 N.J. Super. 211, 302 A.2d 162 (Ch. Div. 1973).

²⁰N.J.S.A. 2A:34-23. *Woliner v. Woliner*, 132 N.J. Super. 216, 333 A.2d 283 (App. Div.), *aff'd o.b.*, 68 N.J. 324, 344 A.2d 781 (1975), *cited with approval in Kazin v. Kazin*, 81 N.J. 85, 93, 405 A.2d 360 (1979).

²¹196 N.J. Super. 76, 481 A.2d 585 (Ch. Div. 1984).

²²*Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).

²³65 N.J. 196, 320 A.2d 484 (1974). *Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478 (1974); *Scalangi v. Scalangi*, 65 N.J. 180, 320 A.2d 475 (1974).

No Retroactivity

The equitable distribution statute cannot be applied retroactively to cases in which divorces were granted prior to its effective date.²⁴

The Three-Step Equitable Distribution Process

The equitable distribution process involves three steps. First, the assets subject to equitable distribution must be identified. Second, they must be valued. Third, the court must decide how they are to be fairly allocated or distributed.²⁵

Marriage Akin to a Partnership

The division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking that in many ways is akin to a partnership.²⁶

Marital Property and Separate Property

Marital property is all real and personal property acquired by either spouse or both from the date of the marriage to the date of the filing of the divorce complaint. It does not include property acquired by third party gift, devise or by intestate succession. However, interspousal gifts are marital property.²⁷ Marital property is subject to equitable distribution upon divorce.

Separate property is all property acquired prior to the marriage and property acquired during the marriage by third party gift or by inheritance, as well as property acquired by either party prior to the marriage. Property acquired by either spouse after the filing of a divorce complaint is also considered to be separate property. Separate property is property that is not subject to equitable distribution upon divorce. The terms “marital property” and “separate property” do not appear in the equitable distribution statute. They are community property concepts which now form part of the New Jersey common law.

Gray Areas

In most cases, it is easy to decide which property is marital and which is separate. But there have been unclear or gray areas in the past, and these have generated considerable litigation. Major subjects of dispute in the past included pensions and personal injury awards.²⁸ Other disputes have arisen with regard to the dates for the beginning and end of the equitable distribution period.²⁹ Currently, unresolved gray areas include such questions as how stock options and bonuses are to be treated with regard to alimony and equitable distribution. The pay package of many executives in major

²⁴Kyzyma v. Kyzyma, 117 N.J. Super. 472, 285 A.2d 76 (Ch. Div. 1971).

²⁵Rothman v. Rothman, 65 N.J. 219, 232, 320 A.2d 496 (1974).

²⁶*Id.*, 65 N.J. 219 at 229.

²⁷N.J.S.A. 2A:34-23. *See* Bellinger v. Bellinger, 177 N.J. Super. 650, 427 A.2d 620 (Ch. Div. 1981).

²⁸*See* Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (App. Div. 1987) (non-vested pension); Landwehr v. Landwehr, 111 N.J. 491, 545 A.2d 738 (1988) (personal injury awards).

²⁹*See* Brandenburg v. Brandenburg, 83 N.J. 198, 416 A.2d 327 (1980); Portner v. Portner, 186 N.J. Super. 410, 453 A.2d 189 (App. Div. 1982), *rev'd on other grounds*, 93 N.J. 215, 219, 460 A.2d 115 (1983).

companies consists of salary, stock options and bonuses. The questions is whether to treat stock options and bonuses as income available for payment of alimony and child support or as equitable distribution assets. *Pascale v. Pascale*³⁰ holds that stock options are assets subject to equitable distribution, depending upon when they are granted, but does not consider them as salary. No definitive decision has been made to date as to whether bonuses should be treated as equitable distribution assets or as salary.

Filing of Lis Pendens

A matrimonial litigant has the right to file a notice of *lis pendens* as to any property subject to equitable distribution upon the filing of a divorce complaint seeking equitable distribution.³¹ The filing of a notice of *lis pendens* will tie up the marital real estate and may be more effective than obtaining a court order barring conveyance of the real estate, which may be violated, while the *lis pendens* will keep a purchaser from acquiring good title.

Notice of Equitable Distribution Upon Default

In cases in which equitable distribution is sought and a default has been entered, the plaintiff must file and serve upon the defaulting party, in accordance with R. 1:5-2, a notice of application for equitable distribution, not less than 20 days prior to the hearing date, and a copy must be filed with the county clerk of the county of venue.³² The notice shall include the proposed trial date, a statement of the value of each asset and the amount of each debt sought to be distributed, a proposal for distribution and a statement indicating whether the plaintiff is seeking alimony, child support or other relief. However, where a written property settlement agreement has been executed, the plaintiff is not obligated to file a notice of equitable distribution.

§ 9-3. Equitable Distribution Factors.

The equitable distribution law was amended in 1988 to specify 14 factors that the court will consider, but not be limited to, in making an equitable distribution of property. In addition to these factors, the court may consider any other factors that it deems relevant.³³ While most of these factors are to be found in the case law that developed over the last 25 years, some are new, and their application should be carefully considered in each particular case. The court is required to make specific findings of fact on the evidence relative to all issues pertaining to asset eligibility, asset valuation, and equitable distribution, including specifically, but not limited to, the factors set forth in N.J.S.A. 2A:34-23.1. These statutory factors are:

- a. The duration of the marriage.
- b. The age and physical and emotional health of the parties.
- c. The income or property brought to the marriage by each party.
- d. The standard of living established during the marriage.

³⁰140 N.J. 583, 607-11, 660 A.2d 485 (1995).

³¹*Dilorio v. Dilorio*, 254 N.J. Super. 172, 187, 603 A.2d 127 (Ch. Div. 1991).

³²R. 5:5-2(e).

³³N.J.S.A. 2A:34-23.1.

- e. Any written agreement made by the parties before or during the marriage concerning an arrangement of property distribution.
- f. The economic circumstances of each party at the time the division of property becomes effective.
- g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- h. The contribution by each party to the education, training or earning power of the other.
- i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker.
- j. The tax consequences of the proposed distribution to each party.
- k. The present value of the property.
- l. The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects.
- m. The debts and liabilities of the parties.
- n. The need for creation now, or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children; and
- o. Any other factors which the court may deem relevant.

Fault Is Not an Equitable Distribution Factor

Marital fault is not one of the factors that may properly be taken into account in equitable distribution.³⁴ In *Chalmers v. Chalmers*,³⁵ the court refused to consider adultery as an equitable distribution factor, finding that marital fault may be merely a manifestation of a sick marriage. It added that 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. It noted with approval that § 307 of the Uniform Marriage and Divorce Act (UMDA) provided for the distribution of marital property without regard to marital misconduct.³⁶ Similarly, in *Painter v. Painter*,³⁷ the court stated that fault of a marital nature is not an appropriate criterion for consideration in effecting an equitable distribution of marital assets.

Where “egregious fault” is involved, such as attempting to take the life of one’s spouse, fault may be a *de facto* factor nonetheless. In *D’Arc v. D’Arc*,³⁸ the court found that the husband was not entitled to any equitable distribution of property from his wealthy wife, a Johnson & Johnson heiress, whom he had tried to murder by “taking out

³⁴ See *Chalmers v. Chalmers*, 65 N.J. 186, 192, 320 A.2d 478 (1974); *Painter v. Painter*, 65 N.J. 196, 212, 320 A.2d 484 (1974).

³⁵ 65 N.J. 186, 192, 320 A.2d 478 (1974).

³⁶ *Chalmers*, 65 N.J. at 193-94.

³⁷ *Id.* at 212.

³⁸ 164 N.J. Super. 226, 395 A.2d 1270 (Ch. Div. 1978), *aff’d in part, rev’d in part*, 175 N.J. Super. 598, 421 A.2d 602 (App. Div. 1980), *certif. denied*, 85 N.J. 487, 427 A.2d 579 (1980), *cert. denied*, 451 U.S. 971, 101 S. Ct. 2049, 68 L. Ed. 2d 350 (1981).

a contract” on her life. Though the court did not say so explicitly, it is clear that the husband’s egregious conduct led to that result. Other states, such as New York, have carved out an exception to their equitable distribution statutes for egregious conduct, based on the *D’Arc* case.

The duration of the marriage clearly is the most important factor that the court will consider with regard to property division. The longer the marriage the more likely it is that the property division will be equal.³⁹ For example, in *Gibbons v. Gibbons*,⁴⁰ the Appellate Division expressed approval of the trial judge’s decision to distribute all marital property equally, noting that this had been a 26-year marriage and that the parties had equally contributed to it.

An award of 40% of the marital property to the wife in a childless eight-and-one-half-year second marriage with marital assets of \$350,000, all contributed by the husband, was excessive.⁴¹

Focusing on the age and relative health of the parties in a short marriage, the court awarded a 67-year-old man in poor health married to a 47-year-old woman 100% of the marital home he purchased with his life savings and put in both names.⁴²

The illness of the wife was the factor examined in *Globman v. Globman*.⁴³ *Globman* involved a six-year marriage with two children, a school teacher husband, and an incompetent, hospitalized wife. Reversing the trial court denial of equitable distribution or alimony to the wife, the appellate court held that her incapacitating mental illness should not disqualify her from some share, however modest, of the assets acquired during the marriage, which would provide her with security in the event of the death or incapacity of the husband.

The financial contribution made by one or both parties to the marriage must be considered.⁴⁴ However, it is by no means the only consideration. In *Perkins v. Perkins*,⁴⁵ the court stated that the husband’s proposal that the assets should be divided solely in proportion to the financial contribution of each party during the marriage was clearly incorrect. The court added that, although the acquisition of property may be traced more directly to one partner than another, the distribution should reflect nonpecuniary as well as pecuniary contributions to the marriage.

Contribution as a Homemaker

One of the major purposes of the equitable distribution law is to give recognition to the essential supportive role played by a wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to her fair share of family assets accumulated during the marriage.⁴⁶

³⁹N.J.S.A. 2A:34-23.1.

⁴⁰174 N.J. Super. 107, 110, 415 A.2d 1174 (App. Div. 1980), *rev’d on other grounds*, 86 N.J. 515, 432 A.2d 80 (1981).

⁴¹*Pascarella v. Pascarella*, 165 N.J. Super. 558, 562, 398 A.2d 921 (App. Div. 1979).

⁴²*Sanders v. Sanders*, 118 N.J. Super. 327, 287 A.2d 464 (Ch. Div. 1972). N.J.S.A. 2A:34-23.1b.

⁴³158 N.J. Super. 338, 386 A.2d 390 (App. Div. 1978).

⁴⁴N.J.S.A. 2A:34-23.1i.

⁴⁵159 N.J. Super. 243, 247, 387 A.2d 1211 (App. Div. 1978).

⁴⁶*See Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974). *See also* N.J.S.A. 2A:34-23.1i.

“Even a sparring partner can be said to contribute in some measure to the success of an adversary,” was the response of the appellate court to the contention of a husband that his success was achieved despite the hostile conduct of his wife and that all she did was fight with him.⁴⁷

For purposes of equitable distribution, marriage is viewed as being akin to a partnership. The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other ingredients of the marital relationship, at least as important to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition.⁴⁸

§ 9-4. Date for Identification of Distributable Assets.

The cut-off date for inclusion of assets subject to equitable distribution is the date the divorce complaint is filed, generally speaking.⁴⁹ In *Smith v. Smith*,⁵⁰ the Court found that an earlier end of the marriage for equitable distribution purposes would be the date of a written agreement that qualifies as a property settlement agreement and not just as a support agreement, accompanied by separation in fact. Since the agreement in *Smith* only dealt with spousal support, it did not cut off the wife’s claim to equitable distribution on divorce.

Where a property settlement agreement is made in conjunction with a judicial decree for separate maintenance, such an agreement would constitute the equitable distribution cut-off date.⁵¹

An oral property settlement agreement in accordance with which the parties separate and divide most of their assets is valid. In such circumstances, the date the agreement is carried out constitutes the cut-off date for identification of assets subject to equitable distribution.⁵²

As previously stated, the cut-off date for identification of assets subject to equitable distribution is the date the divorce complaint is filed. This rule was found, in *Brandenburg v. Brandenburg*,⁵³ to apply even if the parties separated long before that date. In *Brandenburg* the parties separated 10 years before a divorce complaint was filed. The court insisted that the divorce filing date should be taken as the cut-off date for equitable distribution, except in cases where there is a written separation agreement accompanied by actual physical separation or where the parties have separated in fact and divided their property pursuant to an oral agreement.⁵⁴

⁴⁷ *Scherzer v. Scherzer*, 136 N.J. Super. 397, 401, 346 A.2d 434 (App. Div. 1975), *certif. denied*, 69 N.J. 391, 354 A.2d 319 (1976).

⁴⁸ *Gibbons v. Gibbons*, 174 N.J. Super. 107, 113, 415 A.2d 1174 (App. Div. 1980), *rev’d on other grounds*, 86 N.J. 515, 432 A.2d 80 (1981). *See also* *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974).

⁴⁹ *Painter v. Painter*, 65 N.J. 196, 218, 320 A.2d 484 (1974).

⁵⁰ 72 N.J. 350, 371 A.2d 1 (1977).

⁵¹ *Carlsen v. Carlsen*, 72 N.J. 363, 371 A.2d 8 (1977).

⁵² *DiGiacomo v. DiGiacomo*, 80 N.J. 155, 402 A.2d 922 (1979).

⁵³ 83 N.J. 198, 416 A.2d 327 (1980).

⁵⁴ *Id.*, 83 N.J. at 209-10.

The date of a written property settlement agreement will be used as the cut-off date for identification of assets subject to equitable distribution, even if the agreement itself has been set aside.⁵⁵

In *Portner v. Portner*,⁵⁶ the court stated that marriage is deemed to have ended upon the filing of a valid divorce complaint that culminates in a divorce, and that event is the cut-off date for identification of assets subject to equitable distribution. In *Portner*, the husband filed defective divorce complaints first in Pennsylvania and then in Delaware. The court said that it would be manifestly unfair to permit one spouse to unilaterally file an unmeritorious divorce complaint and thereby terminate the other spouse's claim to marital assets. Mere physical separation of the parties, unmeritorious complaints for divorce, and complaints for separate maintenance will not be deemed to terminate a marriage.

Where spouses file two complaints for divorce in different states, the first valid complaint will mark the cut-off date for equitable distribution, even if a second complaint is filed.⁵⁷

§ 9-5. Classification.

Appreciation of Separate Property During Marriage

In the landmark decision of *Painter v. Painter*,⁵⁸ the court stated that property owned by a spouse at the time of marriage would remain the separate property of that spouse and would not be considered an asset subject to equitable distribution on divorce. However, the court included a footnote potentially limiting the immunity from distribution of any enhanced value to that separate property,⁵⁹ as, in fact, it has been limited by case law development over the past quarter century.

An increase after marriage in the value of the closely held corporation stock owned by a husband may be eligible for equitable distribution to the extent that it may be attributable to the expenditure of effort by the wife. The stock of a closely held corporation, in contrast to ordinary marketable securities, necessarily derived its value in large part from the husband's personal participation in the business. So far as equitable distribution is concerned, there is no essential difference between an interest in an individual business and one held in a corporate or partnership name. The form of the enterprise should not control.⁶⁰

The court held that the wife was not entitled to share in that portion of the enhancement in value of the house owned prior to marriage by the husband, which was due solely to inflation or other economic factors, but might be entitled to a share in that portion of the enhancement, if any, to which she contributed or for which both were jointly responsible.⁶¹

⁵⁵*Id.* at 209 n.4.

⁵⁶93 N.J. 215, 219, 460 A.2d 115 (1983).

⁵⁷*Zappala v. Zappala*, 222 N.J. Super. 169, 536 A.2d 308 (App. Div. 1988).

⁵⁸65 N.J. 196, 320 A.2d 484 (1974).

⁵⁹*Id.* at 214, 320 A.2d 484 n.4.

⁶⁰*Scherzer v. Scherzer*, 136 N.J. Super. 397, 400, 346 A.2d 434 (App. Div. 1975), *certif. denied*, 69 N.J. 391, 401, 354 A.2d 319 (1976).

⁶¹*Mol v. Mol*, 147 N.J. Super. 5, 9, 370 A.2d 509 (App. Div. 1977).

The wife is entitled to share in the amount of the mortgage principal paydown on a premarital home owned by the husband. The court found that by being a full-time homemaker she made a contribution to the reduction of the mortgage and was therefore entitled to its inclusion for equitable distribution.⁶²

In the leading case of *Scavone v. Scavone*,⁶³ the court noted the lack of uniformity regarding treatment of incremental values and proposed the following valuation dates for various types of assets. The *Scavone* classification system is important and helpful. In summary, it proposes distribution and evaluation dates of the incremental value of assets as follows:

Passive, Immune Asset (Premarital, Gift, Inheritance) in One Name

Not distributable.

Active, Immune Asset (Premarital, Gift, Inheritance) in One Name

- A. If the increase was solely through efforts of owner: Not distributable.
- B. If the increase was partially or solely through the efforts of the non-owner: Distributable. The valuation date is the date of distribution.

Passive and Active Assets in One Name Acquired in Contemplation of Marriage

- A. Passive assets are distributable and incremental value is determined at the time of distribution.
- B. Active assets are distributable and valuation is determined as of the date of the complaint.

Passive Joint Asset Acquired During Marriage

Distributable, and value is determined at time of distribution.

Active Joint Asset Acquired During Marriage

Barring fraud or bad faith, the incremental value is distributable and determined at the time of distribution, unless the increment is the result of active management of one with no participation by the other, in which event valuation of the asset is determined as of the date of the complaint.

Active Asset Acquired During Marriage in One Name

Distributable, and value is determined as of the date of the complaint.

⁶²Griffith v. Griffith, 185 N.J. Super. 382, 448 A.2d 1035 (Ch. Div. 1982).

⁶³230 N.J. Super. 482, 486-93, 553 A.2d 885 (Ch. Div. 1988), *aff'd*, 243 N.J. Super. 134, 578 A.2d 1230 (App. Div. 1990).

Passive Asset Acquired During Marriage in One Name

Distributable, and incremental value is determined at the time of distribution.

Income Derived from Separate Property

In accordance with community property principles, income derived from separate property is treated differently depending upon whether it is produced passively or actively. Income derived from separate passive immune assets, such as stock dividends or bank account interest, is not subject to equitable distribution.⁶⁴ However, if the income results from onerous efforts or active work, the income from such separate property may be subject to equitable distribution if the other spouse is found to have contributed to that income directly or indirectly, thereby becoming entitled to a share.

Income and Appreciation Distinguished

Where the increase in value of separate property results from independent economic factors, passively, such as, in *Mol v. Mol*,⁶⁵ where the marital residence owned prior to the marriage by the husband increased in value because of inflation, that appreciation in value is not subject to equitable distribution. Conversely, where one spouse owns a business prior to the marriage and works in that business during the marriage, the appreciation in value, if any, of the business from the date of the marriage to the date the divorce complaint is filed is subject to equitable distribution.

Transmutation

Transmutation is a community property doctrine that has found its way into the common law equitable distribution lexicon, although it has been little used in New Jersey. The word “transmutation” conjures up images of alchemists busily at work in their smoke-filled laboratories, trying to convert base metals into gold or silver. Transmutation as an equitable distribution concept refers to a more mundane process whereby separate or nonmarital property can be transmuted into marital property. This occurs when the spouse with title to the separate property represents to the other spouse that the property will be shared and treated as marital property.⁶⁶ Similarly, where separate and marital property have been commingled, the failure of the separate property holder to segregate the separate property may give rise to the rebuttable presumption that the nonmarital property has been transmuted into marital property.⁶⁷

The common law transmutation doctrine stems from community property law. Transmutations among spouses are authorized by statute in California.⁶⁸ Formerly, transmutations of property under California law could be verbal, but, since 1985, they

⁶⁴ See *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484 (1974); *Scavone v. Scavone*, 230 N.J. Super. 482, 486, 553 A.2d 885 (Ch. Div. 1988).

⁶⁵ 147 N.J. Super. 5, 370 A.2d 509 (App. Div. 1977).

⁶⁶ *Coney v. Coney*, 207 N.J. Super. 63, 75, 503 A.2d 912 (Ch. Div. 1985).

⁶⁷ See the leading Illinois case of *In re Marriage of Smith*, 86 Ill. 2d 518, 530, 427 N.E.2d 1239 (1981).

⁶⁸ See Cal. Family Code, § 850 et seq.

must be in writing and must conform to the legal standard involving actions of persons occupying confidential relations with one another.⁶⁹

Where a spouse owning real estate as his separate property executes a deed conveying title to himself and to his wife as tenants by the entirety, the property loses its separate character as a result of the interspousal gift. It has been “transmuted” and has become subject to equitable distribution, as would property purchased with the proceeds of the sale of such property.⁷⁰

§ 9-6. Modification.

Rule 4:50 Relief from Judgment

If a party seeks to modify an equitable distribution agreement post-divorce, an application should be made under R. 4:50. On motion, with briefs, and under such terms as are just, the court may relieve a party from a final judgment or order for one of the following reasons:

- Mistake, inadvertence, surprise, or excusable neglect;⁷¹
- Newly discovered evidence that would probably alter the judgment or order and that could not have been discovered in time to move for a new trial;⁷²
- Fraud, misrepresentation, or other misconduct of an adverse party;⁷³
- Any other reason justifying relief from the operation of the judgment or order.⁷⁴

The R. 4:50 motion must be made within a reasonable time. For the first three reasons above, the motion must be made not more than one year after judgment. For the last reason, there is no such time limit.

In *Castriota v. Castriota*,⁷⁵ where the husband defaulted in equitable distribution payments, the court enforced the levy of the wife on his stock interest in a restaurant, finding his restrictive stock agreement void and against public policy because it was a total restraint on alienation. However, it granted the corporation the option to purchase the husband’s shares.

If a property settlement agreement is extremely unjust or inequitable, relief from its provisions may be afforded under R. 4:50-1(f), provided that application is made within a reasonable period of time.⁷⁶ In *Torwich v. Torwich*,⁷⁷ where the parties had agreed to a division of the husband’s military pension upon divorce and then the husband obtained a disability award that reduced the wife’s share by 40%, the court held that these were exceptional and compelling circumstances entitling her to a plenary hearing under

⁶⁹ See *Haines v. Haines*, 33 Cal. App. 4th 277, 39 Cal. Rptr. 2d 673 (App. 4th 1995). See also *Estate of Blair*, 199 Cal. App. 3d 141, 244 Cal. Rptr. 627 (App. 4th 1988).

⁷⁰ *Canova v. Canova*, 146 N.J. Super. 58, 368 A.2d 971 (Ch. Div. 1976).

⁷¹ R. 4:50-1(a).

⁷² R. 4:50-1(b).

⁷³ R. 4:50-1(c).

⁷⁴ R. 4:50-1(f).

⁷⁵ 268 N.J. Super. 417, 422-24, 633 A.2d 1024 (App. Div. 1993).

⁷⁶ *Edgerton v. Edgerton*, 203 N.J. Super. 160, 496 A.2d 366 (App. Div. 1985).

⁷⁷ 282 N.J. Super. 524, 529, 660 A.2d 1214 (1995).

R. 4:50-1(f). The court distinguished its holding in *Torwich* from its holding in *Schwartzman v. Schwartzman*,⁷⁸ where it denied modification of an equitable distribution payout because it found no exceptional circumstance under 4:50-1(f) in the husband's post-divorce business problems.

Generally speaking, an equitable distribution award is not subject to modification based on changed circumstances, as an alimony award may be.⁷⁹ A property division may not be adjusted to reflected unanticipated changes in circumstances.⁸⁰

In *Capanear v. Salzano*,⁸¹ an application to modify the real estate provisions of a property settlement agreement made 10 years later was held to be time-barred under R. 4:50-2. This case is important because it summarizes the case law governing modification of matrimonial property settlement agreements.

A claim by an ex-wife, filed five years after her divorce, for modification of a commercial lease entered into by her and her ex-husband as part of their divorce property settlement agreement, alleging mistake and fraud, resulted in a plenary hearing.⁸²

In *Rosen v. Rosen*,⁸³ the court would not allow the husband to amend a property settlement agreement because of post-divorce changes in the tax law. It also rejected his contention that this should be done because of a change in circumstances, the *Lepis v. Lepis*⁸⁴ standard for alimony and support modification, which is not applicable to equitable distribution agreements. The court noted that agreements may be modified under R. 4:50-1(f) where there is a showing of inequity or unfairness, but it found neither in this case, nor did it find a showing of fraud or mistake.

Where a widow claimed that her late husband had intentionally withheld material information as to the value of his holdings during settlement negotiations, though over two years had passed since the divorce was granted and one year since his death, a divided Supreme Court (4-3) reversed the Appellate Division denial of her application and remanded the matter to the trial court to determine after a plenary hearing whether the widow's motion had been made within a reasonable time under the circumstances and, if so, whether she could establish a ground for relief under R. 4:50-1(f). With regard to timeliness, the Court said that the relevant date was when the widow discovered the facts underlying her application, not when she was divorced or when her late husband had died.⁸⁵

In *Barrie v. Barrie*,⁸⁶ the former wife, relying on R. 4:50-1(f), applied two years after the divorce judgment to vacate the property settlement agreement provisions incorporated in the judgment, claiming that she was mentally incompetent at the time of the trial. Her application was denied, because the trial judge's finding that she was

⁷⁸248 N.J. Super. 73, 76-77, 590 A.2d 246 (App. Div. 1991).

⁷⁹*Castriota v. Castriota*, 268 N.J. Super. 417, 422-24, 633 A.2d 1024 (App. Div. 1993); *Schwartzman v. Schwartzman*, 248 N.J. Super. 73, 77, 590 A.2d 246 (App. Div.), *certif. denied*, 126 N.J. 341, 598 A.2d 897 (1991); *Monte v. Monte*, 212 N.J. Super. 557, 561, 515 A.2d 1233 (App. Div. 1986); *Mahoney v. Mahoney*, 91 N.J. 488, 498, 453 A.2d 527 (1982); *Mendell v. Mendell*, 162 N.J. Super. 469, 475-76, 393 A.2d 600 (App. Div. 1978).

⁸⁰*Mahoney v. Mahoney*, 91 N.J. 488, 498, 453 A.2d 527 (1982).

⁸¹222 N.J. Super. 403, 537 A.2d 306 (App. Div. 1988).

⁸²*Conforti v. Guliadis*, 128 N.J. 318, 608 A.2d 225 (1992).

⁸³225 N.J. Super. 33, 541 A.2d 716 (App. Div. 1988).

⁸⁴83 N.J. 139, 416 A.2d 45 (1980).

⁸⁵*Palko v. Palko*, 73 N.J. 395, 375 A.2d 625 (1977).

⁸⁶154 N.J. Super. 301, 381 A.2d 374 (App. Div. 1977).

competent was held not to be an abuse of discretion. The *Barrie* case stands for the proposition that agreements must be entered into very carefully, because once an agreement is incorporated in a judgment of divorce, it is very unlikely that it will be set aside.

An application by the ex-husband for relief under R. 4:50-1(f) from the requirement that the former marital home be sold and the proceeds divided as provided in the judgment of divorce was denied despite the fact that the former wife died prior to the sale, on the ground that the former husband had delayed the sale in violation of the court's order. Her executrix was substituted for her and the sale was required.⁸⁷

Modification of Executory Divorce Agreement

Where the parties entered into an executory property settlement agreement at their first divorce, never implemented it, reconciled, remarried and then divorced a second time, the court found it unfair and inequitable to enforce the agreement, and the court had the residual power to modify it or set it aside under R. 4:50-1(f).⁸⁸

§ 9-7. The Marital Home.

No category of marital asset has received more judicial attention or is subject to a greater variety of distributive options than the marital residence, which is typically owned as a tenancy by the entirety and which is also typically a primary, if not the primary, marital asset.⁸⁹

Where a decision has been made that the custodial parent should continue in exclusive possession of the marital home with the children for a defined and limited post-divorce period, the determination of what is fair, practical and workable is not subject to any definitive rule or standard, but must be dictated by the particular circumstances, subject only to equitable principles.⁹⁰

Where the marital residence is the primary asset and the court determines that the wife and children should continue to reside there, one approach is to value and allocate equitably all other assets, and then order title to the residence to be transferred to the wife subject to her giving an interest-bearing mortgage in favor of the husband, payable at a designated future time, such as six months after emancipation of the youngest child.⁹¹

A judgment creditor of one spouse who owned real estate as a tenancy by the entirety is not entitled after the debtor spouse's divorce to become an equal tenant in common entitled to partition or execution sale to satisfy the lien. The judgment creditor is entitled only to the interest of the debtor provided under the equitable distribution scheme. The levying creditor, however, has a sufficient interest to warrant permission for him to intervene. The automatic conversion rule that substituted the creditor for the debtor spouse following divorce, which was enunciated in *Interchange State Bank v. Riegel*,⁹² is rejected.⁹³

⁸⁷Berlin v. Berlin, 200 N.J. Super. 275, 281, 491 A.2d 63 (Ch. Div. 1984).

⁸⁸Capuzzo v. Capuzzo, 244 N.J. Super. 317, 320-21, 582 A.2d 815 (App. Div. 1990).

⁸⁹Daeschler v. Daeschler, 214 N.J. Super. 545, 553, 520 A.2d 777 (App. Div. 1986).

⁹⁰Schaeffer v. Schaeffer, 184 N.J. Super. 423, 428, 446 A.2d 537 (App. Div. 1982).

⁹¹Gemignani v. Gemignani, 146 N.J. Super. 278, 369 A.2d 942 (App. Div. 1977).

⁹²190 N.J. Super. 139, 462 A.2d 198 (App. Div. 1983).

The husband's conveyance to wife, during marriage, of a home owned by him prior to the marriage is a gift to her, making it subject to equitable distribution. Its value was the present fair market value, less the amount of the outstanding mortgage. Neither its original cost, nor its value at the date of marriage, are factors to be considered.⁹⁴

Any decisions regarding distribution of the marital home upon divorce should provide for:

- A fair return for delayed realization; or
- An equity interest; and
- Recognition of the extent of each party's contribution to the protection and enhancement of the asset prior to sale.⁹⁵

The doctrine of equitable estoppel was applied to bar an ex-husband from seeking to partition the marital home after divorce, when it became a tenancy in common, so long as the wife and daughter continue to reside there. The husband had obtained an *ex parte* Nevada divorce judgment with a provision, on which the wife relied, requiring him to pay expenses on the marital home so long as the wife continued to live there with their daughter.⁹⁶

The remarriage of an ex-wife who had been granted exclusive occupancy of the former marital home with the children is frequently, but not always, a sale-triggering event. It constitutes a change in circumstances requiring some revision of the exclusive occupancy arrangement, if not sale of the residence.⁹⁷

Sale of the Marital Home Pendente Lite

The court lacks the authority to order a sale *pendente lite* of the marital home owned by the parties as tenants by the entireties, unless both parties consent, according to the leading case of *Grange v. Grange*.⁹⁸ Exceptions have been carved out of the much-criticized holding in *Grange*, based upon compelling circumstances. A sale of the marital home owned as a tenancy by the entirety was ordered where the husband disappeared after the parties had previously consented to the sale by executing a listing agreement and foreclosure proceedings had been instituted.⁹⁹

The Supreme Court Committee on Matrimonial Litigation¹⁰⁰ criticized the *Grange* rule as unduly restrictive and generally unfair. The problem was exacerbated by N.J.S.A. 3B:28-3, which provides that every married person is entitled to joint possession of real property occupied jointly with his or her spouse acquired on or after May 28, 1980, as their principal matrimonial residence, and that such right of possession cannot be released, extinguished or alienated without the consent of both spouses, except by the judgment of a court. N.J.S.A. 3B:28-3, together with the rule in *Grange*, presents a

⁹³Daeschler v. Daeschler, 214 N.J. Super. 545, 553, 520 A.2d 777 (App. Div. 1986).

⁹⁴Pascarella v. Pascarella, 165 N.J. Super. 558, 564, 398 A.2d 921 (App. Div. 1979).

⁹⁵Daly v. Daly, 179 N.J. Super. 344, 350-51, 432 A.2d 113 (App. Div. 1981).

⁹⁶Goodpasture v. Goodpasture, 115 N.J. Super. 189, 278 A.2d 531 (Ch. Div. 1971).

⁹⁷Schaeffer v. Schaeffer, 184 N.J. Super. 423, 446 A.2d 537 (App. Div. 1982).

⁹⁸160 N.J. Super. 153, 388 A.2d 1335 (App. Div. 1978).

⁹⁹Witt v. Witt, 165 N.J. Super. 463, 466, 398 A.2d 597 (Ch. Div. 1979).

¹⁰⁰Phase II, Final Report (known as Pashman II) at 6 (1981).

formidable barrier to granting relief in situations where the need exists to sell the joint tenancy home *pendente lite*.¹⁰¹

A marital home that was the separate premarital property of the wife, but was held as a joint possessory interest under N.J.S.A. 3B:28-3 and listed for sale by the wife *pendente lite* for pressing economic needs when the husband disappeared after being excluded by a domestic violence order, can be sold to avoid irreparable injury, with the sale proceeds held in escrow for subsequent equitable distribution. This case was distinguished from *Grange* because it did not involve a tenancy by the entirety.¹⁰²

Where the parties are in dire financial circumstances and their joint earnings are insufficient, a matrimonial judge has the broad discretion and authority under N.J.S.A. 2A:34-23 to order sale of the marital home *pendente lite*. The court need not accord weight to the rule in *Grange* if irreparable injury is threatened.¹⁰³

Where a wife separated from her husband and sold the marital home, which she owned by inheritance, to a third party for substantially less than fair market value without informing her husband, who had made substantial improvements to it, the court awarded the husband 35% of the fair market value, in reliance on N.J.S.A. 3B:28-3.¹⁰⁴

Equitable Distribution Liens Held by Third Parties

A mortgage granted by a debtor spouse on his interest in real estate held as a tenant by the entirety and conveyed to the other spouse by way of equitable distribution on divorce, continues post-divorce as a lien on that interest, which cannot be extinguished by equitable distribution.¹⁰⁵

Similarly, where the court has appointed a custodial receiver pursuant to N.J.S.A. 2A:34-23 or a statutory receiver in aid of execution under N.J.S.A. 2A:17-66 for collection of support arrears and of funds subject to equitable distribution, a judgment creditor of the debtor spouse cannot levy on the bank account of the receiver.¹⁰⁶

Hypothetical Brokerage Commission

A hypothetical brokerage commission and legal fees cannot be deducted from the parties' equity in the marital residence, in absence of evidence that the property will be sold to a third person.¹⁰⁷

§ 9-8. The Engagement Ring.

An engagement ring is a conditional gift. The condition is marriage and the ring is returnable only if the engagement is broken. The reason for the engagement being broken is irrelevant and, accordingly, fault is not a factor. Upon marriage the gift is no longer conditional, and unconditionally becomes the property of the wife. However,

¹⁰¹ Glatthorn v. Wisniewski, 236 N.J. Super. 504, 566 A.2d 242 (Ch. Div. 1989).

¹⁰² *Id.*, 236 N.J. Super. at 508.

¹⁰³ Pelow v. Pelow, 300 N.J. Super. 634, 644, 693 A.2d 564 (Ch. Div. 1997).

¹⁰⁴ Arnold v. Anvil Realty Inv., Inc., 233 N.J. Super. 481, 559 A.2d 444 (App. Div. 1989).

¹⁰⁵ Freda v. Commercial Trust Co., 118 N.J. 36, 570 A.2d 409 (1989).

¹⁰⁶ Culp v. Culp, 242 N.J. Super. 567, 577 A.2d 872 (Ch. Div. 1990).

¹⁰⁷ Wadlow v. Wadlow, 200 N.J. Super. 372, 491 A.2d 757 (App. Div. 1985).

because the ring was given prior to marriage, it retains its character as separate property not subject to equitable distribution.¹⁰⁸

The *Winer/Aronow* view rejects fault as a factor in determining ownership when an engagement is broken, in contrast to earlier decisions, most of which held that the party who unjustifiably breaks the engagement loses the ring.¹⁰⁹

§ 9-9. Property Acquired in Contemplation of Marriage.

A date prior to the marriage ceremony can, in appropriate circumstances, qualify as the date of commencement of the marriage for the purpose of deciding whether property is an asset subject to equitable distribution. The shared enterprise of marriage may begin even before the actual marriage ceremony through the purchase of a major marital asset, such as a house, and substantial improvements to that asset.¹¹⁰ This conclusion was supported by trial court decisions in *Raspa v. Raspa*¹¹¹ and *Coney v. Coney*.¹¹²

If the parties have an intention to create a marital partnership prior to the marriage ceremony with respect to particular property, which would be the equivalent of a business partnership, and if by their combined efforts they increase the value of an asset held by one of them, such increase might be subject to treatment as a partnership interest, and, following marriage, as an asset subject to equitable distribution.¹¹³

§ 9-10. Property Acquired During Cohabitation.

Cohabitation *per se* does not lead to acquisition of property subject to equitable distribution, because equitable distribution is only available to those who marry and then divorce. However, property rights may be acquired if the parties create a business partnership. In a situation where the parties cohabited, acquired property, married and then divorced, the court held that whatever rights might have existed under an alleged “palimony” contract would be extinguished following the marriage because a subsequent contract, in this case the marriage contract, covering the same parties and subject matter, would extinguish the prior alleged “palimony” contract.¹¹⁴

New Jersey is a title state, so property division is in accordance with title. This poses no problem with such assets as realty purchased as tenants in common, which should be divided 50% to each. However, it may pose a problem with other assets for which title is more difficult to determine.

¹⁰⁸ *Winer v. Winer*, 241 N.J. Super. 510, 575 A.2d 518 (App. Div. 1990). *See also* *Aronow v. Silver*, 223 N.J. Super. 344, 538 A.2d 851 (Ch. Div. 1987).

¹⁰⁹ *See* *Sloin v. Lavine*, 11 N.J. Misc. 899, 168 A. 849 (Sup. Ct. 1933); *Albanese v. Indelicato*, 25 N.J. Misc. 144, 51 A.2d 110 (D. Ct. 1947); *Beberman v. Segal*, 6 N.J. Super. 472, 69 A.2d 587 (Law Div. 1949).

¹¹⁰ *Weiss v. Weiss*, 226 N.J. Super. 281, 284-89, 543 A.2d 1062 (App. Div.), *certif. denied*, 114 N.J. 287, 554 A.2d 844 (1988).

¹¹¹ 207 N.J. Super. 371, 383-87, 504 A.2d 683 (Ch. Div. 1985).

¹¹² 207 N.J. Super. 63, 503 A.2d 912 (Ch. Div. 1985). *Contra* *Rolle v. Rolle*, 219 N.J. Super. 528, 530 A.2d 847 (Ch. Div. 1987); *Mangone v. Mangone*, 202 N.J. Super. 505, 495 A.2d 469 (Ch. Div. 1985).

¹¹³ *Berrie v. Berrie*, 252 N.J. Super. 635, 646, 600 A.2d 512 (App. Div. 1991).

¹¹⁴ *Mangone v. Mangone*, 202 N.J. Super. 505, 495 A.2d 469 (Ch. Div. 1985).

In cases where property does not fit under the equitable distribution rubric, but justice requires relief, equitable remedies may be fashioned by the court. This was done in *Carr v. Carr*,¹¹⁵ where the husband died *pendente lite*, leaving nothing to the wife, who was not entitled to an elective share because of the pending divorce. The court granted significant relief to the wife by way of equitable remedies. The court of equity has the power to devise and shape its remedy so as to fit the particular circumstances of each case.¹¹⁶ These equitable remedies include the concepts of resulting trust, constructive trust, *quantum meruit*, quasi-contract and transmutation.

Equitable distribution can be granted only in actions for divorce, not in so-called “palimony” cases.¹¹⁷ However, relief of a hybrid nature was granted to unmarried cohabitants in two cases, *Kozlowski v. Kozlowski*¹¹⁸ and *Crowe v. De Gioia*,¹¹⁹ where very lengthy periods of up to 20 years of cohabitation were involved, and was denied in a third, *Zaragoza v. Capriola*,¹²⁰ where cohabitation was for little over a year.

An express or implied contract by adult nonmarital partners, which is not founded on sexual services, whereby one promises to support the other for life was held to be enforceable in the leading case of *Kozlowski v. Kozlowski*.¹²¹ The court cited with approval the celebrated case of *Marvin v. Marvin*.¹²² The court cautioned, however, that its decision had not judicially revived common law marriage, which has been banned in New Jersey since 1939 by N.J.S.A. 37:1-10. Rather, the decision recognized that society’s *mores* have changed and that an agreement between adult parties living together is enforceable to the extent that it is not based on a relationship proscribed by law, or a promise to marry.¹²³

The plaintiff’s one-time lump sum award in *Kozlowski* was based upon the present value of the reasonable future support defendant promised to provide, computed by reference to her life expectancy.

During the course of litigation in the other major “palimony” case, *Crowe v. De Gioia*,¹²⁴ which involved a 20-year relationship, the court denied the plaintiff temporary alimony but granted her *pendente lite* relief by requiring defendant to provide her with temporary support and continued occupancy of the house. In *Crowe v. De Gioia*, the court noted that, according to the 1980 U.S. Bureau of Census report, the number of households composed of unmarried couples living together had risen from approximately 12,000 in 1960 to more than 1.5 million in 1980.¹²⁵

¹¹⁵120 N.J. 336, 576 A.2d 872 (1990).

¹¹⁶*D’Atria v. D’Atria*, 242 N.J. Super. 392, 409, 576 A.2d 957 (Ch. Div. 1990).

¹¹⁷*Kozlowski v. Kozlowski*, 80 N.J. 378, 383, 403 A.2d 902 (1979); *Zaragoza v. Capriola*, 201 N.J. Super. 55, 63, 492 A.2d 698 (Ch. Div. 1985).

¹¹⁸80 N.J. 378, 403 A.2d 902 (1979).

¹¹⁹90 N.J. 126, 447 A.2d 173 (1982).

¹²⁰201 N.J. Super. 55, 492 A.2d 698 (Ch. Div. 1985).

¹²¹80 N.J. 378, 403 A.2d 902 (1979).

¹²²18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

¹²³*Kozlowski*, 80 N.J. at 387.

¹²⁴90 N.J. 126, 447 A.2d 173 (1982).

¹²⁵*Id.*, 90 N.J. at 135.

§ 9-11. Appreciation in Value of Separate Property.

Any property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will be considered an immune asset and not eligible for distribution.¹²⁶ However, the appreciation in value during the marriage of a pre-owned asset may be subject to equitable distribution. First, however, it must be determined whether this asset is active or passive.¹²⁷

Passive and Active Immune Assets

Passive immune assets are assets that fluctuate in value based exclusively on market conditions. Active immune assets are assets that directly increase in value as a result of contributions and efforts by one or both spouses towards the assets growth and development.¹²⁸ When the increase in value of an active immune asset is brought about solely through the efforts of the owner, that value is undistributable. However, when such increase in value is derived, in whole or in part, from the expenditures or efforts of the non-owner, it is subject to distribution. Where the non-owner spouse contributes to the increases in value, the valuation date of the included increment accrues at the time of distribution. In *Valentino v. Valentino*,¹²⁹ the wife was awarded 10% of the appreciation in value of the husband's premarital gas station for her contribution to the eight-year marriage as a homemaker and mother of two children.

The burden of proving that the other spouse made no contribution to the appreciation in value of a pre-owned asset rests upon the spouse asserting that claim.¹³⁰

Appreciation in Value of Premarital Real Estate

Where a house owned by one spouse prior to marriage has appreciated in value during the marriage, the non-owner is not entitled to share in the passive appreciation in value, but only in that portion of increase in value to which he or she, or both jointly, contributed. The court must make findings of fact regarding this issue.¹³¹

Appreciation in Value of Premarital Business

In *Scherzer v. Scherzer*,¹³² the court held that the appreciation in value during marriage of stock in a closely held corporation acquired prior to marriage was subject to equitable distribution when the appreciation was related to the husband's personal efforts. The wife's contribution may be her services as a homemaker. The court in *Scherzer*, a case involving an acrimonious divorce, added the memorable statement that "even a sparring partner can be said to contribute in some measure to the success of an

¹²⁶Painter v. Painter, 65 N.J. 196, 214, 320 A.2d 484 (1974).

¹²⁷Valentino v. Valentino, 309 N.J. Super. 334, 707 A.2d 168 (App. Div. 1998).

¹²⁸Scavone v. Scavone, 230 N.J. Super. 482, 486-87, 553 A.2d 885 (Ch. Div. 1988), *aff'd*, 243 N.J. Super. 134, 578 A.2d 1230 (App. Div. 1990).

¹²⁹309 N.J. Super. 334, 707 A.2d 168 (App. Div. 1998).

¹³⁰Pascale v. Pascale, 140 N.J. 583, 609, 660 A.2d 485 (1995); Valentino v. Valentino, 309 N.J. Super. 334, 707 A.2d 168 (App. Div. 1998).

¹³¹Mol v. Mol, 147 N.J. Super. 5, 9, 370 A.2d 509 (App. Div. 1977).

¹³²136 N.J. Super. 397, 346 A.2d 434 (App. Div. 1975), *certif. denied*, 69 N.J. 391, 354 A.2d 319 (1976).

adversary.” The enhancement in value of a spouse’s premarital assets occurring after the marriage is subject to equitable distribution to the extent that the increase is attributable to the efforts of the other spouse.¹³³

The *Scherzer* decision and others that have followed it make it necessary for the parties to determine the value of the separately owned business at the time of the marriage and then at the valuation date, usually the time the divorce complaint is filed, to determine whether there has been an appreciation in value.

§ 9-12. Gifts, Inheritances and Loans.

All property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of a gift from a third party, devise or intestate succession, is not subject to equitable distribution. However, interspousal gifts are subject to equitable distribution.¹³⁴

There are four elements to a gift:

- A transfer of property without consideration,
- Donative intent,
- Actual or symbolic delivery of the gift, and
- An absolute relinquishment of ownership by the donor.¹³⁵

The burden of proving a gift rests upon the party alleging that status for the property. *Painter v. Painter*¹³⁶ holds that the burden of proof to establish the immunity of an asset from distribution rests with the spouse asserting the immunity.

Interspousal Gifts

The equitable distribution statute subjects interspousal gifts to equitable distribution.¹³⁷ Many disputes have arisen over whether a gift was to one or both spouses or whether a gift to one spouse lost its separate and immune character by virtue of being commingled with marital property, for example by deposit in a joint savings bank account.¹³⁸

A typical interspousal gift is the conveyance after marriage of a home owned by one spouse prior to the marriage to both spouses as tenants by the entireties during the marriage. Such a gift converts what would otherwise have been separate premarital property into marital property subject to equitable distribution.¹³⁹

¹³³*Orgler v. Orgler*, 237 N.J. Super. 342, 351, 568 A.2d 67 (App. Div. 1989).

¹³⁴N.J.S.A. 2A:34-23.

¹³⁵See *Dotsko v. Dotsko*, 244 N.J. Super. 668, 583 A.2d 395 (App. Div. 1990); *Sleeper v. Sleeper*, 184 N.J. Super. 544, 548, 446 A.2d 1220 (App. Div. 1982); *Canova v. Canova*, 146 N.J. Super. 58, 368 A.2d 971 (Ch. Div. 1976); *In re Dodge*, 50 N.J. 192, 216, 234 A.2d 65 (1967).

¹³⁶65 N.J. 196, 214, 320 A.2d 484 (1974).

¹³⁷N.J.S.A. 2A:34-23.

¹³⁸See *Dotsko v. Dotsko*, 224 N.J. Super. 668, 583 A.2d 395 (App. Div. 1990). See 9-14, *Commingling Separate and Marital Property*.

¹³⁹See *Perkins v. Perkins*, 159 N.J. Super. 243, 387 A.2d 1211 (App. Div. 1978).

Third Party Gifts

Gifts from third parties to one spouse are not subject to equitable distribution. For example, in *Capozzoli v. Capozzoli*,¹⁴⁰ the court rejected the claim of the husband that he was entitled to any share of a two-family house that the wife's mother purchased as a gift for the wife during the marriage, for which the wife paid all upkeep expenses and taxes. A gift by a third party to both spouses, typically the downpayment on their house, is subject to equitable distribution. The fact that the gift was made by the parents of one spouse is a factor that the court may take into consideration in equitable distribution, but the asset is nevertheless subject to distribution.

Loans Distinguished from Gifts

Disputes frequently arise in divorce cases as to whether monies or other property provided by the parents of one spouse were a gift or a loan. The maxim that gifts given in good times cannot be taken back in bad times often applies. Unfortunately, on many occasions there is no writing to corroborate the fact that the parties and the generous parents viewed the money as a loan, say of a downpayment on a house, at the time of presentation. Then, when the marriage breaks down, the other spouse claims that it was a gift. If one or both spouses' parents are making a loan, even a non-interest bearing loan, it should be documented so that there can be no dispute in the future. If the monies advanced were a loan to both spouses, that is a marital debt that should be repaid. The best evidence that it was a loan would be a promissory note, signed by both parties. But other evidence may suffice, such as canceled checks by the spouses to the parents over a period of time indicating repayment of a loan.

A mother who was not permitted to intervene in the divorce action of her son and former daughter-in-law was successful in suing to impress an equitable lien on real estate, claiming that she had made a loan to them.¹⁴¹

Where a wife loaned her husband money under a written agreement, and the divorce judgment reserved decision on the issue, she was entitled to bring a subsequent suit and to collect the debt in full, plus interest.¹⁴²

§ 9-13. Property Acquired in Exchange for Separate Property.

Where a party owns separate property acquired prior to the marriage or during the marriage by third-party gift or inheritance, such property keeps its separate identity even if sold or exchanged for other property during the marriage. For example, if a party owned 100 shares of IBM stock prior to the marriage and during the marriage sold them and purchased the equivalent value in gold coins, the gold coins, though acquired during the marriage, would be separate property exempt from equitable distribution. Since it is presumed that property owned by the parties on the date the divorce complaint is filed is marital property, the party asserting that the property is separate property has the burden of proving it. Records should be kept or obtained to meet this burden.

¹⁴⁰121 N.J. Super. 285, 296 A.2d 661 (App. Div. 1972).

¹⁴¹Biddle v. Biddle, 166 N.J. Super. 1, 398 A.2d 1297 (App. Div. 1979).

¹⁴²Zuhlcke v. Zuhlcke, 136 N.J. Super. 266, 345 A.2d 806 (Ch. Div. 1975).

§ 9-14. Commingling Separate and Marital Property.

Generally speaking, where separate property, such as premarital property or property acquired by gift or inheritance, is commingled with marital property, the former loses its separate character and is not exempt from equitable distribution. Where the husband turned over to the wife the proceeds from his automobile personal injury suit, which she put into an account in her name along with her own recovery for loss of consortium, and then the parties invested that money in a residential dwelling in joint names, these separate funds were commingled and became a joint marital asset.¹⁴³ Whether commingling has occurred is a question of the intent of the parties.

There are exceptions to the commingling rule. Where a wife acquired \$20,000 from savings, gifts and inheritances prior to marriage and commingled these monies with marital funds during the parties' 10-year marriage, but the husband acknowledged their separate nature and provided in his will for payment of that sum to her brother if they died in a common disaster, the appellate court held that, although the funds were commingled during the marriage, there was a clearly manifested intent that they belong to the wife and should therefore be excluded as her separate property.¹⁴⁴

Similarly, in *Shayega v. Baldwin*,¹⁴⁵ a case involving Iranian immigrants, where the wife turned over her money to her husband to control, the court found that it was held in trust for her benefit and was not a gift.

Change in Character of Property from Separate to Marital

The value differential between the insider purchase price and the market value of an apartment about to be converted into a cooperative was an asset subject to equitable distribution.¹⁴⁶

§ 9-15. Other Assets Subject to Equitable Distribution.

The types of property that may be subject to equitable distribution on divorce are nearly limitless. First, businesses and professional practices may be subject to equitable distribution, regardless of whether they are in the form of individual proprietorship, corporation or partnership. In addition to the marital home, pensions and other retirement benefits, such as 401(K) plans, are often subject to equitable distribution. The cash surrender value of life insurance is considered an asset subject to equitable distribution. Other assets subject to equitable distribution include automobiles, airplanes, boats, stock, and stock options.

Lottery Winnings

State lottery winnings payable to one spouse as a result of the purchase of a lottery ticket during the marriage and prior to the filing of a divorce complaint are a marital asset subject to equitable distribution. The division of the lottery proceeds shall be

¹⁴³Ryan v. Ryan, 283 N.J. Super. 21, 660 A.2d 1269 (Ch. Div. 1993).

¹⁴⁴Wadlow v. Wadlow, 200 N.J. Super. 372, 491 A.2d 757 (App. Div. 1985).

¹⁴⁵237 N.J. Super. 47, 566 A.2d 1164 (App. Div. 1989).

¹⁴⁶Millstein v. Millstein, 209 N.J. Super. 582, 508 A.2d 1142 (Ch. Div. 1985).

in accordance with all of the equitable distribution factors set forth in N.J.S.A. 2A:34-23.1.¹⁴⁷

Life Insurance

The cash surrender value of life insurance acquired by one or both of the parties during the marriage is an asset subject to equitable distribution.

Stock Options

Stock options are assets subject to equitable distribution provided that they were awarded prior to the filing of the divorce complaint or as deferred compensation for past services. They should not be treated as ordinary income.¹⁴⁸ In the leading case of *Pascale v. Pascale*,¹⁴⁹ the court accepted the parties' agreement that stock options granted prior to the filing of the divorce complaint were assets subject to equitable distribution. As for stock options granted after the filing of the divorce complaint, the court found that the focus must be on whether the options were awarded as a result of joint efforts put forth during the marriage. If they were, they should be treated as assets subject to equitable distribution. If they were not, they were the property of the person to whom they were awarded.

Bonuses

Whether a bonus should be treated as an asset subject to equitable distribution on divorce or as additional income available for alimony and child support remains to be seen. A salary has different characteristics from a bonus. In *Chapel v. Board of Trustees*,¹⁵⁰ the court noted that a salary has been defined as monies received by a person on a fixed and continuous basis, normally paid in regular periodic intervals in specific regular amounts. The court in *Chapel* contrasted the foregoing definition of a salary with the quite different definition of a bonus. A bonus is defined as something given or paid in addition to the usual or expected.¹⁵¹ A bonus has also been defined as an extra dividend paid from profits. The term bonus usually applies to money in excess of what is normally received or strictly due, being given in consideration of superior achievement or as a share of profits.¹⁵²

The nature of a bonus in a divorce context was examined by the New York Court of Appeals in *Hartog v. Hartog*,¹⁵³ where the court held that the husband's bonus, earned during the course of the marriage but paid after the commencement of marital dissolution proceedings, was marital property subject to equitable distribution. Similarly, in *Reiss v. Reiss*,¹⁵⁴ the court held that the former husband's "signing bonus" in excess of

¹⁴⁷DeVane v. DeVane, 260 N.J. Super. 501, 616 A.2d 1350 (Ch. Div. 1992).

¹⁴⁸Callahan v. Callahan, 142 N.J. Super. 325, 328, 361 A.2d 561 (Ch. Div. 1976); Orgler v. Orgler, 237 N.J. Super. 342, 353, 568 A.2d 67 (App. Div. 1989).

¹⁴⁹140 N.J. 583, 607-11, 660 A.2d 485 (1995).

¹⁵⁰258 N.J. Super. 389, 393, 609 A.2d 1294 (App. Div. 1992).

¹⁵¹*Id.*

¹⁵²In re Estate of Gregoriou, 142 N.J. Super. 465, 468, 361 A.2d 6 (Co. Ct. 1976), *rev'd on other grounds*, 153 N.J. Super. 44, 378 A.2d 1168 (App. Div. 1977).

¹⁵³85 N.Y.2d 36, 647 N.E.2d 749 (1995).

¹⁵⁴654 So. 2d 268 (Fla. App. 1st Dist. 1995).

\$122,000 given to him by Prudential for leaving Shearson was an asset subject to equitable distribution.

Patents, Trademarks, Copyrights and Other Intangibles

In *Dugan v. Dugan*,¹⁵⁵ the court noted that some intangibles, such as a trademark, trade name or patent, are related to an identifiable tangible asset. It stated that intangibles, as distinguished from tangible assets, have no intrinsic value, but do have a value related to the ownership and possession of tangible assets.

§ 9-16. Personal Injury and Workers' Compensation Awards.

The portion of a personal injury settlement intended to compensate for lost earnings and the medical expenses of the injured spouse is subject to equitable distribution, but the portion of the settlement intended to compensate the injured spouse for personal pain, suffering, and mental and physical disabilities is not subject to equitable distribution. Nor is the *per quod* claim, intended to compensate the non-injured spouse for loss of consortium or services, subject to equitable distribution.¹⁵⁶

The portion of a workers' compensation award attributable to income lost from personal injury and reimbursement of medical expenses is subject to equitable distribution, but the portion which compensates a worker for permanent disability that reduces his future earning capacity is not.¹⁵⁷

Disability Pension

In *Avallone v. Avallone*,¹⁵⁸ the court stated that the portion of a disability pension that represents a retirement component is subject to equitable distribution and the portion that represents compensation for the recipient's personal disability and personal economic loss is not. The *Avallone* court followed the approach taken to personal injury awards in *Landwehr v. Landwehr*.¹⁵⁹

§ 9-17. Illicitly Obtained Funds.

In *Sheridan v. Sheridan*,¹⁶⁰ the court found that marital property acquired with funds illicitly obtained and not reported for federal and state taxing purposes is not subject to equitable distribution. The parties were found to have acquired \$250,000 illegally, which the court impounded. It reported their intentional underreporting of income to the appropriate tax authorities.

¹⁵⁵92 N.J. 423, 428-29, 457 A.2d 1 (1983).

¹⁵⁶Landwehr v. Landwehr, 111 N.J. 491, 545 A.2d 738 (1988).

¹⁵⁷Lentini v. Lentini, 236 N.J. Super. 233, 565 A.2d 701 (App. Div. 1989).

¹⁵⁸Avallone v. Avallone, 275 N.J. Super. 575, 583-84, 646 A.2d 1121 (App. Div. 1994).

¹⁵⁹111 N.J. 491, 545 A.2d 738 (1988).

¹⁶⁰247 N.J. Super. 552, 589 A.2d 1067 (Ch. Div. 1990).

§ 9-18. Licenses, Degrees and Enhanced Earnings.

*Mahoney v. Mahoney*¹⁶¹ addresses the question whether professional licenses and degrees are property subject to equitable distribution. The court in *Mahoney* found that a professional license or degree is a personal achievement of the holder; it cannot be sold and has no value for purposes of equitable distribution.

On the same day that *Mahoney* was decided, the court also decided *Hill v. Hill*¹⁶² and *Lynn v. Lynn*.¹⁶³ The three cases, known as the *Mahoney-Hill-Lynn* trilogy, together set forth the New Jersey position on licenses and degrees *vis-à-vis* equitable distribution. The facts in these cases were similar, though not identical. All involved marriages of short duration in which no significant property subject to equitable distribution existed at the time the divorce complaint was filed. In each case the wife contributed significantly to the other spouse obtaining a professional license or degree by working to support the couple and foregoing or deferring such professional advancement herself.

New York has taken a contrary view to *Mahoney* in *O'Brien v. O'Brien*,¹⁶⁴ holding that a professional license or degree is marital property and that it can be valued based on “earning capacity.” This concept was rejected in New Jersey as involving speculation. Thus, it can make a significant difference whether a holder of a professional license or degree seeks a divorce in the Garden State or the Empire State.

Reimbursement Alimony

In *Mahoney* the court introduced the new concept of reimbursement alimony, which is awarded to reimburse a spouse who has contributed to the other spouse’s obtaining a degree and who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future as a result of the divorce.¹⁶⁵ This remedy is in the nature of restitution and has nothing whatsoever to do with permanent or rehabilitative alimony, except for its name.

The court added that such reimbursement alimony should cover all financial contributions towards the former spouse’s education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree.¹⁶⁶ While in the *Mahoney-Hill-Lynn* trilogy the court rejected the concept that professional degrees and licenses were property subject to equitable distribution, it provided very limited guidance to trial courts regarding what would be a proper reimbursement alimony award.

¹⁶¹91 N.J. 488, 453 A.2d 527 (1982).

¹⁶²91 N.J. 506, 453 A.2d 537 (1982).

¹⁶³91 N.J. 510, 453 A.2d 539 (1982).

¹⁶⁴66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S. 2d 743 (Ct. App. 1985).

¹⁶⁵*Mahoney*, *supra*, 91 N.J. at 501-04.

¹⁶⁶*Id.* at 501.

Reimbursement Alimony Criteria

The criteria for awarding reimbursement alimony, which was developed in *Reiss v. Reiss*,¹⁶⁷ is as follows:

- The working spouse is entitled to reimbursement of expenses paid by her or him to obtain a professional degree for the other.
- Reimbursement alimony is not really alimony, it is a form of restitution.
- An award of reimbursement alimony does not terminate upon the remarriage of the spouse receiving it.
- The precise expenses for which reimbursement or restitution should be allowed encompass all financial contributions toward the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license, as mandated by *Mahoney*.¹⁶⁸
- The phrase beginning "and any other contributions," above, includes such monetary expenses as medical expenses, clothing expenses, entertainment and leisure expenses, costs of toiletry and personal expenses, and the like.

The facts in *Reiss* were typical of those involved in the *Mahoney-Hill-Lynn* trilogy of cases. The wife postponed her graduate education and went with the husband to Spain, where he pursued his medical studies. After she had financed his medical school education, he abandoned her on the day he finished his residency back in the United States. The only valuable asset accumulated during the marriage through the joint efforts of the parties was the husband's increased earning capacity.

The court awarded Mrs. Reiss \$46,000 by way of reimbursement alimony, to be paid at the monthly rate of \$1,500. It found that 50% of her net earnings spent in Spain were for her husband's benefit and that she paid \$6,000 of his expenses during the three years of his residency in the United States.

Celebrity Status

The celebrity status of an entertainer and comedian was held to have a value for purposes of equitable distribution on divorce in *Piscopo v. Piscopo*.¹⁶⁹ The Appellate Division accepted the court-appointed accountant's analysis that the husband had an incorporated business that could be valued based upon ordinary business appraisal principles and upon the goodwill value of the personal celebrity of the entertainer. The court cited a New York decision, *Golub v. Golub*,¹⁷⁰ where the New York court recognized the earning potential of the wife, a model and actress, as an asset subject to equitable distribution. The Appellate Division quoted at length from the New York case,

¹⁶⁷ 195 N.J. Super. 150, 478 A.2d 441 (Ch. Div. 1984), *same case*, 200 N.J. Super. 122, 490 A.2d 378 (Ch. Div. 1984), *aff'd in part & remanded*, 205 N.J. Super. 41, 500 A.2d 24 (App. Div. 1985).

¹⁶⁸ *Mahoney*, 91 N.J. at 501.

¹⁶⁹ 232 N.J. Super. 559, 557 A.2d 1040 (App. Div. 1989), *aff'g* 231 N.J. Super. 576 (Ch. Div. 1988).

¹⁷⁰ 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct. 1988).

but in a footnote pointed out that the New York law under which licenses and degrees are considered to be property subject to equitable distribution is contrary to the New Jersey law.¹⁷¹ In fact, the *Piscopo* decision follows the New York Court of Appeals decision in *O'Brien* and is clearly contrary to the New Jersey Supreme Court decision in *Mahoney*.

§ 9-19. Valuation of Assets.

Dates for Valuation

Generally, the equitable distribution valuation date is the date the divorce complaint is filed or the date of trial, but other dates may be selected, depending upon the type of asset and the view of the court. The equitable distribution statute does not specify a valuation date, so this issue is left to the discretion of the trial court, but the use of a consistent date is preferable.¹⁷² *Borodinsky v. Borodinsky*¹⁷³ and *Smith v. Smith*¹⁷⁴ stand for the proposition that the date the divorce complaint is filed is also the date for valuation. Similarly, in *DiPietro v. DiPietro*,¹⁷⁵ a pension case, the court stated that it followed the general rule that the valuation date is the date the complaint for divorce was filed.

However, in *Bednar v. Bednar*,¹⁷⁶ the court was faced with the necessity of selecting a valuation date for the husband's business and a jointly owned motel that had appreciated substantially until its sale eight years after the divorce complaint was filed. The court held that principles of equity required a common evaluation date, which might be the date the complaint was filed or the time of trial, depending on the nature of the asset and any compelling equitable considerations.

Where valuation was of the husband's one-half seat on the New York Stock Exchange, a passive asset with a value of \$200,000 on the date of filing and \$350,000 at the time of trial, the court chose the time of trial as the valuation date.¹⁷⁷

Where a husband owned an automobile dealership with a value of \$294,000 on the date the divorce complaint was filed and which was worth nothing at the time of trial three years later, the court chose the trial date, rather than the filing date, as the valuation date, which it justified on grounds of "special circumstances" and avoidance of unfairness. The Appellate Division affirmed the choice of the valuation date.¹⁷⁸

Valuation of Property by Owner

The owner of property has a right to express an opinion as to its value. Where a husband's new and used car automobile dealership was a marital asset, the trial court

¹⁷¹ See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (Ct. App. 1985).

¹⁷² *Bednar v. Bednar*, 193 N.J. Super. 330, 332, 474 A.2d 17 (App. Div. 1984).

¹⁷³ 162 N.J. Super. 437, 447, 393 A.2d 583 (App. Div. 1978).

¹⁷⁴ 72 N.J. 350, 361-62, 371 A.2d 1 (1977).

¹⁷⁵ 193 N.J. Super. 533, 538, 475 A.2d 82 (App. Div. 1984).

¹⁷⁶ 193 N.J. Super. 330, 332, 474 A.2d 17 (App. Div. 1984).

¹⁷⁷ *Scavone v. Scavone*, 230 N.J. Super. 482, 492-93, 553 A.2d 885 (Ch. Div. 1988), *aff'd*, 243 N.J. Super. 134, 578 A.2d 1230 (App. Div. 1990).

¹⁷⁸ *Goldman v. Goldman*, 248 N.J. Super. 10, 589 A.2d 1358 (Ch. Div. 1991), *aff'd in part & remanded in part*, 275 N.J. Super. 452, 646 A.2d 504 (App. Div. 1994).

accepted as correct the value of \$172,000 given by him, which was based on the corporate balance sheet attached to his 1974 federal income tax return.¹⁷⁹

Valuation of Property by Experts

In cases where an issue arises regarding the value of a closely held corporation or professional practice, it is often helpful to have the assistance of expert opinion. Economic experts can be court appointed, selected by mutual agreement, or privately retained.¹⁸⁰ One appealing way to “solve” the valuation problem, particularly with regard to closely held corporations and professional practices, is by consenting to a valuation expert or by having the court appoint the valuation expert for these assets. There are various pros and cons to this procedure. For instance, although the expert will not be the “hired gun” of one side, he may fail to do a good job in a particular case but his report will tend to be accepted solely because of his status as the court-appointed expert.

A leading case recommends that, in the event of a dispute between private experts, the court appoint an independent expert to assist it.¹⁸¹ Such a practice has much to commend it, but is not without its dangers. Some assets, such as a marital home and commercial real estate, are relatively easy to value, while other assets, such as closely held corporations and professional practices, are more difficult. There is little uniformity in such appraisals and even in methodology by recognized experts. Experts qualified to perform these valuations are few and far between, and such appraisals tend to be costly.

Rule 5:5-3(b), entitled “Economic Experts,” provides that economic experts may be selected by mutual agreement of the parties or independently by the court. The court must establish the scope of the expert’s assignment in the order appointing him or her. The rule further provides that neither party shall be bound by the report of the expert so appointed.¹⁸²

The court-appointed expert shall be permitted to conduct an investigation independently to obtain information reasonable and necessary to complete his or her report from any source, and may make contact directly with any party from whom information is sought within the scope of the order of appointment. The parties are entitled to have their attorney or expert present during any examination by a court-appointed expert.

Importantly, the rule bars the court-appointed expert from communicating

Any finding or report by a court-appointed expert shall be submitted upon completion to both the court and the parties. After the court-appointed expert submits his or her report, the parties shall be permitted a reasonable opportunity to conduct discovery in regard to it. This includes, but is not limited to, the right to take the deposition of the expert.¹⁸⁴

The rule provides that the court shall not entertain any presumption in favor of the court-appointed expert's findings. A court-appointed expert's report may be entered into evidence on the court's own motion or that of any party, in a manner consistent with the rules of evidence and is subject to cross-examination by the parties.¹⁸⁵

Nothing in the rule permitting court appointment of experts is intended to preclude the parties from retaining their own private experts, either before or after the appointment of an expert by the court, on the same or similar issues.¹⁸⁶

Liability of Experts for Malpractice

A court-appointed economic expert hired to render a binding valuation of a business for purposes of equitable distribution can be held liable for negligence if he deviates from accepted accounting standards.¹⁸⁷ In *Ziegelheim v. Apollo*,¹⁸⁸ the court stated that a person who undertakes to render services in the practice of a profession is required to exercise the skill and knowledge normally possessed by members of that profession in similar communities. It added that deviation from accepted standards of professional care will result in liability for negligence. Professionals subject to the rule include accountants,¹⁸⁹ lawyers,¹⁹⁰ doctors,¹⁹¹ dentists,¹⁹² and insurance brokers.¹⁹³

Stipulations as to Value

Litigants should generally be held to their stipulations and to the consequences thereof. *Negrotti v. Negrotti*¹⁹⁴ held that, in the rare instances in which the circumstances justify the court's rejection of the parties' stipulation, the party losing the benefit of the stipulation must still receive his day in court with respect to the stipulated issue. This requires that the litigant who is being prejudiced by the court's non-adherence to the stipulation be given the same opportunity to present his proofs as he would have received had the stipulation not been entered upon the record.

In the *Negrotti* case, both parties had stipulated in open court that a business asset had a value of \$49,000. Because of this stipulation, the husband did not offer proof as to its value. The trial court rendered a judgment finding that this particular asset was worth \$11,000, disregarding the parties' stipulation, and the Appellate Division affirmed.

¹⁸⁴R. 5:5-3(e).

¹⁸⁵R. 5:5-3(f).

¹⁸⁶R. 5:5-3(g).

¹⁸⁷*Levine v. Wiss & Co.*, 97 N.J. 242, 478 A.2d 397 (1984).

¹⁸⁸128 N.J. 250, 607 A.2d 1298 (1992).

¹⁸⁹*E.g.*, *Levine v. Wiss & Co.*, 97 N.J. 242, 478 A.2d 397 (1984).

¹⁹⁰*Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298 (1992).

¹⁹¹*E.g.*, *Betenbaugh v. Princeton Hosp.*, 50 N.J. 390, 235 A.2d 889 (1967).

¹⁹²*E.g.*, *Sanzari v. Rosenfeld*, 34 N.J. 128, 167 A.2d 625 (1961).

¹⁹³*E.g.*, *Milliken v. Woodward*, 64 N.J.L. 444, 45 A. 796 (Sup.Ct. 1900).

¹⁹⁴98 N.J. 428, 487 A.2d 328 (1985).

The Supreme Court reversed and remanded for a plenary hearing limited to the value of the particular asset.¹⁹⁵

§ 9-20. Valuation of Closely Held Businesses and Professional Practices.

The valuation principles involved in valuing an interest in an individual business and one held in a corporate partnership name are the same. The Supreme Court said that the form should not control.¹⁹⁶ The Supreme Court also stated that there is no single formula that will apply to each enterprise. Rather, each case presents a unique factual question, the solution to which is not within the ambit of any exact science. The reasonableness of any valuation depends upon the judgment and experience of the appraiser and the completeness of the information upon which his conclusions are based.¹⁹⁷

Goodwill Defined

When future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value. The goodwill associated with a business is an asset distributable upon the dissolution of a marriage. An attorney's goodwill in his exclusively-owned professional corporation was property subject to equitable distribution, despite the fact that ethical considerations at the time prevented the lawyer from selling his practice.¹⁹⁸ A professional entertainer's goodwill attributable to his celebrity status is an asset subject to equitable distribution.¹⁹⁹

Business Goodwill

Business goodwill has been defined as the total of all the special advantages, not otherwise identifiable, related to a going concern, including a good name, capable staff and personnel, high credit standing, reputation for superior products and services, and favorable location.²⁰⁰

Professional Goodwill

Over the past two decades New Jersey courts have considered the difficult question of valuation of professional goodwill in a number of nationally important decisions.

The approach taken to valuation of a husband's partnership interest in a major law firm for purposes of equitable distribution was to determine the amount his estate would receive upon his death under the partnership agreement plus the sum appearing

¹⁹⁵ *Id.* See also *Matter of Robinovitz*, 102 N.J. 57, 505 A.2d 595 (1986), a disciplinary hearing, in which the court cited *Negrotti* with approval for the proposition that as a general rule, the parties are held to their stipulations and the consequences thereof.

¹⁹⁶ *Dugan v. Dugan*, 92 N.J. 423, 431-32, 457 A.2d 1 (1983).

¹⁹⁷ *Bowen v. Bowen*, 96 N.J. 36, 473 A.2d 73 (1984).

¹⁹⁸ *Dugan v. Dugan*, 92 N.J. 423, 432-33, 457 A.2d 1 (1983).

¹⁹⁹ *Piscopo v. Piscopo*, 232 N.J. Super. 559, 565, 557 A.2d 1040 (App. Div.), *certif. denied*, 117 N.J. 156, 564 A.2d 875 (1989).

²⁰⁰ *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983).

after the partner's name on a schedule appended to the partnership agreement, which schedule was revised quarterly. This would result in the presumptive value, subject to challenge by either side.²⁰¹

In a trial level case involving valuation of a solo law practice, the court stated that whether there was goodwill would depend on the measurement of excess earnings. Excess earnings are derived by deducting from properly determined average earnings (e.g., earnings over a five-year period) whatever amounts are appropriate to compensate for a proper return on capital or the reasonable value of personal services or both, to the extent that either enters into production of income of the enterprise. What is being measured is in reality the capacity for repeat patronage and of a certain immunity from competition to produce earnings beyond the average for that kind of business. In this particular case the court found there were no excess earnings, because the average earnings of this attorney with 20 years' experience was less than he would have earned if he had been employed by a large law firm or corporation doing the same type of work.²⁰²

An attorney's goodwill in his solely owned professional corporation is subject to equitable distribution. Moreover, goodwill may be present regardless of the form of an enterprise. Goodwill exists in personal service enterprises as well as other businesses. The Supreme Court stated that it approved of the valuation approach in *Levy v. Levy, supra*, in which the goodwill of a law practice was determined by comparing the amount by which the attorney's earnings exceed that which would have been earned by a person with similar qualifications of education, experience and capability. The excess earnings, if any, would be subject to a capitalization factor. The court added that other valuation approaches might also be used.²⁰³

Where a law practice or other professional practice was begun prior to the marriage, only the appreciation in value, if any, from the date of the marriage to the date of filing of the divorce complaint is subject to equitable distribution.

“Captive Insurance Agency”

A “captive insurance agency” is one controlled by the insurance company. As a result, no goodwill for purposes of equitable distribution can be ascribed to the manager of the agency. The goodwill associated with a “captive insurance agency” is an asset of the insurance company, not of the agency manager, who was an employee of the insurance company and not an independent entrepreneur.²⁰⁴

Revenue Ruling 59-60

IRS Revenue Ruling 59-60²⁰⁵ sets forth one of the proper approaches to use in valuation of closely held corporate stocks for purposes of equitable distribution, as well

²⁰¹ *Stern v. Stern*, 66 N.J. 340, 346-47, 331 A.2d 257 (1975).

²⁰² *Levy v. Levy*, 164 N.J. Super. 542, 397 A.2d 374 (Ch. Div. 1978).

²⁰³ *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983).

²⁰⁴ *Seiler v. Seiler*, 308 N.J. Super. 474, 477, 706 A.2d 249 (App. Div. 1998).

²⁰⁵ C.B. 1959-1, 237.

as for estate and gift tax purposes.²⁰⁶ The fundamental valuation factors set forth in Revenue Ruling 59-60, which require analysis in each case, are:

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Revenue Ruling 68-609

The Internal Revenue Service has prescribed a formula approach for federal tax purposes when there is no better basis for valuation. This approach is set forth in Revenue Ruling 68-609.²¹⁰ It calls for a determination of income from the tangible assets and subtraction of that income from the total income. The residual is capitalized and the balance is designated goodwill.²¹¹

Approaches to Valuation

In *Bowen v. Bowen*,²¹² a case involving valuation of a minority interest in a closely held corporation, the court stated the following principles:

- Courts must arrive at a value for closely held corporate stock to effect equitable distribution of the asset to one spouse;
- A comprehensive buy-sell agreement will provide presumptive evidence of such value;
- Opinions of value not based upon evidence in the record or of proven acceptance in the field should be given little weight;
- Courts should employ independent experts under Rule 5:3-3 when necessary to resolve specific disagreements between the parties' experts.

Book Value

Book value is the net equity on the books of a corporation. Where the owner of a 50% stock interest in a business claimed that its book value of \$35,000 as of the divorce filing date was the value, but sold his stock six months later for \$55,000 with a four-year payout, the court stated that it hardly required analysis to conclude that the actual sales figure provided a more realistic valuation than mere book value. It agreed that the value should be reduced because of the installment payout figure and came to a present value of \$48,000.²¹³

Capitalization of Earnings

The capitalization factor is generally viewed as the number of years of excess earnings a purchaser would be willing to pay for in advance in order to acquire the goodwill of an enterprise.²¹⁴

Buy-Sell Agreements

Where a stockholders' agreement valuing the owners' shares in the corporation is not carefully kept and updated, it should not be used to value an individual's share.

²¹⁰1968-2 C.B. 327.

²¹¹See *Dugan v. Dugan*, 92 N.J. 423, 436, 457 A.2d 1 (1983).

²¹²96 N.J. 36, 53, 473 A.2d 73 (1984).

²¹³*Esposito v. Esposito*, 158 N.J. Super. 285, 297, 385 A.2d 1266 (App. Div. 1978).

²¹⁴*Dugan v. Dugan*, 92 N.J. 423, 440, 457 A.2d 1 (1983).

While in *Stern v. Stern*²¹⁵ a partners' agreement was maintained so that it could be used to determine a partner's interest in a law practice, the corporate buy-sell agreement in *Bowen v. Bowen*²¹⁶ was not well kept and could not be used for that purpose. The buy-sell agreement in *Bowen* provided that each partner's share would be determined on the basis of book value, specifically excluded goodwill, and was not periodically updated. For these reasons another approach had to be taken.

Discount for Minority Interest

It is a recognized practice in valuing businesses in which the party has a minority interest to discount that interest, since the party lacks control.

§ 9-21. Methods of Distribution.

In-Kind Distribution

It is often simply preferable to make an in-kind distribution of some marital property, such as shares of stock, rather than reducing it to cash. In *Marsh v. Vetter*,²¹⁷ 424 shares of bank stock were subject to equitable distribution. The trial judge ordered the husband to pay the wife cash for her 50% share but the Appellate Division reversed, holding that she should receive an in-kind distribution. It stated that in the absence of an agreement, where assets are available and capable of division in kind, and where the consequences of such distribution would not be inappropriate under the circumstances, they should be so divided in order to avoid injustice or unfairness that might result from chance loss or gain upon one of the parties as against the other.

Clearly, an in-kind distribution cannot be made of all assets. In *Borodinsky v. Borodinsky*,²¹⁸ the court left two hostile parties as co-owners of an auto-repair business rather than having the asset valued and allocated — the cash to one and the business to the other. The appellate court held the distribution to be inappropriate and reversed it. *Borodinski* stands for the proposition that the parties should have their financial affairs post-divorce separated as much as possible, because if they cannot get along as husband and wife, it is not likely that they will get along as business partners.

Other Methods of Distribution

Other methods of distribution include cash and payments over a period of time, usually secured by a mortgage or other security interest.

§ 9-22. Pensions and Retirement Benefits.

Generally

Pensions are a form of deferred compensation. The subject of equitable distribution of pensions has been a difficult one for the courts to deal with. The first step was to decide whether pensions were "property legally and beneficially acquired" during

²¹⁵66 N.J. 340, 345, 331 A.2d 257 (1975).

²¹⁶96 N.J. 36, 44, 473 A.2d 73 (1984).

²¹⁷167 N.J. Super. 425, 428, 400 A.2d 1225 (App. Div. 1979).

²¹⁸162 N.J. Super. 437, 443, 393 A.2d 583 (App. Div. 1978).

the marriage and thus subject to distribution upon divorce in accordance with the statute.²¹⁹

Pension Valuation

In *Kikkert v. Kikkert*,²²⁰ the court found that the husband's vested pension plan was subject to equitable distribution. He was 49 at the time. Normal retirement was age 62 and early retirement was age 60. The court recognized the pension as a form of deferred compensation acquired during the marriage. The court recommended determining the present value based on actual computations and awarded the nonpensioned spouse her share of the present value where there were assets sufficient to do so. If that was not feasible, then a deferred distribution must be developed based upon fixed percentages to each spouse.

The court in *Tucker v. Tucker*²²¹ held that only the portion of a pension acquired during the marriage is subject to equitable distribution, while whatever portion was acquired prior to the marriage or after the divorce complaint is filed is not subject to equitable distribution. *Tucker* further held that only pension and profit-sharing rights that had actually "vested" during the marriage were subject to equitable distribution, a view rejected in *White v. White*²²² and subsequent decisions.

While the equitable distribution statute requires that property be acquired during the marriage to qualify, there is no requirement of vesting. In *Weir v. Weir*,²²³ the pension at issue was a noncontributory Public Service Electric and Gas Company pension. The court recommended that the pension be distributed if, as and when payments commence, which would eliminate the need to determine a present value.

No distinction should be made between contributory and noncontributory pensions with regard to equitable distribution.²²⁴

*DiPietro v. DiPietro*²²⁵ involved the question of how to value for purposes of equitable distribution a vested pension with known fixed monthly payments commencing at a future date. The correct method is first to determine the cost of the pension if purchased as an annuity on the retirement date, and then to assume that the term of the annuity will run from the retirement date to the end of the pensioner's life expectancy measured from the date of divorce. The cost of the annuity is the value of the pension on the retirement date. This figure must then be discounted to valuation date value.

Despite repeated disclaimers of the importance of "vesting" in numerous New Jersey equitable distribution pension decisions, the concept of "vesting" continued to be of central importance until the landmark decision in *Whitfield v. Whitfield*.²²⁶ In *Whitfield*, the parties had been married for 16 years, during all of which time the husband was in military service. His pension would not vest until after 20 years of service. He argued that the pension should be excluded from equitable distribution because it did not

²¹⁹N.J.S.A. 2A:34-23.

²²⁰177 N.J. Super. 471, 427 A.2d 76 (App. Div.), *aff'd o.b.*, 88 N.J. 4, 438 A.2d 317 (1981).

²²¹*Tucker v. Tucker*, 121 N.J. Super. 539, 549, 298 A.2d 91 (Ch. Div. 1972).

²²²136 N.J. Super. 552, 347 A.2d 360 (App. Div. 1975).

²²³173 N.J. Super. 130, 136, 413 A.2d 638 (Ch. Div. 1980).

²²⁴*McGrew v. McGrew*, 151 N.J. Super. 516, 377 A.2d 697 (App. Div. 1977).

²²⁵193 N.J. Super. 533, 475 A.2d 82 (App. Div. 1984).

²²⁶222 N.J. Super. 36, 535 A.2d 986 (App. Div. 1987).

mature during the marriage. The Appellate Division held that a pension that was earned during the marriage, but which had neither vested nor matured at the time of the divorce, is marital property and subject to equitable distribution, when and if it vests. The court stated that the pension had been earned during each and every day of the defendant's military employment, 16 years of which were spent in a shared enterprise with the wife. However, because of the uncertainty involved in valuation of a nonvested pension, the decision recommended deferring distribution until receipt.

The primary issue in *Whitfield* was whether the wife was entitled to anything, since the pension had not vested when the divorce complaint was filed. The secondary issue was how much she was entitled to. When the court found in her favor on the first issue and moved on to the second, it then employed a device known as the coverture fraction for calculating the wife's share of the pension. The coverture fraction results from taking the years of pension plan participation necessary for receipt of benefits as the denominator and the years of plan participation during which the parties were married as the numerator. In *Whitfield*, the coverture fraction was 16/20, representing 16 years of marriage while the husband was in the military and 20 years until he qualified for his pension. Upon the husband's receipt of the pension, the wife would be entitled to her equitable share of 16/20ths of the pension.

Where an employee was offered and accepted a voluntary retirement incentive package whereby an additional five years was added to his service and age in calculating his pension benefit, the wife was entitled to 50% of that same benefit. The coverture fraction was 28/35, which included the additional five years.²²⁷

Cost-of-Living Increases and Other Future Contingent Benefits

The right of a retired policeman to receive future post-retirement cost-of-living increases payable under the New Jersey Police and Firemen's Retirement System qualifies as marital property subject to equitable distribution. Despite the speculative nature of future post-retirement cost-of-living benefits, they are subject to equitable distribution. However, inclusion of post-retirement cost-of-living increases is limited to those increases attributable to the portion of the pension that was earned during the marriage.²²⁸ The court in *Kikkert v. Kikkert*²²⁹ approved inclusion of a future contingent pension benefit in an equitable distribution award, and, in *Whitfield v. Whitfield*,²³⁰ the court stated that "the includability of property in the marital estate does not depend on when, during the marriage, the acquisition took place, but depends on the nature of the interest and how it was earned." The court held that to the extent that any cases stand for the proposition that any future pension benefit is not subject to equitable distribution, they are overruled.

²²⁷Reinbold v. Reinbold, 311 N.J. Super. 460, 710 A.2d 556 (App. Div. 1998).

²²⁸Moore v. Moore, 114 N.J. 147, 553 A.2d 20 (1989).

²²⁹177 N.J. Super. 471, 475, 427 A.2d 76 (App. Div.), *aff'd o.b.*, 88 N.J. 4, 438 A.2d 317 (1981).

²³⁰222 N.J. Super. 36, 47, 535 A.2d 986 (App. Div. 1987).

Methods of Distribution

The Court in *Moore v. Moore*²³¹ noted that generally there are two ways in which trial courts have equitably divided an employee-spouse's future pension, the "deferred distribution" method and the "immediate offset or payment" method. Under the immediate payment method, the pensioner, if he can afford to do so, may pay his spouse the present value of the pension. Otherwise, distribution must be deferred until the pension is due and the pensioned spouse will pay the distributive percentage out of each pension payment.²³² The court in *Moore* recommended the present payment method, while recognizing that in some instances the "deferred distribution" or "partial deferred

Only the widow of a policeman is entitled to the PFRS widow's pension, not his former wife. The definition of a "widow" under the Police and Firemen's Retirement Statute does not include a divorced wife. A husband's remarriage and the passage of two years vested the widow's benefits solely in the new wife.²³⁹

Cost-of-living increases from the date of the filing of the complaint through the date of retirement should be excluded from the valuation of a New Jersey State Trooper's pension. There should be no adjustment for social security benefits, since New Jersey State Troopers are not entitled to receive social security benefits as a member of the State Police.²⁴⁰

Federal Railroad Retirement and Social Security Benefits

Federal Railroad Retirement Pension Act benefits and social security benefits are not subject to equitable distribution. The court in *Hipsley v. Hipsley*²⁴¹ found the railroad pension to be very similar to social security benefits and dissimilar to a military pension, and held that it was not subject to equitable distribution. This decision was made while certiorari had been granted from a contrary ruling from California in *Hisquierdo v. Hisquierdo*,²⁴² a ruling that was ultimately reversed, with a holding in accord with that of *Hipsley*.

Social security benefits are nonassignable and therefore are not considered marital property subject to equitable distribution.²⁴³

Qualified Domestic Relations Orders

A Qualified Domestic Relations Order enables distributions to be made from pension plans, provided the order requiring such distributions is qualified. The QDRO is a domestic relations order that creates or recognizes the existence of an "alternate payee's" right to receive all or a portion of the benefits payable with respect to a participant under a plan, or assigns to an alternate payee the right to receive all or a portion of the benefits payable with respect to a participant under a plan, provided all Internal Revenue Code requirements are met. The QDRO usually provides for a deferred distribution of pension benefits, in contrast to the present offset method whereby the pensioner pays his spouse a share of the present value and remains as sole owner of the retirement benefits.

Defined Contribution and Defined Benefit Pension Plans

A defined contribution plan under the Internal Revenue Code²⁴⁴ means a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to that participant's account.

A defined benefit pension plan under the Internal Revenue Code²⁴⁵ means any plan which is not a defined contribution plan. The defined benefit plan is an aggregate

²³⁹Seavey v. Long, 303 N.J. Super. 153, 696 A.2d 102 (App. Div. 1997).

²⁴⁰Hayden v. Hayden, 284 N.J. Super. 418, 665 A.2d 772 (1995).

²⁴¹161 N.J. Super. 119, 390 A.2d 1220 (Ch. Div. 1978).

²⁴²439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

²⁴³42 U.S.C.A. § 407. Hayden v. Hayden, 284 N.J. Super. 418, 665 A.2d 772 (App. Div. 1995).

²⁴⁴26 U.S.C.A. § 414(i).

account of funds contributed by the employer for the benefit of all participating employees. There are no individual employee accounts; therefore, an employee's retirement benefits can only be determined by a formula applied at the time of retirement.²⁴⁶ Under a defined benefit plan, the benefit is an annuity, paid at the time of retirement, that is based on various factors including age at time of retirement, final average salary, number of years of employment, mortality, future rates of interest, and the form in which the annuity is paid.²⁴⁷

The court in *Marx v. Marx*²⁴⁸ had no problem in settling on a QDRO for the defined contribution plan. The dispute had to do with the defined benefit plan, this being the first New Jersey case to deal with allocation of a defined benefit plan. The court directed entry of a QDRO allocated as follows:

- The total benefit is to be determined when the wife is permitted to move her share of the benefit to pay status pursuant to the plan requirements.
- The plan administrator is to determine the coverture fraction and multiply the total accrued benefit by the coverture fraction.
- The product of the total accrued benefit times the coverture fraction is to be divided in half in accordance with plaintiff's equitable share.²⁴⁹

Death Benefits from Pension Reserve

In *Corrigan v. Corrigan*,²⁵⁰ an early equitable distribution case, the question at issue was whether death benefits connected to pension plans are subject to equitable distribution. The case involved the power of the husband to designate a beneficiary in connection with the alternative death benefit payable from his Port Authority of New York and New Jersey pension reserve in the event that he died before retiring. The reserve fund amounted to \$157,000, of which \$151,000 was contributed by his employer. The husband had the power to nominate the beneficiary, and appointed his two sons after separation from his wife.

The court distinguished the husband's pension interest, which clearly would be subject to equitable distribution, from what it termed a mere power to designate a beneficiary of an alternative death benefit, payable from the employee's pension reserve, which it found did not constitute property within the meaning of the equitable distribution statute. The court discussed the concept of "vesting," which it considered important. Probably, the case would be decided differently today as a result of the decisions in *Whitfield v. Whitfield*²⁵¹ and *Moore v. Moore*,²⁵² which rejected the concept of vesting in relation to equitable distribution.

²⁴⁵ 26 U.S.C.A. § 414(j).

²⁴⁶ *Marx v. Marx*, 265 N.J. Super. 418, 423-24, 627 A.2d 691 (Ch. Div. 1993).

²⁴⁷ *Id.*, 265 N.J. Super. at 424.

²⁴⁸ 265 N.J. Super. 418, 627 A.2d 691 (Ch. Div. 1993).

²⁴⁹ *Id.* at 428.

²⁵⁰ 160 N.J. Super. 400, 390 A.2d 141 (Ch. Div. 1978).

²⁵¹ 222 N.J. Super. 36, 535 A.2d 986 (App. Div. 1987).

²⁵² 114 N.J. 147, 553 A.2d 20 (1989).

Double-Dipping

After a pension has been equitably distributed, the share retained by the pensioner is not subject to a later application for alimony by the nonpensioned spouse. N.J.S.A. 2A:34-23, adopted in 1988, settled this issue by providing that when a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony.

Following enactment of the above statute, the New Jersey Supreme Court in *Innes v. Innes*²⁵³ confirmed the ban on double-dipping, based on the statutory amendment barring it and preexisting case law. However, the court distinguished income from pension benefits earned after the equitable distribution cut-off date. Such new post-divorce pension benefits may be considered on an application by the dependent spouse for alimony modification.

Where the parties had been married for seven years prior to divorce, the wife was awarded alimony for 32 years plus other assets, but none of the husband's military pension, which was based on 22 years of service. However, when the court subsequently extended her alimony, his pension was made subject to execution to pay the alimony. This did not involve double-dipping. While the wife waived her claim to the spousal fraction of 7/22, 15/22 of the ex-husband's pension was subject to execution for payment of alimony to her.²⁵⁴

Pension Benefits and Child Support

Neither the statute nor the court's decision in *Innes* deal with the question whether the pensioner's pension benefits can be subject to a child support obligation. Both the statute and *Innes* refer only to alimony. The child support issue was reached in *Johns v. Johns*,²⁵⁵ which held that deferred benefits, once received by the husband, should be considered as an income base for establishment of child support, following a lump sum distribution to the wife. The court reasoned that since child support is a continuing obligation, if the reasonable needs of the children are not being met, the court must look to the assets that were previously distributed, including the husband's share of his pension.

Federal Preemption

A state court involved in equitably distributing property rights created by federal legislation must first determine: (1) the purpose of Congress in enacting the federal statute, and (2) whether an order of equitable distribution would conflict with substantial federal interests.²⁵⁶ Federal regulations applicable to retirement pensions preclude a prior spouse from remaining as a survivor annuitant subsequent to the dissolution of marriage.²⁵⁷

²⁵³ 117 N.J. 496, 500, 569 A.2d 770 (1990).

²⁵⁴ Slayton v. Slayton, 250 N.J. Super. 47, 50, 593 A.2d 365 (App. Div. 1991).

²⁵⁵ 208 N.J. Super. 733, 506 A.2d 854 (Ch. Div. 1985).

²⁵⁶ Chestone v. Chestone, 285 N.J. Super. 453, 461-62, 667 A.2d 371 (App. Div. 1995).

²⁵⁷ *Id.*, 285 N.J. Super. at 459.

§ 9-23. Marital Debts.

Equitable distribution requires a consideration of marital debts as well as marital assets. Generally speaking, the court must take into account the liabilities as well as the assets of the parties in dividing marital assets. There are even situations in which there are no marital assets, but only marital debts, which must nevertheless be allocated for purposes of equitable distribution. Relatively few New Jersey decisions deal with the subject of marital debts and the related subject of dissipation of marital property.

If the assets are to be divided between the parties, the debts incurred in obtaining those assets should likewise be allocated between them.²⁵⁸ There are several ways to accomplish this. A debt incurred during the marriage may be deducted from the total value of the marital property in determining the net value of the assets subject to equitable distribution.²⁵⁹ Another approach is to allocate the debts separately to reduce any monetary award payments.²⁶⁰ Under certain circumstances it may not be an abuse of judicial discretion to divide the assets of the parties equally without requiring them to share the debts.²⁶¹

In *Pascarella v. Pascarella*,²⁶² it was held that the net value of assets was subject to equitable distribution, while in *Ionno v. Ionno*,²⁶³ the court held that the debts should be allocated between husband and wife. The court in *Monte v. Monte*²⁶⁴ indicated that the allocation of debts depends upon the circumstances in the particular case. The *Monte* court approved distinguishing between marital debts, those that are directly traceable to the acquisition of marital property, and nonmarital debts, which are not. The court noted that even if debts are determined to be marital, they could be allocated to one party based upon his or her greater earning potential. The court in *Monte* further found that the husband, who had incurred the debts, had the burden of establishing the traceable debts.

§ 9-24. Death While Divorce Action Is Pending.

When a spouse dies while a divorce action is pending, equitable relief can be afforded to the surviving spouse, though she is not statutorily entitled either to equitable distribution (because she has not yet obtained a divorce)²⁶⁵ or to an elective share under the Probate Code (because she was then obtaining a divorce).²⁶⁶ The equitable relief can be in the form of a constructive trust to prevent unjust enrichment, or relief based on quasi contract or *quantum meruit*.²⁶⁷ The court in *Carr v. Carr*²⁶⁸ noted that it was not

²⁵⁸ *Monte v. Monte*, 212 N.J. Super. 557, 566, 515 A.2d 1233 (App. Div. 1986).

²⁵⁹ *Pascarella v. Pascarella*, 165 N.J. Super. 558, 563, 398 A.2d 921 (App. Div. 1979).

²⁶⁰ *Ionno v. Ionno*, 148 N.J. Super. 259, 262, 372 A.2d 624 (App. Div. 1977).

²⁶¹ *Monte*, *supra*, 212 N.J. Super. at 567.

²⁶² 165 N.J. Super. 558, 563, 398 A.2d 921 (App. Div. 1979).

²⁶³ 148 N.J. Super. 259, 262, 372 A.2d 624 (App. Div. 1977).

²⁶⁴ 212 N.J. Super. 557, 515 A.2d 1233 (App. Div. 1986).

²⁶⁵ N.J.S.A. 2A:34-23.

²⁶⁶ N.J.S.A. 3B:8-1.

²⁶⁷ *Carr v. Carr*, 120 N.J. 336, 576 A.2d 872 (1990), *on remand*, *Carr v. Burgess*, 264 N.J. Super. 191, 197 623 A.2d 1384 (Ch. Div. 1991), *aff'd*, 264 N.J. Super. 10, 623 A.2d 1384 (App. Div. 1993), *certif. denied*, 134 N.J. 476, 634 A.2d 524 (1993).

²⁶⁸ *Carr*, *supra*, 120 N.J. 336, 576 A.2d 872 (1990).

bound by the equitable distribution or probate statutes. The parties had been married for 17 years with no children born of the marriage, and the marital estate was found to be worth \$2 million when the husband died. The court awarded the wife approximately \$600,000 tax free under the theories of constructive trust and quasi-contract. The plight confronting the surviving wife had been compared by the court to the astrophysical phenomenon, “a black hole.”²⁶⁹

The executrix of the estate of the decedent spouse is not entitled to assert equitable claims against the marital estate sounding in constructive trust, resulting trust, quasi-contract or unjust enrichment, such entitlement being limited to the surviving spouse, as provided in the *Carr* case.²⁷⁰

Where the parties sold real estate they had owned as a tenancy by the entirety and placed the funds in escrow while their divorce action was pending, and the husband died prior to trial, the Family Part declined jurisdiction in favor of the Probate Division, which was dealing with the late husband’s estate.²⁷¹

Where the wife died after the judge had granted a divorce but before entry of an amended divorce judgment, the appellate court upheld the equitable distribution award to the wife, and to her estate as successor, of her share of the marital property.²⁷² The trial court stated that even if no judgment had been entered before the wife’s death, it would have entered a judgment *nunc pro tunc* as of the date of its ruling.²⁷³

Murder Pendente Lite

Where the wife was murdered *pendente lite* and the husband was imprisoned and charged with the murder, the court reserved in part on his application to dismiss all pleadings. The court held that the wife’s complaint for divorce and alimony abated with her death, these being personal rights that die with her. However, the court also concluded that, although there would be no equitable distribution if the husband was acquitted of the murder charge, if he were convicted of murder or some lesser offense there would be equitable distribution to the wife’s estate, based upon the well-settled principle in equity that a person should not profit from his own wrongdoing. The court held that the estate of the deceased wife should be added as party to the action.²⁷⁴

§ 9-25. Creditor’s Rights to Tenancy by the Entirety Realty.

New Jersey courts have had difficulty in determining the relative rights of creditors of one spouse against the interests of the other in real estate held as a tenancy by the entirety prior to divorce. Upon divorce a tenancy by the entirety becomes a tenancy in common by operation of law. Cases have arisen in which the treatment of marital realty may be in conflict with claims of a creditor against the interest of one spouse in such property. The former rule of automatic conversion of a tenancy by the entirety into a

²⁶⁹See *Carr*, 120 N.J. at 346 n.2.

²⁷⁰*Krudzlo v. Krudzlo*, 251 N.J. Super. 70, 596 A.2d 1098 (Ch. Div. 1990).

²⁷¹*Lopatkin v. Lopatkin*, 236 N.J. Super. 555, 566 A.2d 559 (Ch. Div. 1989).

²⁷²*Olen v. Melia*, 141 N.J. Super. 111, 357 A.2d 310 (App. Div.), *certif. denied*, 71 N.J. 518, 366 A.2d 673 (1976).

²⁷³See also *Olen v. Olen*, 124 N.J. Super. 373, 307 A.2d 121, *certif. denied*, 63 N.J. 570, 310 A.2d 484 (1973).

²⁷⁴*Jacobson v. Jacobson*, 146 N.J. Super. 491, 370 A.2d 65 (Ch. Div. 1976).

tenancy in common does not survive the equitable distribution law, because if it did, the essential purpose of the equitable distribution law would be subverted. The right of the trial judge fairly to apportion all marital property accordingly supersedes the automatic conversion rule.

However, in *Daeschler v. Daeschler*,²⁷⁵ it was held that a levying creditor should be given the opportunity to intervene in a divorce action, since his claim may be an important consideration for the court to take into account in devising an equitable distribution scheme that will best serve and protect all competing interests. The court in *Daeschler* declined to follow the contrary prior rule, set forth in *Sisco v. New Jersey Bank*.²⁷⁶

This problem cannot arise in respect to tenancies by the entirety created after April 5, 1988, the effective date of N.J.S.A. 46:3-17.4, because that statute prohibits either spouse from severing, alienating or otherwise affecting their respective interests in the tenancy by the entirety during the marriage or after separation without the written consent of the other.²⁷⁷

§ 9-26. Change in Value of Property After the Valuation Date.

There is often a substantial lapse of time between the filing of the divorce complaint and the final judgment. In certain cases an asset that was valued as of the date of the filing of the divorce complaint declines substantially in value by the time of the divorce trial. How should this be treated by the court? In *Scherzer v. Scherzer*,²⁷⁸ the wife sought equitable distribution of the husband's stock interest in a corporation that had gone into bankruptcy after the divorce complaint was filed, claiming that the value of this stock must be fixed as of the date of filing of the complaint. The Appellate Division rejected this argument, noting preliminarily that the statute requires that the distribution be an equitable one, which requires the trial judge to consider all of the particular circumstances of the individuals before it. The court stated that a proper factor in that determination is any significant change in the valuation of marketable assets that occurs prior to final judgment.

The court in *Goldman v. Goldman*²⁷⁹ chose the trial date as the valuation date where the husband's automobile dealership had a stipulated value of \$294,000 on the date the divorce complaint was filed and no value as of the date of trial, where there was no allegation that he acted in bad faith.

§ 9-27. Relationship Between Equitable Distribution, Alimony, Child Support and Counsel Fees.

There is a very close relationship between propern.1(h)8.6.Cieted asitl(te)TJJ3.6145 -1.1566 TD0.3536 Tc-0.002

interchangeable concepts, particularly in negotiating a property settlement agreement. Yet awards have very different meanings and implications depending upon how they are labeled. For example, an equitable distribution award is generally not subject to modification, while alimony and child support awards clearly are, based upon a substantial change in circumstances. On the other hand, an alimony obligation is not dischargeable in bankruptcy, while an equitable distribution obligation is.

Unlike alimony, which is directly related to the ability to pay, equitable distribution is simply an allocation of the assets amassed in the past due to the joint efforts of the parties. A later change in a party's financial position is irrelevant to an equitable distribution and is no basis for modification.²⁸⁰

In some cases alimony and equitable distribution aspects of a property settlement agreement are interrelated. In *Connor v. Connor*,²⁸¹ the alimony payments were, in fact, a method of equalizing equitable distribution. In that situation, the trial judge was required to determine what portion of the alimony, if any, was actually equitable distribution, and then limit the application for modification based upon changed circumstances to the remaining alimony portion.

In *Esposito v. Esposito*,²⁸² the court commented upon the fact that support payments are intimately related to equitable distribution of marital property. It stated that unearned income from investments funded by an equitable distribution award should be considered when determining the sufficiency of alimony. Similarly, in *Lepis v. Lepis*,²⁸³ the leading case on modification of alimony and support, the Court discussed the interrelationship between alimony, child support and equitable distribution. It stressed the importance of the court's exercise of its power to distribute property equitably as a means for relieving the strain of total reliance by the dependent spouse on support payments for financial security. It noted that the courts do not and should not consider support awards in isolation.

§ 9-28. Dissipation of Marital Assets.

Dissipation of marital assets is an important factor with regard to equitable distribution in a relatively small number of cases. Although it is listed as one of the statutory equitable distribution factors,²⁸⁴ the equitable distribution statute does not define dissipation. It is being defined instead in the case law. One instance of dissipation of marital assets is where one spouse uses marital property for his or her own benefit and for a purpose unrelated to the marriage at a time when the marriage relationship is in serious jeopardy. Whether a given course of conduct constitutes dissipation thus depends upon the facts and circumstances of the particular case.²⁸⁵

In *Kothari v. Kothari*,²⁸⁶ the defendant husband sent very large sums of money to his parents in India and also removed large sums for his personal requirements, all of which were marital assets. He removed these marital assets without obtaining the

²⁸⁰Connor v. Connor, 254 N.J. Super. 591, 602, 604 A.2d 158 (App. Div. 1992).

²⁸¹*Id.*, 254 N.J. Super. at 598, 603.

²⁸²158 N.J. Super. 285, 296, 385 A.2d 1266 (App. Div. 1978).

²⁸³83 N.J. 139, 154, 416 A.2d 45 (1980).

²⁸⁴N.J.S.A. 2A:34-23.1i.

²⁸⁵Kothari v. Kothari, 255 N.J. Super. 500, 506, 605 A.2d 750 (App. Div. 1992).

²⁸⁶*Id.*

authorization of his wife. The court found that he was guilty of dissipation of marital property and required him to pay his wife 50% of the monies that were dissipated.²⁸⁷

If the marital debt occurred because one spouse intentionally dissipated marital assets, such intentional dissipation would be a fraud on the marriage and the dissipating spouse would be held solely responsible for its payment.²⁸⁸

Where a spouse dissipates marital assets by extensive gambling losses, he may be held solely responsible for such dissipation. Whether a spouse's conduct constitutes dissipation depends on the facts of the particular case, but generally there must be an intent to dissipate assets. The party against whom dissipation is charged has the burden of proving the legitimacy of his or her expenditures of marital funds.²⁸⁹

§ 9-29. Bankruptcy and Equitable Distribution.

There is an interrelationship between the Bankruptcy Code and New Jersey family law with regard to marriage, divorce, equitable distribution of property, alimony and child support. The Federal Bankruptcy Court has superior jurisdiction to the New Jersey Superior Court in dealing with the property of an individual when that person has filed for bankruptcy protection or has been involuntarily brought into bankruptcy.²⁹⁰ A judgment "on the merits" in a federal court will preclude a later action on the same merits in a state court.²⁹¹

In *Reid v. Reid*,²⁹² the Appellate Division held that, where the Bankruptcy Court by consent of the parties assumed jurisdiction of all issues pertaining to the property of a debtor, including marital property, following which it entered an order dealing with the marital property, the Family Part was bound by that order and precluded from considering the equitable distribution issues on the merits in the subsequent divorce proceedings.²⁹³

²⁸⁷*Id.*, 255 N.J. Super. at 509.

²⁸⁸*Monte v. Monte*, 212 N.J. Super. 557, 567-68, 515 A.2d 1233 (App. Div. 1986).

²⁸⁹*Siegel v. Siegel*, 241 N.J. Super. 12, 574 A.2d 54 (Ch. Div. 1990).

²⁹⁰*Reid v. Reid*, 310 N.J. Super. 12, 18, 708 A.2d 74 (App. Div. 1998).

²⁹¹*Watkins v. Resorts Int'l Hotel & Casino*, 124 N.J. 398, 415, 591 A.2d 592 (1991).

²⁹²310 N.J. Super. 12, 20, 708 A.2d 74 (App. Div. 1998). *See also* *In re McCulley*, 150 B.R. 358, 360 (Bankr. M.D. Pa. 1993); *Motor Carrier Audit & Collection Co. v. Lighting Prods., Inc.*, 113 B.R. 424, 426 (N.D. Ill. 1989).

²⁹³*See also* Section 11-28, Effect of Bankruptcy on Alimony and Support, *infra*.

