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Michael G. Heyman

THE ILLINOIS MARRIAGE AND DISSOLUTION OF MARRIAGE ACT: NEW SOLUTIONS TO OLD PROBLEMS

MICHAEL G. HEYMAN*

INTRODUCTION

The enactment of "The Illinois Marriage and Dissolution of Marriage Act"[1] has affected dramatic and far-reaching changes in many areas of family law. As the first comprehensive revision in 103 years, the Illinois Act is a major step in updating the law to reflect present marital conditions.[2] Undoubtedly, the provision that has attracted the greatest attention is the "marital property" section,[3] but much like the model act upon which it is based,[4] the Illinois Act addresses other broad-ranging problems in the area of family law.[5]

The impetus for revising the law of divorce, now referred to as dissolution of marriage, grew in part out of a dissatisfaction with the doctrine of special equities,[6] and a realization that the policies underlying divorce law did not accurately reflect the times.[7] The special equities doctrine had taken on the attributes of a hydra, evolving into an amorphous concept subject to diverse and conflicting applications.[8] An equally compelling reason was the realization that an adversarial relationship be-

* B. A., 1968, Temple University; M. A., 1968, University of Wisconsin; J. D., 1972, George Washington University; LL. M., 1976, New York University. Mr. Heyman is presently an Associate Professor at The John Marshall Law School. The author wishes to acknowledge the invaluable student research assistance of Wallace J. Wolff.

1. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

2. *See, e.g.*, Auerbach, *An Introduction to the New Illinois Marriage and Dissolution of Marriage Act*, 66 ILL. B.J. 132 (1977).

3. ILL. REV. STAT. ch. 40, § 503 (1977).

4. THE UNIFORM MARRIAGE AND DIVORCE ACT, 9 UNIFORM LAWS ANNOTATED 459 (1977 Supp.).

5. The Illinois Act has, for example, effected substantial changes in the area of annulment—now termed declaration of invalidity of marriage—and child custody adjudication. *See* ILL. REV. STAT. ch. 40, §§ 301-306, 610(a) (1977).

6. *See generally* Susler & Johnstone, *Looking to the Future to Correct Evils of the Past—Attempts to Modernize Illinois Family Law*, 23 DEPAUL L. REV. 326, 343-50 (1973).

7. *See* notes 34-35 and accompanying text *infra*.

8. *See* text accompanying notes 18-33 *infra*.

tween litigants is often destructive.[9] To remedy this, the legislature removed, or at least minimized, the adversity and acrimony attendant to dissolution proceedings.[10] For these reasons, among others, the Illinois Marriage and Dissolution of Marriage Act was enacted.

In view of the complexity and comprehensiveness of the Illinois Act, it would be fanciful, if not simply foolish, to undertake an explication of the entire Act within the confines of a single article. Therefore, this article will focus on the "marital property" section, and recurring issues arising therefrom that other jurisdictions with similar statutes have confronted. Even with this limited objective, certain areas of inquiry must be neglected.[11] To explain the theory behind marital property, several preparatory steps will be taken to insure an adequate understanding of this section.

First, the predecessor of marital property—the doctrine of special equities—will be discussed in an effort to understand its purpose.[12] The next step will demonstrate how the concepts of special equities and marital property overlap,[13] and why marital property is an improvement over the special equities doctrine.[14] This step, however, cannot be taken without first setting forth the concept of marriage upon which the new Act is based—the notion of joint enterprise.[15] Also, difficult questions of statutory interpretation will be raised and considered in light of certain seminal language of the Illinois Act.[16] Finally, conflict of laws principles regarding the division of marital property will be discussed under the language of the new Act.[17]

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9. *See generally* Susler & Johnstone, *Looking to the Future to Correct Evils of the Past—Attempts to Modernize Illinois Family Law*, 23 DEPAUL L. REV. 326 (1973).

10. ILL. REV. STAT. ch. 40, § 102 (3), (4) (1977): "(3) promote the amicable settlement of disputes that have arisen between the parties to a marriage; (4) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage. . . ."

11. This article will not discuss the constitutionality of various provisions of this Act. It should be noted, however, that the Supreme Court of Illinois, in Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978), upheld the constitutionality of various provisions of the Illinois Act. Of particular importance to this article was the Kujawinski court's constitutional approval of section 503. *See, e.g., In re* Marriage of Franks, 542 P.2d 845 (Colo. 1976); Fournier v. Fournier, 376 A.2d 100 (Me. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. App. 1977); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974). All of these cases upheld their state's version of section 503.

12. *See* text accompanying notes 18-33 *infra*.

13. *See* text accompanying notes 34-52 *infra*.

14. *See* text accompanying notes 53-67 *infra*.

15. *See* text accompanying notes 34-39 *infra*.

16. *See* text accompanying notes 68-109 *infra*.

17. *See* text accompanying notes 110-25 *infra*.

SPECIAL EQUITIES: IMPRECISION AND INCONSISTENCY

Prior to 1977, Illinois law adhered to the traditional view that marriage was an institution involving one economically productive party—the husband.[18] The duties within the marriage were reciprocal: the wife had a duty to render domestic services; the husband had the concomitant duty to support her.[19] Although passage of the Married Women's Property Act did extend some individual property rights to the wife, the statute explicitly precluded her from receiving compensation for domestic services, since they were performed as part of her legal duty.[20]

This arrangement of rights was consistent with the concept of separate property and worked, in large part, to insulate one party's titular property rights from any claims of the other spouse. Title, however, did not always create an inviolable property right. Together with the passage of the Married Women's Property Act, the Illinois legislature enacted a provision empowering the court to order a conveyance of property from the titleholder to a party found to be the equitable owner of the property.[21] This marked the inception of the special equities doctrine by which a court could compel conveyance of property from one spouse to another.

Since spouses were not compensated for their domestic services,[22] special equities would only exist if the services performed went substantially beyond that required of a spouse. As to what services would invoke the doctrine of special equities, the Illinois Supreme Court stated that it "must be alleged and proved by the spouse . . . that he or she has furnished valuable consideration such as money or services other than those normally performed in the marriage relation which has directly or indirectly been used to acquire or enhance the value of the property."[23]

The problem created by the special equities doctrine was twofold: it was difficult to apply with ease or uniformity; and it contained confusing, if not contradictory, elements. While it would seem clear that a party who made a financial contribution

18. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 181 (1968) (explanation of the traditional theory of marriage).

19. *Id.*

20. "Neither husband or [sic] wife shall be entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise." ILL. REV. STAT. ch. 68, § 8 (1975) (repealed, P. A. 80-923, § 901 (1977)).

21. ILL. REV. STAT. ch. 40, § 18 (1975) (repealed, P. A. 80-923, § 901 (1977)).

22. *See* note 20 and accompanying text *supra*.

23. Everett v. Everett, 25 Ill. 2d 342, 347, 185 N.E.2d 201, 204-05 (1962) (citations omitted).

toward the acquisition of property should have rights in that property regardless of how title was held, such clarity did not endure when the contribution was nonmonetary, and especially if the services provided were arguably required of the party by law. This obscurity was compounded because the courts, in determining what services exceeded those required, had to define what "reasonable services" were.

Reasonable Services

Initially, doubts were expressed as to whether the concept of "reasonable services" was consistent with the traditional belief that both parties should work assiduously to make a success of their joint undertaking. It was conceivable that a court might find *all* services reasonable, thereby precluding application of the special equities doctrine. This view, however, did not prevail, as is evidenced by decisional law.

In *Norris v. Norris*,[24] an Illinois Appellate Court denied the wife any interest in her husband's farm, despite many years of service, including the preparation of five or six meals per day for the hired workers. While these domestic services were incommensurate with those provided by the woman's urban counterpart, the court found no special equities because it deemed the performance of these services incidental to being a farmer's wife. In contrast, special equities were found in *Ylonen v. Ylonen*,[25] where the parties jointly engaged in a number of business ventures. Though the wife did not provide financial consideration for any of the purchases, the Illinois Supreme Court concluded that "the property involved, both real and personal, was accumulated through the joint efforts of the parties."[26] These efforts contributed to the acquisition or enhancement in value of the property and were, therefore, a basis for finding property rights in the non-titleholding spouse under the special equities doctrine.

Factually, there appears to be no principled distinction between *Norris* and *Ylonen*. Both cases agree on the applicable principles of the special equities doctrine, yet opposite results occurred, demonstrating the difficulty in applying these principles in order to determine the parameters of "greater-than-reasonable services." In other words, the contours of the relevant principles were too indefinite to yield a consistent body of decisional law.

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24. 16 Ill. App. 3d 879, 307 N.E.2d 181 (1974).
25. 2 Ill. 2d 111, 117 N.E.2d 98 (1954).
26. *Id.* at 118, 117 N.E.2d at 103.

Joint Tenancy

Additional problems developed under the special equities doctrine when the disputed property was owned in joint tenancy. In this instance, two bodies of law came into direct conflict. The special equities doctrine created a property interest to the extent that one's efforts provided the basis for acquisition or enhancement in value of the property. Conversely, the law of joint tenancy created the presumption of a gift when a married couple placed property in joint tenancy, a presumption that could only be rebutted by clear and convincing evidence.[27]

The conflict arose when the party who had provided the basis for acquisition or enhancement in value (donor) placed the title to the property in joint tenancy with the other spouse (donee). If the gift theory were followed, the donor would be denied the right of reconveyance; but if the special equities theory were followed, the donor would then be allowed reconveyance of the property. Though the argument favoring reconveyance to the donor was appealing, the courts were reluctant to follow it, a controlling factor being the extent to which one spouse released his claim to the other's property or alimony.[28] It therefore seemed that property acquired in joint tenancy was to be excluded from the clutches of special equities.

Intent

The difficulty in applying the special equities doctrine in a separate property system is also revealed in the final element: the effect of the parties' intent on the distribution of property. It is beyond question that the parties' intent should override the operation of a general rule of law.[29] The difficulty lies in discerning the intention, if in fact one existed. This difficulty is especially prevalent in matrimonial law since "[d]uring . . . a marriage the law of matrimonial property is of little interest to the spouses . . . . It is when family life is disrupted . . . [that] the matrimonial property law in all systems comes to the fore."[30] Thus, the parties' failure to consider the legal effect of their actions upon their property rights enabled the courts to impute the intent after the fact in order to resolve the dispute.

As with other aspects of the special equities doctrine, the artificial imputation of intent resulted in unfair distributions

27. *See, e.g.*, Fraase v. Fraase, 29 Ill. App. 3d 281, 330 N.E.2d 285 (1975).
28. *Id.* at 283, 330 N.E.2d at 288.
29. Garmisa v. Garmisa, 4 Ill. App. 3d 411, 280 N.E.2d 444 (1972).
30. Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21, 24 (1974).

and considerable uncertainty. In the absence of an expressed intent, the court was forced to speculate as to what the parties probably intended. This inferential process by its nature relied on the application of patent fictions, or, in attempting to discern the true intent of the parties, left the court with an ineffective method of fact-finding.

This process was resorted to in *D'Amico v. D'Amico*,[31] wherein the wife deposited her money into a joint checking account from which family expenses were paid. The court confronted the question of whether the commingling of funds evinced an intent to share family expenses, which would proportionately reduce her share in the account. The court concluded that the wife had made a gift for the benefit of both spouses, and accordingly, she could not claim the bulk of the money in the account. Had the wife not commingled her funds, the same result would probably not have been reached.[32] Moreover, if the parties had handled their finances less consistently, the court could easily have ruled for either party. Since courts had to imply the intent from the evidence presented, it was evident that the use of "intent" was, in many cases, an unsatisfactory method to divide marital property, especially where no intent could reasonably be discerned.

A fundamental conflict underlied the interplay of these factors used in resolving marital property claims, and the failure of the law to formulate a coherent scheme for the division of *marital property* signalled their demise. One source of conflict was the basic notion that a party was entitled to keep what he owned in his own right, thereby placing a premium on title. Second, recognition was given to the value of spousal efforts, and property rights could then be derived from such efforts if deemed sufficient. Finally, attempts were made to apportion property in accordance with the intention of the parties. However, since intent was frequently indiscernible, beneficient fictions supplanted factual determinations in many cases.[33] With the

31. 1 Mass. App. Ct. 561, 303 N.E.2d 737 (1973).

32. *See generally* the following item which appeared in the Champaign-Urbana News Gazette, Sept. 13, 1972, at 23, col. 1: "Here are some practical suggestions gleaned from Millie, Naomi and two women lawyers. Many of these pointers also apply to women who someday may be widowed. . . . 6. Do not 'commingle' your inheritance money or any other non-community property with your husband's property."

33. *See, e.g.*, Pettit v. Pettit [1969] 1970 Law Reports 777, 826 (H.L.), wherein the founding of rights on a patent fiction was criticized by one of the Lords, noting:

> I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is

interment of the special equities doctrine and its attendant factors, a different viewpoint of the marital relationship emerged.

MARITAL PROPERTY: SPOUSAL RIGHTS AND GUIDELINES FOR DIVISION

A major reason for the failure of the prior law was its refusal to re-evaluate the concept of marriage in light of current social customs. Marriage was viewed as an institution in which the husband was the breadwinner; the wife was the homemaker. Under this model, the marriage was regarded as a consuming institution, not an economically productive one. The fact that the parties frequently pooled their assets and efforts in acquiring property was often disregarded.

The Partnership

The law's refusal to recognize the disparate but equally significant functions of the homemaker-spouse was frequently commented upon,[34] but rarely acted upon. The value of the homemaker's role in a marriage was reflected in a report by a presidential commission which stated:

> Marriage, as a partnership in which [the] spouse makes a different but equally important contribution is increasingly recognized as a reality in this country and is already reflected in the laws of some other countries. During marriage, each spouse should have a legally defined, substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management. Such a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment or death.[35]

Since the term "marital partnership"[36] is not self-explanatory, an analogy to commercial partnerships will be made in order to construe the meaning of that term. By this analogy, the subject of contributions should then take on a particular significance.[37]

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only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would entertain their heads.

34. *See, e.g.*, Foster & Freed, *Marital Property and the Chancellor's Foot*, 10 FAM. L.Q. 55 (1976).

35. THE REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF AMERICAN WOMEN 69 (1963).

36. For a comparison of the marital partnership to its commercial counterpart see Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1255 (1974).

37. The marital partnership comparison to the commercial partnership has not been without its detractors. Commenting on the Uniform Marriage and Divorce Act, Max Rheinstein said:

> [D]oes the scheme correspond to popular expectations? Is marriage truly seen as a full community of life, of fortune, and of property in a time in which marriage is no longer seen as an indissoluble partner-

Like a commercial partnership, the parties in a marriage function by sharing duties and by dividing their labor, without which the relationship could not succeed. It is conceded that the relationship cannot successfully operate without the acquisition of some capital. The accumulation of that capital, however, will not occur, especially if children are present, unless the homemaker-spouse contributes a significant part of her energies to the marriage. The services of both are necessary for the continuance of the relationship. "[T]he wife who spends almost all her married life in homemaking and childrearing contributes significantly to the family's economic welfare by making it possible for [the] husband to earn income and amass property during the marriage."[38] Parties enter into marriage to achieve particular objectives, and, as in a commercial partnership, the degree to which the joint efforts effectuate this purpose provide the basis for determining and assessing property rights upon dissolution.[39] This viewpoint of marriage as a functional partnership underlies the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act.

The Illinois Act and Unsettled Issues

The Illinois Marriage and Dissolution of Marriage Act[40] does not mandate any rigid percentage for the distribution of property upon dissolution of a marriage.[41] Instead, the Act requires

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> ship for life? Are we truly far from this stage at which marriage is widely regarded as a scheme of living and copulating together until affections erode?

Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L. REV. 413, 431 (1976).

Assuming *arguendo* that Professor Rheinstein's observations are correct, they do not provide a valid criticism of the Uniform Act, because popular expectations and current views of marriage are irrelevant to the division and distribution of property upon dissolution of the marriage.

38. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 165-66 (1969) [hereinafter cited as LEVY]. Professor Levy was a reporter to the Uniform Marriage and Divorce Act. His book carefully explains much that is now embodied in the Uniform Act. Accordingly, it provides an important source for interpretation of the Illinois Act.

39. As the prefatory note to the Uniform Marriage and Divorce Act states: "The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." *Commissioners' Prefatory Note*, UNIFORM MARRIAGE AND DIVORCE ACT, 9 UNIFORM LAWS ANNOTATED 457 (1977 Supp.). *See also* Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165 (1976); Comment, *Marital Property: A Look at Old Inequities*, 39 ALB. L. REV. 52 (1974); Note, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221 (1974).

40. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

41. ILL. REV. STAT. ch. 40, § 503(c) (1977):

the division to turn on the particular facts of each case.[42] This division of property is distinguishable from the determination of maintenance. In maintenance, formerly known as alimony, the major purpose is rehabilitative—the needy spouse should be assisted by the financially able spouse.[43] Property division, however, is based on the existing rights of the parties in the property acquired during the marriage. Rights derive from the contributions made. What is withdrawn from the marriage is reflective of what has been put in, providing the *quid pro quo* for the marital contributions. As such, the partnership model provides not only the basis for the distribution of property upon dissolution of the marriage, but also provides the guidelines for the distribution.[44]

Perhaps the greatest difficulty presented by this system is assessing the value to be placed on the different forms of contri-

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(c) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant 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 reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

See also LEVY, *supra* note 38, at 167 (expressly rejecting a mandated 50/50 division).

42. ILL. REV. STAT. ch. 40, § 503(c) (1977); *see* note 41 *supra* for text of section. *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW 108 (2d ed. 1977) (circumstances may justify awarding the wife more than an one-half interest).

43. *See* ILL. REV. STAT. ch. 40, § 504 (1977).

44. ILL. REV. STAT. ch. 40, § 503(c)(1-10) (1977); *see* note 41 *supra* for text of section.

bution. In this respect, one argument is that greater emphasis should be placed upon monetary contributions than on non-monetary contributions.[45] This argument, though, has predominantly been rejected, since it would be inimical to the purpose of the new Act if the argument was accepted. As the Supreme Court of Montana stated: "The pecuniary and proprietary fruits of the marriage are frequently acquired by joint effort, even though actual financial outlay may be more the contribution of one spouse than the other."[46] Although the above statement was made prior to the enactment of the uniform act, subsequent decisional authority is in accord,[47] and the principles espoused therein have frequently been reaffirmed.[48]

Aside from valuation, another potential area of confusion deals with the "acquisition" of the marital property. Illinois' statutory scheme indicates that only those assets acquired through joint efforts may be distributed as marital property,[49] and the percentage of the party's interest will vary according to the actual contributions made.[50] Therefore, property must be acquired by onerous, rather than lucrative,[51] title if it is to qual-

45. Cook v. Cook, 159 Mont. 98, 495 P.2d 59 (1972).

46. *Id.* at 103, 495 P.2d at 64.

47. *See, e.g.*, Roe v. Roe, 556 P.2d 1246 (Mont. 1976). Caution should be exercised in the use of Montana decisions as persuasive authority, for its statute differs significantly from that of Illinois. Montana's law provides for the division of property "however and whenever acquired." MONT. REV. CODES ANN. § 48-321 (1977).

48. *See, e.g.*, Rieger v. Christensen, 529 P.2d 1362, 1364-65 (Colo. App. 1974):

> It is also well established that a wife's housekeeping labors are a factor to be considered in dividing property. . . . These services are necessary to the maintenance of a civilized life style and if they were not performed by one of the parties, the parties would be forced to hire other persons to perform these services.

49. ILL. REV. STAT. ch. 40, § 503(a) (1977):

> (a) For purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':
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> (1) property acquired by gift, bequest, devise or descent;
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> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
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> (3) property acquired by a spouse after a judgment of legal separation;
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> (4) property excluded by valid agreement of the parties;
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> (5) the increase in value of property acquired before the marriage; and
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> (6) property acquired before the marriage.

50. ILL. REV. STAT. ch. 40, § 503(c) (1977); *see* note 41 *supra* for text of section.

51. *Compare* BLACK'S LAW DICTIONARY 1241 (rev. 4th ed. 1968) (defining "onerous title" as "[a] title acquired by the giving of a valuable consideration, as the payment of money or rendition of services or the performance of

ify as marital property. "Acquisition" is thus dependent upon actual efforts rendered, rather than ownership resulting from a gift or similar fortuitous event. This distinction becomes significant when faced with the problems of statutory interpretation that will likely arise.[52] Other state courts have already faced the issue of defining the term "acquired" within their statutory schemes, and hence, their decisions are an appropriate source to refer to in interpreting "acquired" as set out in the Illinois Act.

In *Eschenburg v. Eschenburg*,[53] the Supreme Court of Montana reviewed the equal division of property between a husband and wife. After considering the length of the marriage, the number of children raised by the wife, and her management of the house, the court concluded that the distribution was appropriate. The court also took into account her "entertaining at social activities and volunteering her services to other activities related to defendant's career. . . . [E]ven though these contributions differed in kind they were of equal weight to the financial contributions of defendant."[54] While the intricate details of a marriage may never be completely known,[55] *Eschenburg* illustrates that property rights can be determined and divided under a contribution scheme.

The *Eschenburg* court attached importance to the duration of the marriage—32 years—thereby implying that the length of time over which the efforts are made can effect the amount of distribution. This factor, the duration of a marriage, was also considered in *Marcotte v. Marcotte*,[56] wherein the wife was awarded 25 per cent of the marital property. The Colorado Appellate Court affirmed the award, stating that "a 'fair and equitable' division of marital property does not require that the marital estate be split in equal proportions."[57] In *Marcotte*, the marriage had lasted three years.

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conditions or assumption or discharge of liens or charges") *with id.* at 1098 (defining "lucrative" as "[y]ielding gain or profit; profitable; bearing or yielding a revenue or salary" [*and*] "*lucrativa causa*" as "[a] consideration which is voluntary; that is to say, a gratuitous gift, or such like"). *See also* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 62 (2d ed. 1971).

52. *See* text accompanying notes 68-109 *infra*.

53. 557 P.2d 1014 (Mont. 1977).

54. *Id.* at 1016.

55. An inherent limitation in this scheme of property division results from the fact that the judicial process cannot operate with mathematical precision to determine percentages of contribution. This limitation should not, however, dictate the abandonment of the scheme, for there are limitations to any scheme, and the present scheme best compensates for the limitations.

56. 525 P.2d 507 (Colo. App. 1974).

57. *Id.* at 508.

Eschenburg and *Marcotte* indicate that the contributions of the wife will not be considered alone, but rather in conjunction with the length of time over which they are performed.[58] By considering these two factors together, a party is precluded from reaping a windfall by marrying at a propitious time. Since the acquisition of property must be traceable to the activities of both parties, the Illinois Act most likely contemplates that the marriage be of a substantial duration before equal division of the marital property is warranted. This length of time may be reduced where children are born, since the homemaker's responsibilities will naturally be greater. Therefore, while the courts do differ in degree as to the weight to be accorded to the duration of a marriage, it is evident that the marital duration is an influential consideration in determining the division of marital property.

A homemaker-spouse may possibly be entitled to more than an equal share of the marital property. For example, in *In re Marriage of Vanet*,[59] a Missouri court was confronted with a twenty-one year marriage, during which time three children were born. The wife had been the principal breadwinner while the husband was in law school. Upon completion of his legal education and the birth of their first child, the wife assumed the duties of a homemaker. The court, following statutory guidelines which are similar to Illinois', awarded her 74 per cent of the marital property.[60] The factor most favorable to the wife's claim was the financial contribution that she had made which enabled the husband to complete law school. In this respect the court stated: "The financial contributions . . . was [sic] of inestimable value with respect to acquisition of the marital property."[61]

58. The Illinois Act requires courts to receive guidance from all of the factors listed in section 503(c)(1-10) in apportioning marital property. Emphasis is placed on the factors of contribution and duration of the marriage in this article for two reasons. First, the inclusion of those factors demonstrates the continuity in principle between special equities and marital property. Second, these two factors most clearly reflect the marital partnership model.

59. 544 S.W.2d 236 (Mo. App. 1976).

60. While the language of the Missouri property division statute is quite similar to that of Illinois, a major substantive difference is that marital misconduct may be considered in determining equitable distribution under the Missouri scheme. MO. REV. STAT. § 452.330 (1974).

61. 544 S.W.2d 236, 241 (Mo. App. 1976). In a similar setting, the Supreme Court of Iowa reached the same conclusion, noting that though the law degree was not itself an asset subject to distribution, "[i]t is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of the wife's efforts which constitute the asset for distribution by the Court." *In re* Marriage of Horstmann, 4 FAM. L. REP. 3069, 3073 (Iowa 1978).

This distinction may be tenuous, but it is reasonable for a court to find that an intangible item such as an academic degree or the benefits it can

The presumption that parties to a marriage of substantial duration have equally contributed to the accumulation of property was affirmed by a Kentucky court in *Herron v. Herron*.[62] The *Herron* court, however, did indicate that this presumption could be rebutted by evidence "that one or the other was a spendthrift, or declined to devote his best efforts to the prosperity of the union . . . ."[63] It should be noted that the above factors, as with marital duration, do not operate solely for the benefit of the homemaker-spouse, but may inure to the husband's benefit as well.[64]

Although an equal division of the marital property may frequently be the most practical solution for the court, it is not mandated under the Illinois Act.[65] What is mandated is a reasonably detailed consideration of the individual contributions within the marriage.[66] The rights flow from that finding. When compared with its predecessor, the Illinois Marriage and Dissolution of Marriage Act[67] creates property interests that flow from the marriage as a matter of right, making equitable ownership the rule rather than the exception. The Illinois Act also bases

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produce is a form of property resulting from spousal contributions. Since acquisition of the degree was made possible by the efforts of the wife in both cases, and since the degree provided the necessary basis for the production of income as an attorney, it had attributes of property and should have been valued together with the other types of marital property.

62. 4 FAM. L. REP. 2058 (Ky. App. 1977).

63. *Id.* at 2059.

64. *See, e.g.*, Thompson v. Thompson, 30 Colo. App. 57, 59, 489 P.2d 1062, 1064 (1971): "We find no statutory or common law authority which would require the application of a different set of standards to the treatment of a husband's non-capital contributions to assets acquired during marriage than would be applied to a wife's contributions."

65. The statutory provision relied upon in *Herron* stated that the court shall consider "(a) contributions of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker." KY. REV. STAT. § 403.190 (1972). The Illinois statute is more detailed, and it expressly includes as a factor in distribution the contributions of a spouse to the "preservation, or depreciation or appreciation in value, of the marital and non-marital property." ILL. REV. STAT. ch. 40, § 503(c)(1)(1977); *see* note 41 *supra* for text of section. This language directs the court to consider the full extent of the actual contributions. For a similar approach under case authority, see Liggett v. Liggett, 152 Colo. 331, 380 P.2d 673 (1963).

66. This inquiry need not scrutinize the daily lives of the parties, for that would render this scheme of property division impracticable, if not absurd. In *In re* Marriage of Patus, 372 N.E.2d 493 (Ind. App. 1978), the wife claimed that since she had been both a homemaker and a wage earner, she was entitled to more than an one-half interest in the marital property. The Indiana court rejected this claim, finding that both the husband and the wife had made roughly equal contributions in both capacities. Accordingly, the court declined to make an "exhaustive examination of who washed the dishes, who took out the trash, who painted the house, who changed the oil in the car, who changed the diapers, who paid the bills and who mowed the lawn. . . ." *Id.* at 496.

67. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

property rights only on the express intent of the parties, so property division upon dissolution of the marriage is founded upon function rather than fiction. Since both parties are entitled to an equitable share of the marital property in proportion to their contributions during the marriage, the next question that arises is what property is included within the term "marital property."

PROBLEMS IN STATUTORY INTERPRETATION

The parameters of marital property are elusive.[68] While property disputes may be resolved by the parties,[69] those resolved by the court require guidelines from which to identify marital property if the distribution system is to operate effectively. In discerning these guidelines, the language of the statute must be read in light of the objectives desired, bearing in mind that this property law is *sui generis*, applying only to dissolution and non-retroactive invalidity actions.[70] Under the Illinois Act, the word "acquired" can be interpreted with various meanings.[71] Since marital property consists of all property "acquired by either spouse subsequent to marriage,"[72] a concept of acquisition that effectuates the underlying purpose of the Act must be developed for its proper application.

The major area of confusion involves property in which the titled spouse does not have a complete, indefeasible, and immediate interest. Property of this kind evokes questions as to what form or degree of ownership will include or exclude property from the marital property category. Reference to concepts of ownership in other areas of property law provides a starting point in interpreting the Illinois Act. But, as Judge Learned Hand warned, we must "remember that statutes always have

68. This is so despite the detail of the new Act.

69. ILL. REV. STAT. ch. 40, § 502(a) (1977) (allows the parties to execute a valid property settlement agreement which, if not unconscionable, will preclude the court's reaching a contrary decision as to the division of the property). *Id.* § 503(a)(4) (1977) (excluding from "marital property" that "property excluded by valid agreement of the parties").

70. ILL. REV. STAT. ch. 40, § 503(a) (1977). This provision, which defines marital property, limits its application with this introductory phrase: "For purposes of this Act . . . ." *See also* Kujawinski v. Kujawinski, 71 Ill. 2d 563, 572-73, 376 N.E.2d 1382, 1386-87 (1978). The Illinois Supreme Court interpreted the introductory language of § 503(a) to limit marital property classification to subsequent to the institution of an action authorized under the Act.

71. In interpreting "acquired," courts should "[a]void, in particular, the one-word, one-meaning fallacy. Words may have many different meanings. There are more ideas in the world to be expressed than there are words in any language to express them." H. Hart & A. Sacks, The Legal Process 1156 (1958) (unpublished manuscript in Harvard Law School Library).

72. ILL. REV. STAT. ch. 40, § 503(a) (1977); *see* note 49 *supra* for text of section.

some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[73] Therefore, this article will examine two types of property interests that have frequently engendered dispute—rights in real property under a mortgage and pension plans.

Real Property

Cain v. Cain[74] illustrates the problem of determining rights in real property under a mortgage contract. In *Cain*, the husband purchased a farm for $20,000 before the marriage, for which he made a $3,500 down payment, and gave a note for $16,500 secured by a mortgage on the farm. The husband made seven monthly installment payments on the note before marrying the wife, and 187 monthly payments during the marriage. Title was held solely in the husband's name. The wife claimed an 85 per cent interest in the farm, based upon a computation of the amounts paid prior to and those paid during the marriage. She argued that "whether property is marital or nonmarital should depend upon the source of the funds used to acquire the property, not upon the time at which bare legal title was acquired."[75]

The Missouri Appellate Court employed a two-step analysis to reach the conclusion that the farm was nonmarital property. First, the court asked whether the encumbrance upon the property rendered the husband any less the owner of the farm. The *Cain* court responded in the negative, noting that a mortgagee has no legal title to the property, but only a lien to secure the debt.[76] Thus, the fact that the property was subject to a mortgage was immaterial to the question of ownership.

Second, the court focused upon the meaning to be attributed to the word "acquired," since the wife contended that acquisition had gradually occurred with each subsequent payment on the mortgage contract. In defining "acquired," the court referred to a variety of sources, but relied principally upon legal encyclopedias, treatises, and dictionaries. The *Cain* court found that "acquired contemplates inception of title,"[77] and concluded: "It is indisputable that John came into possession of the farm prior to the marriage. He had control of it. Prior to this proceeding it was his to improve, lease, sell, subdivide, devise,

73. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).
74. 536 S.W.2d 866 (Mo. App. 1976).
75. *Id.* at 869.
76. *Id.* at 870.
77. *Id.* at 871 (quoting 15 AM. JUR. 2D *Community Property* § 22, at 836 (1976)).

and even to further encumber, subject of course to the lien."[78]

It is evident that the *Cain* court did not consider the underlying statutory scheme in deciding the case, for two factors in that scheme militate against the result reached. First, reference to powers one has over property should not be used to define "acquired," because the manner in which title is held is irrelevant to the determination of interests in property clearly acquired during marriage. Title unquestionably confers powers, but mere possession of those powers cannot be dispositive of the rights of another in that property. This is inextricably bound to the second statutory factor upon which the *Cain* opinion is impaled.

Since the concept of rights in property under the statute is based upon onerous acquisition of property,[79] there is ample basis for granting the wife's claim in *Cain*. Her contention is that that portion of the property secured by joint efforts should be subject to distribution as marital property. While this argument may not comport with traditional definitions of ownership, it is consistent with the statutory intent. Her argument is consonant with the theory of rights implied in the statute, and the word "acquired" should be interpreted in light of the underlying theory. Acquisition therefore does not inescapably take place at a fixed point in time.

The final criticism of *Cain* is directed at the court's peculiar preoccupation with form over substance. Had there been no purchase of property, the money used to purchase the property would have been marital property. However, the asset lost its character as marital property because it was converted from one form (money) into another (real property). An example will illustrate the superficiality of this position: Had the property not consisted of a single tract, but of various individual parcels whose time of purchase and source of payment corresponded precisely with those present in *Cain*, the opposite result would have been reached. The court seemed fixated on the unitary nature of the property in reaching its decision. Yet, since no principled distinction exists between the single tract and a series of parcels, the aggregate of which equals the single tract, the same result should be reached in both instances.

If joint efforts are rendered which yield something of value, the statutory scheme would be frustrated if only one party were to receive the result of the joint undertaking. Emphasis must be placed on the compensatory aspect of the scheme, rather than on completeness or maturity of the existing interest in the

78. *Id.* at 872 (footnotes omitted).

79. *See* note 51 and accompanying text *supra*.

subject property. The misplaced reliance on completeness or maturity of rights results in the operation of a mechanical, simple-minded concept of acquisition. Nonetheless, the reliance upon the unitary character of property is hardly aberrant, even in some of the community property states.[80]

California is a noteworthy exception, however, because separate and community property are not considered mutually exclusive categories of property. "[T]he rule developed through the decisions in California gives to the community a pro tanto community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payment made with separate funds."[81] Since this rationale adheres to the partnership model on which the Illinois Act is based,[82] its acceptance is urged as providing a proper guideline for determining the parameters of "acquired."

Pension or Retirement Plans

The concept of "acquired property" should apply not only to property over which one of the parties has power of ownership prior to marriage, but also to that property over which no present right of enjoyment exists in either party. The argument centers not on whether acquisition has taken place, but on whether property exists that is subject to acquisition. Courts will have to determine what constitutes an ownership interest sufficient to confer present rights upon the parties. Past analysis has frequently relied on such traditional notions as "matured" or "vested." Thus, what is presently occurring is a confrontation between a new statutory scheme and a cumbersome, restrictive body of concepts best relegated to future interests.[83]

What disturbs the courts is the possibility of the nonrealization of the interest in property. Recent decisions recognize that

80. *See, e.g.*, Forbes v. Forbes, 118 Cal. App. 2d 324, 325, 257 P.2d 721, 722 (1953).

81. *Id.* at 325, 257 P.2d at 722; *accord, In re* Marriage of Jafeman, 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483, 491 (1972).

82. *See* notes 35-39 and accompanying text *supra*.

83. Within this confrontation, certain issues are fairly well settled. Generally, after retirement has occurred, all of the retirement pay is subject to distribution as marital property. *See, e.g.*, Karlin v. Karlin, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972); Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960); Morris v. Morris, 69 Wash. 2d 506, 419 P.2d 129 (1966). Similarly, disability payments after a party has retired are subject to distribution. *E.g.*, Busby v. Busby, 457 S.W.2d 551 (Tex. 1970). Eligibility to retire, and not retirement itself, provided the basis for prospective benefits being accorded treatment as marital property. *E.g.*, Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968).

determination of rights in pensions or similar plans must focus not on the events that may defeat the right to receive the benefits, but upon the nature of the interest subject to defeasance. If the interest becomes presently enjoyable by the happening of an anticipated event, such as retirement, the beneficiary then has a definite and enforceable legal claim to that property upon retirement. This interest is distinguishable from a mere expectancy, which lacks the element of enforceability.

The concern over nonrealization of the interest is essentially a problem of implementation. Distribution of interests in property should not be denied solely because of the problems attendant to realization of that interest. If the right to future enjoyment of the interest is traceable to the joint efforts of the parties, non-vested interests should be treated like other marital property,[84] the proportionate interest of each spouse determined by the contribution of that individual's efforts to the entire interest. While this argument is logically compelling, relatively few jurisdictions have accepted it.

In *Tucker v. Tucker*,[85] a New Jersey court was asked to distribute interests in incentive compensation and pension plans, each of which was payable upon either age attainment or disability. The court held that only vested interests were subject to distribution, and defined vested as an interest "subject to no contingencies."[86] The *Tucker* court therefore refused to distribute to the wife property that the husband was not certain that he would receive. While this position has gradually been eroded,[87] it has not yet been overruled. There are, however, in-

84. As was true with interests in real property under a mortgage contract, it is plausible to say that the interest in pension plans has been incrementally acquired subsequent to marriage.

85. 121 N.J. Super. 539, 298 A.2d 91 (1972).

86. *Id.* at 550, 298 A.2d at 96.

87. *See, e.g.*, Stern v. Stern, 66 N.J. 340, 348, 331 A.2d 257, 262 (1975):

> [T]he concept of vesting should probably find no significant place in the developing law of equitable distribution. The notion of a vested interest came into being in a feudal society and was intimately associated with the medieval concept of seisin. . . . The now customary usages of the concept of vesting are clearly in no way relevant to the question of effecting an equitable distribution upon the occasion of divorce. Our Statute requires, in order that property be available for distribution incident to a divorce, that it shall have been acquired during marriage. There is no reference to vesting.

But see Callahan v. Callahan, 142 N.J. Super. 325, 361 A.2d 561 (1976) (stock option presently available to husband); Blitt v. Blitt, 139 N.J. Super. 213, 353 A.2d 144 (1976) (non-contributory pension, but husband had an absolute right to a fixed amount when the divorce complaint was filed); Pellegrino v. Pellegrino, 134 N.J. Super. 512, 342 A.2d 226 (1975) (contributory pension). In White v. White, 136 N.J. Super. 552, 347 A.2d 360 (1975), the court held that since none of the conditions precedent to receipt of the benefits had occurred, the property was not subject to distribution.

dications of a subtle shift in focus from the requirement of vesting to an examination of equities which are relevant to the property claims.[88]

In *McGrew v. McGrew*,[89] pension rights which had not yet been exercised were presently available to the husband. If he did not exercise these rights before his death or retirement, they would be forfeited. Thus, a hybrid situation was presented where present rights existed, even though they were subject to defeasance. Instead of focusing upon whether the presently realizable interest was an absolute right to enjoyment, the *McGrew* court looked at whether, assuming the right did mature, its existence was attributable to the efforts of the couple, since "the consideration critical to the issue of distribution is the extent to which the anticipated benefits will have been generated by the mutual efforts of the parties."[90] Consequently, the court felt obligated to "act upon the equities which are relevant to the claims asserted upon the proceeds when, as, and if they materialize."[91] Since the husband had not exercised his option, there was neither present enjoyment of the property nor an indefeasible right to possession, factors that earlier decisions considered the *sine qua non* for distribution. Following the holding in *McGrew*, it would be a short step for a court to disregard completely the requirement of vesting in dividing property upon dissolution.[92]

Non-vested pension rights were held to be a community asset subject to distribution in the landmark case of *Brown v. Brown*.[93] In *Brown*, two additional years of service had to be rendered before the beneficiary was entitled to the pension benefits. The California Supreme Court first examined precedent and concluded that these past decisions rested upon the traditional belief that non-vested pension rights did not constitute property.[94] Concluding that prior decisions were erroneous,[95] the *Brown* court ruled that non-vested pension rights were property.[96] The salient characteristic of property was its en-

88. *See* notes 89-91 and accompanying text *infra*.

89. 151 N.J. Super. 515, 377 A.2d 697 (1977).

90. *Id.* at 518, 377 A.2d at 699.

91. *Id.*

92. *See* Woodward v. Woodward, 571 P.2d 294 (Ariz. App. 1977); DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971); Pinkowski v. Pinkowski, 67 Wis. 2d 176, 226 N.W.2d 518 (1975). *But see* Savage v. Savage, 374 N.E.2d 536 (Ind. App. 1978).

93. 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

94. *Id.* at 844, 126 Cal. Rptr. at 636, 544 P.2d at 564.

95. The *Brown* court overruled French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941).

96. 15 Cal. 3d at 842, 126 Cal. Rptr. at 634, 544 P.2d at 563.

forceability as a contractual right, as opposed to an expectancy, which is unenforceable and the realization of which turns upon the future beneficence of some benefactor.[97]

The *Brown* court next projected into the future, noting that if the husband were to work the two additional years, he would then possess an indefeasible right to the pension proceeds. Were vesting to be dispositive of property rights, the date of dissolution would determine the existence of assets, notwithstanding the community efforts that were responsible for acquiring those interests. It was the distinction between the existence of substantive property rights and the difficulties attendant upon their distribution that compelled the California court to conclude that "the claim of mere administrative burden surely cannot serve as support for an inequitable substantive rule which distinguishes between vested and non-vested rights."[98] The *Brown* court looked to the joint efforts that comprised the community, and, noting that the wife's contribution was not "one whit less"[99] regardless of how the pension was characterized, the court held: "[T]he husband's pension rights, a contingent interest, whether vested or not vested, comprise a property interest of the community and . . . the wife may properly share in it."[100]

To the extent that interests in property are attributable to the marriage,[101] the property should be shared by both parties.

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97. *Id.* at 847, 126 Cal. Rptr. at 637, 544 P.2d at 565.

98. *Id.* at 849, 126 Cal. Rptr. at 639, 544 P.2d at 567. To combat this problem, a court may continue jurisdiction to supervise the payments of pension benefits. Were that approach not taken, the logistical problems might be enormous, but that should not be defeative of substantive rights. *See, e.g.*, Bass, *ERISA and the Treatment of Pensions as Property Divisible in Divorce*, 4 FAM. L. REP. 4009, 4011-12 (1978).

99. 15 Cal. 3d at 851, 126 Cal. Rptr. at 642, 544 P.2d at 570 (1976).

100. *Id.* at 852, 126 Cal. Rptr. at 642, 544 P.2d at 570.

101. Difficult questions still exist regarding property interests. The United States Supreme Court recently granted *certiorari* to review Hisquierdo v. Hisquierdo, 19 Cal. 3d 613, 139 Cal. Rptr. 590, 566 P.2d 224 (1977), (*certiorari granted* April 24, 1978, No. 77-533). In his brief, the husband claimed that the language of the Railroad Retirement Act prohibiting any assignment, attachment, or other form of alienation of any annuity "under any circumstances whatsoever" precluded the distribution of the benefits as community property. 45 U.S.C. § 231(m) (1974). The Supreme Court of California concluded that the statute was directed at creditors, and to the extent that a spouse had a present interest in the other's pension benefits, the vindication of that right did not fall within the prohibition of the federal statute. Similarly, ERISA expressly supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this Title and not exempt under Section 1003(b) of this Title." 29 U.S.C. § 1144 (1974). Thus, since 29 U.S.C. § 1056(d)(1) prohibits the assignment or alienation of benefits, there is a question of whether state divorce laws that effect the distribution of benefits are superseded by this statute.

A contrary result would enrich one spouse at the expense of the other by resorting to a rule of expediency rather than reason. For an interest to constitute a right in property acquired subsequent to marriage, that interest need not presently exist in a palpable form, but need only bear the attributes of property, merely awaiting realization. This fact, together with the efforts that give rise to the acquisition of the property, are the twin touchstones that must be considered to facilitate the proper application of the Illinois Act.

Closing Date

The final problem that courts have had to contend with is whether the closing date for the acquisition of marital property should be coextensive with the date of dissolution of the marriage. The predominant view is that when the partnership has ceased to operate *in fact*, it is irrational to permit the acquisition of additional "marital property."[102] The minority position is expressed in *Wife J. v. Husband J.*,[103] wherein one party received the proceeds from a life insurance policy subsequent to filing the complaint for dissolution of marriage. In holding the property subject to division, the Delaware court's viewpoint is stated as follows: "[N]o statutory provision or judicial decision has been cited which indicates a legislative policy that the marriage should be considered as being legally terminated prior to the entry of a final decree of divorce."[104]

Both the New Jersey and Delaware statutes differ from that of Illinois in one fundamental respect. While those statutes allow an equitable division of the property acquired either "during the marriage"[105] or "subsequent to the marriage,"[106] Illinois specifically defines marital property as "[a]ll property acquired

102. The Supreme Court of New Jersey, in formulating its rule, originally set the closing date as of the filing of the complaint. Painter v. Painter, 65 N.J. 196, 218, 320 A.2d 484, 495 (1974). This rule may be criticized, however, because the marriage subsists subsequent to filing, and property acquired thereafter is therefore literally acquired "during the marriage." N.J. STAT. ANN. § 2A:34-23 (1971). Another repositioning of that cut-off point has been advanced. In the face of a separation agreement and a physical separation, the Supreme Court of New Jersey found the date of separation to constitute the terminal point for acquisition, reasoning that to find otherwise would be "clearly irrational." Smith v. Smith, 72 N.J. 350, 361, 371 A.2d 1, 7 (1977). Another court, in view of a seven-year separation, rested its decision on the fact that "[w]hen people are no longer partners, there is no partnership." Ross v. Ross, 151 N.J. Super. 486, 488, 376 A.2d 1350, 1351 (1977).

103. 367 A.2d 655 (Del. Super. 1976).

104. *Id.* at 657. *See generally* DEL. CODE tit. 13, § 1513 (1976). Unlike Illinois, the Delaware statute does not exclude from marital property that property acquired by gift, bequest, devise or descent.

105. N.J. STAT. ANN. § 2A:34-23 (1971).

106. DEL. CODE tit. 13, § 1513(b) (1976).

by either spouse after the marriage and before a judgment of dissolution of marriage. . . ."[107] This language, coupled with the provision excluding "property acquired by a spouse after judgment of legal separation,"[108] appears to prohibit other considerations as to the closing date for acquisition of marital property.

The import of this language, however, must not be taken too literally. Although the closing date for acquisition has been precisely set, blind adherence to this rule may at times be inconsistent with the purpose of the Act. While property acquired may technically be considered marital property, the waning or collapse of the partnership calls for a proportionate reduction of the parties' interest in this property consistent with the actual efforts made. If one party has deserted and been continuously absent until the date of dissolution, then that person's interest in the property acquired subsequent to desertion may well be non-existent.[109] Although the latitude provided by the Illinois Act demands that the courts draw some fine distinctions in apportioning property, such leeway avoids the obvious pitfalls of strictly following a narrow rule of law.[110]

THE NEW ACT AND CONFLICT OF LAWS

Even if we can decide with reasonable certainty whether property has met the acquisition requirements for marital property, do the time and place of acquisition, or present situs of the

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107. ILL. REV. STAT. ch. 40, § 503(b) (1977):

> (b) All property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

108. ILL. REV. STAT. ch. 40, § 503(a)(3) (1977); *see* note 49 *supra* for text of section.

109. *See, e.g.*, Liggett v. Liggett, 152 Colo. 331, 380 P.2d 673 (1963). Similarly, in Colley v. Colley, 460 S.W.2d 821, 826 (Ky. 1970), the court said:

> Fault is not a relevant consideration except when personal considerations are present to the extent that the spouse concerned can be said to have made no contribution to the acquisition of the property. In such instance, the spouse's interest is insignificant or nonexistent, not because of fault, but simply because the concerned spouse made no contribution to the acquisition of the property.

110. The Illinois approach clearly avoids the automatic operation called for by the community property statute. In Baragry v. Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977), the husband unsuccessfully argued that the community, for all practical purposes, had collapsed prior to legal dissolution. The rights in community property subsisted, therefore, despite a considerable breakdown in the functioning of the community.

property affect its division and distribution under the Illinois Act? The answer to this question ranges across the artificial boundaries of contract law, property law, and constitutional law, revealing a marital property law that is *sui generis*, governed by the law of the divorce forum.[111]

At one time the question of which law to apply in determining interests in real or personal property was answered by choosing the law of the situs of the property or the law of parties' domicile at time of acquisition.[112] Thus, the California case of *In re Thornton's Estate*,[113] which found that property interests vest upon acquisition and are not subject to divestiture through the operation of the different property law of a sister state was hailed as indisputably correct.[114] In recent years, though, this position has steadily declined, as its premise of constitutional necessity has repeatedly been questioned.[115]

In *Addison v. Addison*,[116] a couple moved from Illinois to California bringing with them a considerable amount of personal property. Under the rule espoused in *Thornton's Estate*, the trial court held the applicable quasi-community property statute[117] unconstitutional. Although the Supreme Court of

111. An entire book has been devoted to this and related topics. H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS (1972). *See also* Annot., 14 A.L.R.3d 404 (1967); de Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 501 (1965); Sheehan, *Selected Community Property Problems of the Migrant Spouse*, 10 FAM. L.Q. 433 (1973); Note, *Community Property in a Common Law Jurisdiction: A Seriously Neglected Area of the Law*, 16 WASHBURN L.J. 77 (1976).

112. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 233, 257 (1971).

113. 1 Cal. 2d 1, 33 P.2d 1 (1934).

114. R. LEFLAR, AMERICAN CONFLICTS LAW § 236 (Rev. ed. 1968):

> There is no doubt that the statutes were unconstitutional and the California court duly invalidated them. A rule that the mere taking of goods across a state line results in this loss of a half-interest in the title clearly involves a taking of property without due process of law. (footnotes omitted).

115. For an early criticism, see Armstrong, *"Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity*, 33 CAL. L. REV. 476 (1945).

116. 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1967). In connection with this opinion, see Note, *Retroactive Application of California's Community Property Statute*, 18 STAN. L. REV. 514 (1966).

117. CAL. CIV. CODE § 140.5 defined quasi-community property to mean:

> all personal property wherever situated and all real property situated in this State heretofore or hereafter acquired:
>
> (a) By either spouse while domiciled elsewhere which would have been community property of the husband and wife had the spouse acquiring the property been domiciled in this State at the time of its acquisition; or
>
> (b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

California did not expressly overrule *Thornton's Estate*, it did limit its range of application. In concluding that the statute was constitutional, the court noted that it

> 'makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him. . . .' Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California.[118]

Furthermore, the *Addison* court stated that the nexus between California and the parties was fully established after the creation of a new domicile and the occurrence of "acts or events which give rise to an act for divorce or separate maintenance."[119] Once the connecting links existed, the forum state's interest (California) was sufficient to predominate over any other state, and hence, the court was able to apply its own law. The same result has been reached under similar property statutes.[120]

In substance, the Illinois Act is similar to these quasi-community property statutes. Since marital property in Illinois is "all property acquired by either spouse subsequent to the marriage,"[121] and how title is held is irrelevant to the distribution of marital property,[122] neither the law of the state where the acquisition occurred nor the law of the state where the property is presently located will control its distribution as marital property. This interpretation is strengthened by the broad language of the statute, and by the fact that since two of the forms of ownership listed cannot arise under Illinois law,[123] the Act must be

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This section has been repealed and replaced by CAL. CIV. CODE § 4803 (1970):

> As used in this part, 'quasi-community property' means all real or personal property, wherever situated . . ., heretofore or hereafter acquired . . . *in any of the following ways*:
>
> (a) By either spouse while domiciled elsewhere which would have been community property . . . *if* the spouse . . . *who acquired* the property *had* been domiciled in this state at the time of its acquisition.
>
> (b) In exchange for real or personal property, wherever situated, . . . *which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.*

118. 62 Cal. 2d 558, 566, 43 Cal. Rptr. 97, 102, 399 P.2d 897, 902 (1967).

119. *Id.*

120. *See* Woodward v. Woodward, 571 P.2d 294 (Ariz. App. 1977).

121. ILL. REV. STAT. ch. 40, § 503(a) (1977); *see* note 49 *supra* for text of section.

122. ILL. REV. STAT. ch. 40, § 503(b) (1977); *see* note 107 *supra* for text of section.

123. *Id.* (including tenancy by the entirety and community property as

intended to apply to property either originally acquired elsewhere or presently existing outside of Illinois. Hence, the controlling law must be that of Illinois.

The Illinois Act has also resolved an additional choice of laws problem. Previously, courts had to make not one, but two determinations in dividing property. First, they had to decide which state's law determined the character of the property, whether separate or co-owned in some form. Then, as a separate inquiry, the court had to determine whether the same state's law should determine its distribution.[124]

The Illinois Act renders this form of interests analysis unnecessary, as its choice of laws rules leave no room for doubt as to the applicable law. The Act does both; it characterizes the property and it provides for the mode of distribution.[125] Where property is located outside of Illinois, the Illinois Act has an extra-territorial reach, because there exists authority empowering an Illinois court to render an order affecting realty located outside the forum state.[126] As a whole, the Illinois Act is self-contained, setting forth both substantive rules and choice of laws principles for applying those rules.

CONCLUSION

Much has been achieved by the Illinois Marriage and Dissolution of Marriage Act.[127] It has taken as ill-defined and confused a notion as special equities and has transformed its animating principle into the fundamental basis for property division—marital property—setting forth clear guidelines for its im-

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two of the forms of property included in "marital property," and subject to the court's power of distribution).

124. *See, e.g.*, Rau v. Rau, 6 Ariz. App. 362, 432 P.2d 910 (1967); Berle v. Berle, 97 Idaho 452, 546 P.2d 407 (1976). *But see* Brown, *Conflict of Laws Between Community Property and Common Law State in Division of Marital Property in Divorce*, 12 MERCER L. REV. 287, 294 (1961).

125. ILL. REV. STAT. ch. 40, § 503 (1977).

126. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 55 (1971); Chirekos v. Chirekos, 33 Ill. App. 3d 606, 338 N.E.2d 140 (1975). The California scheme provides clear directives for the implementation of this extra-territorial power. The preferred mode of division would not involve any action that would change the nature of the interests in real property situated elsewhere. If that cannot be followed, the court may:

> (1) Require the parties to execute such conveyance or take such other action with respect to the real property situated in the other state as may be necessary;
>
> (2) Award to the party who would have benefited from such conveyance or other action the money value of the interest in such property that he would have received if such conveyance had been executed or other action taken.

CAL. CIV. CODE § 4800.5 (1970).

127. ILL. REV. STAT. ch. 40, §§ 101-802 (1977).

plementation. The Act is evidence of an area of law that has been changed to meet the modern perception of the nature of marriage. Even more, the marital property concept in the Illinois Act is at the vanguard of a national movement toward more equitable treatment of the parties upon dissolution of the marital relation.

The new Act has, much like the commercial partnership model upon which it is based,[128] determined that the parties shall withdraw from the marital partnership in relation to the amount individually contributed to that partnership. While gray areas still exist as to some types of marital property, especially as to rights in real property under a mortgage contract[129] and pension or retirement plans,[130] guidelines exist and sufficient latitude prevails to resolve these matters. There is sufficient discretion inherent in the Act that allow the courts to apply the law equitably to different factual situations. This discretion, alone, is an advance in the marital law of Illinois. When coupled with the clarified choice of laws provision,[131] the Act removes much of the uncertainty and inequity that resulted from the old law.

Divorce reform, to be effective, must not only be based upon a clear perception of people's needs and rights, but the statutes themselves must be coherently expressive of this perception. The new Act is coherently expressive of the present-day perception of marriage. Reform has been long in coming, to be sure, but hopefully the wait has not been "so long in the anteroom that the propertyless housewife will walk away from the operating table to the market place."[132]

128. *See* text accompanying notes 34-39 *supra*.
129. *See* notes 74-82 and accompanying text *supra*.
130. *See* notes 83-100 and accompanying text *supra*.
131. *See* notes 101-09 and accompanying text *supra*.
132. Glendon, *Is There a Future for Separate Property*, 8 FAM. L.Q. 315, 328 (1974).