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LEGISLATION

PROPERTY DISPOSITION UPON DIVORCE IN MARYLAND: AN ANALYSIS OF THE NEW STATUTE

I. INTRODUCTION

Family law in Maryland is in the midst of revision both by the courts and by the legislature. In response to a variety of stimuli, including the adoption in Maryland of the Equal Rights Amendment,¹ pressure from women's groups seeking equality, pressure from men's groups seeking greater and more equitable rights in child custody, the rapidly rising divorce rate, the spread of no-fault divorce, and a general change in attitude toward the roles of marriage and the family in our society, both the Maryland General Assembly and the Maryland courts have recently effected dramatic and substantive changes in Maryland law.

The changes thus far have affected the law governing a wide range of domestic law. No longer does the burden of support of minor children fall entirely upon the father of the family, but rather both parents have an obligation to contribute to the support of their children.² Neither the maternal custody preference for a child of tender years,³ nor the presumption that an adulterous parent is an unfit custodian,⁴ remains valid. Alimony may be awarded to either spouse rather than only to the wife.⁵ In sharp contrast to the title theory governing the division of property upon divorce, which gives to each spouse the property that he purchased and to which he holds title, the Court of Appeals of Maryland has recognized a presumption that household furnishings purchased either in contemplation of marriage or during the marriage are a gift to the marital unit by the purchasing spouse and are owned as tenants by the entirety.⁶

1. MD. CONST., DECL. OF RIGHTS art. 46.

2. MD. ANN. CODE art. 72A, § 1 (1970). This mutual parental obligation to provide child support is one that must be allocated by the trial court on both "a sexless basis" and "in accordance with [the parents'] respective financial resources." *Rand v. Rand*, 280 Md. 508, 517, 374 A.2d 900, 905 (1977). Not more than a month subsequent to the *Rand* decision, the Court of Special Appeals of Maryland held that a trial court had abused its discretion when it "automatically divided the amount of child support equally between the parents" without taking into consideration their relative financial conditions. *German v. German*, 37 Md. App. 120, 123, 376 A.2d 115, 117 (1977).

3. *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978). See Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641, 651-57 (1978).

4. *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977). See generally 7 U. BALT. L. REV. 141 (1977).

5. MD. ANN. CODE art. 16, § 3 (1973). Cf. *Orr v. Orr*, 47 U.S.L.W. 4224 (U.S. 1979) (state statute that limited alimony obligations to husbands held to violate the Equal Protection Clause).

6. *Bender v. Bender*, 282 Md. 525, 386 A.2d 772 (1978).

Courts of equity, sitting as divorce courts, which had been limited traditionally in their powers to those of the English Ecclesiastical Courts, recently have been granted all equitable powers.⁷ The traditional doctrine of interspousal tort immunity has been partially abrogated by allowing a spouse a cause of action for outrageous intentional torts.⁸ This trend towards abrogating traditional principles governing the relationship among the husband, the wife and the family during and after the marriage can be expected to continue. In February 1977, Governor Marvin Mandel appointed a Commission on Domestic Relations to conduct a review of the constitutional, statutory and common law applicable to domestic relations and to suggest legislation to the General Assembly.⁹

The 1978 Session of the General Assembly adopted two bills in the field of domestic relations that follow this trend, both of which were signed by the Governor and are in force.¹⁰ The first is a long-arm statute giving Maryland courts jurisdiction over a non-resident defendant in any civil proceeding arising out of the marital relationship.¹¹ Under this statute, the courts have authority to award child support, spousal support, and counsel fees, provided that the non-resident defendant has been personally served with process in accordance with the Maryland Rules of Procedure,¹² that Maryland was the state of the matrimonial domicile immediately prior to separation,¹³ and that the obligation to pay support or counsel fees arose under either the laws of Maryland or an agreement executed in Maryland by one of the parties.¹⁴ Jurisdiction also extends to any civil proceeding arising out of the marital relationship.¹⁵

This article, however, will discuss in detail only the second domestic relations statute adopted by the 1978 legislative session. The passage of that statute, Senate Bill 604,¹⁶ substantially changed Maryland law by authorizing courts, in a divorce or annulment

7. See Law of April 29, 1977, ch. 221, 1977 Md. Laws 1866 (preamble).

8. *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978).

9. See REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS (Jan. 1978).

10. S. 604, Act of May 29, 1978, ch. 794, 1978 Md. Laws 2304 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-603 to 3-6A-07 (Supp. 1978)); S. 553, Act of May 16, 1978, ch. 476, 1978 Md. Laws 1641 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 6-103.1 (Supp. 1978)).

11. *Id.* For a discussion of the constitutional requirements of a long-arm statute, see Strausberg, *The Abandoned Spouse: Alimony and Support Actions, and the Maryland Long Arm Statute*, 37 MD. L. REV. 227 (1977).

12. MD. CTS. & JUD. PROC. CODE ANN. § 6-103.1 (Supp. 1978). Md. Rule 107 provides for service of process outside the state.

13. MD. CTS. & JUD. PROC. CODE ANN. § 6-103.1 (Supp. 1978).

14. *Id.*

15. *Id.*

16. Law of May 29, 1978, ch. 794, 1978 Md. Laws 2304 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-603 to 3-6A-07 (Supp. 1978)). The General Assembly passed the bill on the final day of the 1978 legislative session.

proceeding, to allocate the assets acquired during the marriage by the grant of a monetary award¹⁷ and to provide for the use and possession of certain property.¹⁸ This statute brings Maryland law closer to the modern view that marriage is a partnership between equals, and establishes that state policy recognizes non-monetary as well as monetary contributions to a family.¹⁹ Although the law does not empower courts to change title to property,²⁰ it does grant power to effect an equitable distribution of property acquired during the marriage by providing for a monetary award to reflect an equal division of the value of marital property. Discretionary deviation from this equal division is permissible, provided the courts consider certain enumerated factors.²¹ Likewise, the statute enumerates the factors to be considered in granting a use and possession award of the family home and personal property used in the home to a spouse with custody of a minor child.²²

This article will analyze Maryland law prior to January 1, 1979, the substantive provisions of the new statute, and the ambiguities and problems of the statute that may require either litigation or further legislative action for clarification and improvement.

II. PRIOR LAW

The new statute expressly provides that it is applicable only to cases filed after January 1, 1979.²³ All cases filed prior to that date

17. Md. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (Supp. 1978).

18. *Id.* § 3-6A-06.

19. *Id.* § 3-6A-05(b)(1). The Governor's Commission on Domestic Relations Laws concluded that "non-monetary contributions within a marriage are real and should be recognized." REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 3 (Jan. 1978). Also, "[t]he General Assembly declare[d] that it is the policy of this State that marriage is a union between a man and woman having equal rights under the law." Law of May 29, 1978, ch. 794, 1978 Md. Laws 2304, 2305.

20. "[T]he court may not transfer the ownership of real property from one spouse to the other." MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-04(a) (Supp. 1978). "[T]he court may not transfer ownership of personal property from one spouse to the other." *Id.* § 3-6A-03.

21. *See id.* § 3-6A-05(b)(1)-(9).

22. *See id.* § 3-6A-06(a)(1)-(4).

23. Law of May 29, 1978, ch. 794, § 2, 1978 Md. Laws 2304, 2311. Several interim problems exist with this statute in determining whether the new law would apply to certain cases. Because the statute applies to cases filed after January 1, 1979, a litigant probably cannot return to court to modify or request relief under the provisions of the new law when a judgment has been rendered prior to the effective date. It is unclear whether an action filed prior to January 1, 1979, can be amended or supplemented and thereby qualify as a new action within the statutory provisions. The Maryland Attorney General has concluded, however, that the statute applies to causes of action arising before January 1, 1979, which culminate in a decree of divorce based upon a bill of complaint filed subsequent to that date. Md. Att'y Gen. Op., Daily Record, Dec. 30, 1978 at 4, col. 2. Nor is it clear whether a divorce petition filed prior to January 1, 1979 could be dismissed and a new divorce petition filed after January 1, 1979. Md. Rule 582 provides that equity actions may be dismissed with leave of the court, but a court has no

are subject to the previous law. In granting a divorce *a mensa et thoro*, Maryland courts have had the statutory authority to

award to the wife such property or estate as she had when married or the value of the same, or of such part thereof as may have been sold or converted by the husband having regard to the circumstances of the husband at the time of the divorce, or such part of any such property as the court may deem reasonable.²⁴

Despite the seemingly broad language of the statute, court decisions have limited its application to instances where there is an express agreement to repay the wife.²⁵

Under prior law, in most cases distribution of property upon divorce or annulment depended upon who held record title.²⁶ In distributing property upon the dissolution of a marriage, courts of equity had the authority only to

[D]etermine ownership of personal property other than chattels real, held, possessed or claimed by a party to the divorce proceeding, and in accordance with that determination, may:

(1) Make a division of the personal property between the parties;

discretion and must dismiss so long as the opposing party has not become entitled to affirmative relief. *Byron Lasky & Assocs. v. Cameron-Brown Co.*, 33 Md. App. 231, 364 A.2d 109 (1976).

Counterclaims under the Maryland Rules of Procedure are permissive. Md. Rule 314. Consequently, it is not clear which law would apply if one spouse filed a bill for divorce prior to January 1, 1979 and the other filed after that date. It is unclear whether the filing of the second divorce action would withstand a preliminary objection on the basis of the pendency of another action between the same parties for the same cause. Md. Rule 323. If the second bill for divorce withstands a preliminary objection, it is not clear what law would apply if the cases were consolidated. Md. Rules 603, 606 and 697 deal with consolidation, allowing wide discretion to the court. The court may render separate judgments, Md. Rule 606, and may dismiss one bill and hear the other. *Coppage v. Resolute Ins. Co.*, 264 Md. 261, 285 A.2d 626 (1972).

Most statutes adopted by the legislature become effective July 1 of the year of the legislative session. This statute was drafted with special effective date to allow time for education of the public and members of the Bar. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 13 (Jan. 1978).

24. MD. ANN. CODE art. 16, § 25 (1973). Under the Equal Rights Amendment, MD. CONST., DECL. OF RIGHTS art. 46, this provision extends to husbands.
25. *Smith v. Smith*, 37 Md. App. 277, 376 A.2d 1164 (1977) (citing cases).
26. See, e.g., *Lopez v. Lopez*, 206 Md. 509, 112 A.2d 466 (1955); *Sody v. Sody*, 32 Md. App. 644, 363 A.2d 568 (1976); *Abell v. Abell*, 12 Md. App. 99, 277 A.2d 629 (1971); *Joyce v. Joyce*, 10 Md. App. 516, 276 A.2d 692 (1970). This line of cases indicates that the court lacks jurisdiction to award the personal property of one spouse to the other. Courts also lack authority to change the parties' rights or estates in real property. See, e.g., *Dougherty v. Dougherty*, 187 Md. 21, 32, 48 A.2d 451, 457 (1946). Title to property is nonetheless subject to the equitable doctrine of resulting trusts. *Ensor v. Ensor*, 270 Md. 549, 312 A.2d 86 (1975); *Richardson v. Richardson*, 17 Md. App. 665, 304 A.2d 1 (1973).

(2) Order a sale of personal property and a division of the proceeds; or

(3) Make any other disposition of personal property it deems proper.²⁷

The court of appeals consistently strictly interpreted this statute. In most cases where property was found to have been jointly owned, the court divided the property equally.²⁸ Where only one spouse contributed funds to the purchase of jointly titled property, there was presumed to have been a gift of a one-half interest to the non-contributing spouse,²⁹ absent a showing of coercion or undue influence.³⁰ In cases where the property was titled in the name of one spouse only, however, the former statute was held not to empower the courts to transfer title or grant a monetary award to the non-property owning spouse.³¹ Consequently, this statute enabled the court to resolve only ownership disputes.³²

In resolving such ownership disputes, the courts considered several principles. First, a presumption of ownership was raised when record title was traced to a spouse. This record title was conclusive unless either rebutted by evidence of fraud or undue influence,³³ or a resulting trust could be established by proof that the

27. MD. CTS. & JUD. PROC. CODE ANN. § 3-603(c) (1974). Divorce was unknown at common law. The authority of the courts over divorce and annulment and their concomitant power to divide and distribute property are entirely statutory. *Altman v. Altman*, 282 Md. 483, 490, 386 A.2d 766, 770 (1978). Section 3-603 of the Courts and Judicial Proceedings Article has its foundation in the powers of the Ecclesiastical Courts of England. See *Dougherty v. Dougherty*, 187 Md. 21, 29, 48 A.2d 451, 456 (1946). In fact, the code specifically mentions those English courts. MD. CTS. & JUD. PROC. CODE ANN. § 3-603(a) (1974). The powers of the Ecclesiastical Courts of England did not enable a divorce court to exercise ordinary equity jurisdiction. Thus, a Maryland divorce court was governed by the limited powers established in the Ecclesiastical Courts. *Kapneck v. Kapneck*, 31 Md. App. 410, 413-14, 356 A.2d 572, 576 (1976). Because these English courts lacked the authority to apply general equity rules, the court of special appeals in *Kapneck* prohibited the issuance of an injunction in a divorce proceeding. *Id.* at 419, 256 A.2d at 578.

In order to enlarge the limited scope of authority of divorce courts, as determined in *Kapneck*, the General Assembly amended the statute governing court authority in an action for divorce or annulment. Law of April 29, 1977, ch. 221, 1977 Md. Laws 1866 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 3-603(b) (Supp. 1978)). The amended statute currently provides in pertinent part: "*Injunction* — A court of equity sitting in an action for divorce, alimony, or annulment has all the powers of a court of equity, and may issue an injunction to protect any party to the action from physical harm or harassment." *Id.*

28. *E.g.*, *Sody v. Sody*, 32 Md. App. 644, 363 A.2d 568 (1976).

29. *Klavans v. Klavans*, 23 Md. App. 144, 146, 326 A.2d 26, 27 (1974) (citing cases).

30. *Reed v. Reed*, 109 Md. 690, 692, 72 A. 414, 415 (1909).

31. *Gebhard v. Gebhard*, 253 Md. 125, 129-30, 252 A.2d 171, 173-74 (1969); *Brucker v. Benson*, 209 Md. 247, 250-51, 121 A.2d 230, 232-33 (1956); *Smith v. Smith*, 37 Md. App. 277, 281-82, 376 A.2d 1164, 1167 (1977).

32. MD. CTS. & JUD. PROC. CODE ANN. § 3-603(c) (1974).

33. *Cf. Brucker v. Benson*, 209 Md. 247, 253, 121 A.2d 230, 233 (1956) (court refused to address the effect of "fraud or concealment" on the ground that such question was not presented by the case).

parties did not intend the beneficial interest to run with legal title.³⁴ The rule that record title was conclusive of ownership applied even though one spouse made non-monetary contributions to the marriage that enabled the other to purchase the property.³⁵ The work efforts of the parties were not considered in determining ownership if only one party had record title.³⁶ Thus, a wife's payment of household expenses did not give her an interest in property titled solely in her husband's name.³⁷

Second, where record title to a particular asset did not exist, the court determined ownership by looking to the factual circumstances of the property's acquisition. The source of the funds contributed to the acquisition of property was an important consideration, but the burden of tracing the funds was on the spouse asserting the contribution.³⁸ Non-monetary contributions were not taken into consideration in calculating contributions to property and determining ownership.³⁹ Recently, however, the court of appeals limited the effect of this rule with respect to household goods and furnishings. In *Bender v. Bender*,⁴⁰ the court held that household goods and furnishings purchased either during the marriage or in contemplation of marriage are presumed to be a gift to the marital unit, and that consequently such property is held as tenants by the entirety.⁴¹ It was undisputed in *Bender* that the husband was the only spouse with income, and thus, the only one who could have contributed monetarily to the purchase of the disputed property. Apparently the presumption of joint ownership of household goods and furnishings can only be rebutted by evidence of record title, some other written record of purchase, or proof of an intention that the property remain separate property.⁴²

Prior law, however, granted only limited jurisdiction over real property to a divorce court.⁴³ Upon a divorce *a vinculo matrimonii* property held as tenants by the entirety was converted by operation

34. *Mountford v. Mountford*, 181 Md. 212, 218, 29 A.2d 258, 262 (1942).

35. See note 31 and accompanying text *supra*.

36. *Gebhard v. Gebhard*, 253 Md. 125, 130, 252 A.2d 171, 174 (1969).

37. *Woodall v. Woodall*, 16 Md. App. 17, 25, 293 A.2d 839, 843 (1972).

38. See *id.* at 25, 293 A.2d at 843-44.

39. *Gebhard v. Gebhard*, 253 Md. 125, 252 A.2d 171 (1969).

40. 282 Md. 525, 386 A.2d 772 (1978).

41. *Id.* at 534, 386 A.2d at 778-79. Tenancies by the entirety, permitted only between husband and wife, may not be severed during the lives of the spouses without their joint action. *Schilbach v. Schilbach*, 171 Md. 405, 407-08, 189 A. 432, 433-34 (1937). The effect of a divorce *a vinculo matrimonii* upon a tenancy by the entirety is to convert it into a tenancy in common. *Tucker v. Dudley*, 223 Md. 467, 164 A.2d 891 (1960). A divorce *a mensa et thoro*, however, has "no effect whatsoever" upon a tenancy by the entirety. *Eberly v. Eberly*, 12 Md. App. 117, 123, 278 A.2d 107, 110 (1971) (*per curiam*).

42. The *Bender* court did not indicate the degree of proof necessary to rebut the presumption.

43. *Hall v. Hall*, 32 Md. App. 363, 372, 362 A.2d 648, 653 (1976).

of law into a tenancy in common.⁴⁴ Thus, the court could provide the traditional common law remedy of partition or sale. The court had the authority to sell such property and distribute the proceeds to the parties according to their interests should it be unable to make an equitable partition.⁴⁵

In sum, in those cases in which only one spouse worked and title to all real property was in that spouse's name, the non-working spouse was generally not entitled to any of that property upon divorce. Although courts do have discretion to award alimony,⁴⁶ which may offset this inequity, it has proven in many cases a less than satisfactory alternative. Alimony does not survive the death of the spouse ordered to pay;⁴⁷ it is contingent upon the recipient spouse remaining unmarried;⁴⁸ and it is available only to a spouse who is "free of fault" at the time of the divorce.⁴⁹ Thus, a spouse's alimony rights are subject to conditions not generally associated with a division of property.

III. CURRENT LAW

A. Legislative History

On February 6, 1977, Governor Marvin Mandel established the Governor's Commission on Domestic Relations. The Commission is charged with reviewing the constitutional, statutory and common law applicable to domestic relations. The Commission's first action was to review Maryland law concerning the disposition of property when divorce or annulment occur.⁵⁰ This review resulted in proposed legislation⁵¹ that sought to remedy the "perceived inequity in pres-

44. *Keen v. Keen*, 191 Md. 31, 37-38, 60 A.2d 200, 204 (1948); *Hall v. Hall*, 32 Md. App. 363, 372-73, 362 A.2d 648, 653 (1976). The rule that a divorce *a vinculo matrimonii* based upon adultery "works a divestiture of the interest of the wrongdoer in the real property purchased solely with the funds of the innocent spouse, and held in a tenancy by the entirety" does not apply in Maryland. *McCally v. McCally*, 250 Md. 541, 545-48, 243 A.2d 538, 541-43 (1968).

45. MD. REAL PROP. CODE ANN. § 14-107(a) (1974).

46. See MD. CTS. & JUD. PROC. CODE ANN. § 3-603(a) (Supp. 1978).

47. Cf. *Bellofatto v. Bellofatto*, 245 Md. 379, 385, 226 A.2d 313, 316 (1967) (support payments provided for in separation agreement held not to be alimony because the payments were "not limited to the joint lives of the spouses"); *Woodham v. Woodham*, 235 Md. 356, 360, 201 A.2d 674, 676 (1964) (payments that the agreement "does not cut off . . . at the death of the husband" cannot be considered alimony).

48. *Knabe v. Knabe*, 176 Md. 606, 613, 6 A.2d 366, 369 (1939); *Simpson v. Simpson*, 18 Md. App. 626, 628, 308 A.2d 410, 412 (1973).

49. *Renner v. Renner*, 16 Md. App. 143, 160, 294 A.2d 671, 680 (1972) (quoting *Flanagan v. Flanagan*, 14 Md. App. 648, 288 A.2d 225 (1972)).

50. See REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS (Jan. 1978) (Letter from Beverly Anne Groner, Chairman of the Governor's Commission on Domestic Relations Laws, to Acting Governor Blair Lee, III (January 9, 1978)).

51. S. 604 (1978); H. 949 (1978).

ent Maryland law governing the disposition of real and personal property upon divorce or annulment."⁵²

In January 1978 legislation drafted by the Commission, offering substantial changes in existing law, was introduced concurrently in both houses of the General Assembly.⁵³ The changes proposed were in part prompted by the Commission's belief that the people of Maryland view the spouse whose contributions to a family are non-income producing as having contributed nevertheless to the purchase of property.⁵⁴ The Commission's proposed legislation was thus designed to reflect its perception of the current view of Maryland's citizens.

The Senate Judicial Proceedings Committee acted first on the legislation. Although the Committee adopted the basic reforms proposed by the Commission, it offered substantial changes for consideration by the Senate.⁵⁵ The changes would have authorized

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52. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 2 (Jan. 1978). This "perceived inequity" is demonstrated by the case of *Woodall v. Woodall*, 16 Md. App. 17, 293 A.2d 839 (1972), decided by the Court of Special Appeals of Maryland. In *Woodall*, the wife had worked during periods of the marriage and had paid for some of the family household expenses. The husband, in the meantime, used portions of his salary to acquire stocks and other securities, which he registered in his name alone. At the time of the divorce, the wife was not entitled to a share of the value of the securities, despite her monetary contributions to the family. *Id.* at 25, 293 A.2d at 843. The court of special appeals relied upon *Gebhard v. Gebhard*, 253 Md. 125, 252 A.2d 171 (1969), in which the court of appeals reversed a cash award to a wife for her services over the years as a homemaker, hostess, and secretary because she was not the record owner of the property and had made no monetary contribution toward its purchase. The disallowance of such monetary claims was followed by the court of special appeals in *Smith v. Smith*, 37 Md. App. 277, 376 A.2d 1164 (1977).
53. S. 604 (1978); H. 949 (1978). The bill proposed by the Commission was different in several significant respects from the enacted legislation. For example, the Commission proposed that the use and possession award of the family home and family use personal property could be granted for an unlimited period of time, and that title to family use personal property could be transferred from one spouse to the other. Although the use and possession award was primarily to benefit minor children, custody of a minor child was not an absolute necessity. The original bill provided that the interest of a spouse in using the home for the production of income was sufficient to permit use and possession of the home. Also, property acquired by one spouse by gift or inheritance was not excluded from the definition of marital property and would have been divided the same as any other property acquired during the marriage.
- The Commission's proposals were met with various objections. The definition of marital property was attacked as being overly broad because it included property acquired by gift or inheritance by one spouse. See undated Memorandum from Maryland Trial Lawyers' Association to the Senate Judicial Proceedings Committee. Additionally, concern was expressed that the lack of adequate guidelines for the distribution of property could generate increased litigation and thus result in delay and uncertainty. See Release from the National Organization for Women, dated April 10, 1978; Women's Law Center Analysis of H.B. 949 and S.B. 604.
54. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 3 (Jan. 1978).
55. See S. 604 (1978) (Senate Judicial Proceedings Committee Reprint).

an equal division of the value of the assets acquired during the marriage by means of a monetary award to compensate the spouse owning less than fifty percent of the assets.⁵⁶ The Senate Judicial Proceedings Committee proposal was rejected, however, by the full Senate, which offered amendments of its own to the Commission bill.⁵⁷

The Judiciary Committee of the House of Delegates began consideration of the legislation, with the Senate amendments, on Friday, April 7 and concluded Saturday, April 8. The Committee made substantial changes in the Senate version of the proposed legislation.⁵⁸ With the exception of one minor amendment, the bill, as amended by the House Judiciary Committee was adopted by the General Assembly on the final day of the 1978 legislative session, Monday, April 10, 1978.

The statute limits the effect of the title theory of property when a divorce or annulment occurs. The new law repealed subsection 3-603(c) of the Maryland Courts and Judicial Proceedings Code

56. *Id.* § 3-6A-05(8). The Senate Judicial Proceedings Committee offered other important amendments. The amendments excluded property acquired by gift or inheritance from the definitions of marital property. In addition, property subject to a use and possession award was excluded from the initial determination of marital property and, therefore, from the cash award. Further, the family use personal property section was redrafted to be parallel to the family home section. Also, the Committee proposal contained its own enforcement mechanism, which provided that the filing of the divorce operated as *lis pendens*.

57. *See* S. 604 (1978) (2nd Reader with Senate amendments). Although the Senate rejected the bill offered by the Senate Judicial Proceedings Committee, several of the proposals were adopted by the Senate. The Senate rejected the absolute 50-50 split of the value of the property, but added a "presumption of equality" in dividing the value of marital property. Prior acquired property and property received by gift or inheritance was excluded from the marital property definition. The use and possession award was limited to three years and upon termination the property would become marital property and would be divided accordingly. The Senate added a factor to be considered in determining whether to order a use and possession award, namely, hardship to the other spouse. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-06(a)(4) (Supp. 1978).

58. *See* Amendments to Senate Bill No. 604 (3d Reading File Bill) by the House Judiciary Committee. The House Judiciary Committee rejected the presumption of equality adopted by the Senate. The Committee added amendments which provided that a use and possession award could only be made to a spouse with custody of a minor child and that the award would terminate if the spouse remarried. Additionally, the amendment redefined minor child to include a child over 18 years of age who was disabled and dependent upon the parent. The Committee also excluded property received by gift or inheritance from the definition of family home.

Other Committee amendments provided that if a use and possession award was granted as part of a divorce *a mensa et thoro*, then the use and possession award could not be made effective for another three years in a subsequent action for a divorce *a vinculo*. The Senate added an enforcing mechanism, on the condition that the section providing that a monetary award was a judgment was deleted, and the Committee bill provided that the award may be reduced to a judgment to the extent that any part of the award is due and owing. Other amendments added by the Judiciary Committee are discussed in the text accompanying notes 135, 177 through 185 *infra*.

Annotated and enacted in its place a new subtitle entitled "Property Disposition in Divorce and Annulment."⁵⁹ The primary significance of the new law stems from the tri-partite categorization of certain real and personal property and the courts' concomitant powers regarding such property. The three new categories of property are marital property, the family home, and family use personal property.

Although courts may not change title to property under the new law,⁶⁰ they are given authority to provide a substitute for property division by granting a monetary award.⁶¹ This award is intended to compensate a spouse who holds title to less than an equitable portion of the property accumulated during the marriage.⁶²

B. Marital Property

Marital property, as defined by the new law, consists of,

all property, however titled, acquired by either or both spouses during their marriage. It does not include property acquired prior to the marriage, property acquired by inheritance or gift from a third party, or property excluded by valid agreement or property directly traceable to any of these sources.⁶³

Additionally, "[f]amily use personal property or the family home shall not be considered marital property so long as it is the subject of a use and possession order."⁶⁴

The statute prescribes a three-step process for the court's use in determining a monetary award. Initially, the court must determine what property is marital property. Second, the court must determine the value of such property. This determination may be made pursuant to a grant of an absolute divorce or annulment, or during a ninety-day period thereafter should the court reserve the right to do so, and if property division is at issue.⁶⁵ Finally, after making these

59. Act of May 29, 1978, ch. 794, § 2, 1978 Md. Laws 2304, 2311. The preamble to the new statute indicated a legislative intention that "property interests of the spouses should be adjusted fairly and equitably." *Id.* at 2305. The use of the term "Property Disposition" in the title of the statute is a misnomer. The court does not have the authority to "dispose" of property. Rather, its authority is limited to making monetary awards, awarding temporary use and possession of property, and determining questions of ownership.

60. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-03(a), 3-6A-04(a) (Supp. 1978).

61. *Id.* §§ 3-6A-05, 3-6A-06.

62. *Id.* § 3-6A-05(b).

63. *Id.* § 3-6A-01(e).

64. *Id.* § 3-6A-05(a). For a discussion of family use personal property and the family home, see text accompanying notes 71 through 83 *infra*.

65. *Id.* In contrast to the court's authority to order a use and possession award pursuant to a limited or absolute divorce or annulment, the court's power in determining marital property is limited to situations involving absolute divorce or annulment. Compare § 3-6A-06(b) with § 3-6A-05(a).

determinations, the court may make a monetary award in order to adjust the equities of the parties, "whether or not alimony is awarded."⁶⁶ The court also has the power to determine the method of payment of the monetary award.⁶⁷ Although the court is not empowered to change the title to property,⁶⁸ the monetary award may have that effect nonetheless because sale of the property may be necessary to satisfy the award.

The court, in determining the amount of the monetary award and the method of payment, is directed to consider the following:

- (1) The contributions, monetary and non-monetary, of each party to the well-being of the family;
- (2) The value of all property interests of each spouse;
- (3) The economic circumstances of each spouse at the time the award is to be made;
- (4) The circumstances and facts which contributed to the estrangement of the parties;
- (5) The duration of the marriage;
- (6) The age and the physical and mental condition of the parties;
- (7) How and when specific marital property was acquired including the effort expended by each party in accumulating the marital property;
- (8) Any award or other provision which the court has made under this subtitle 6A with respect to the family use personal property or the family home, and any award of alimony; and
- (9) Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.⁶⁹

C. *Family Home and Family Use Personal Property*

A significant aspect of the new statute is its provision that the court may order the use and possession of the family home and of the family use personal property for a period of three years following a final divorce decree.

The family home is defined as property in Maryland that,

- (1) Was used as the principal residence of the spouses when they lived together, (2) at the time of the proceeding is owned or leased by at least one of the spouses, and (3) is being used

66. *Id.* § 3-6A-05(b).

67. *Id.*

68. See note 63 and accompanying text *supra*.

69. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05(b)(1)-(9) (Supp. 1978).

or will be used by at least one of the spouses and a minor child as their principal residence. It does not include property acquired prior to the marriage, property acquired by inheritance or gift from a third party, or property excluded by valid agreement.⁷⁰

Family use personal property consists of,

tangible personal property, acquired during the marriage, owned by either spouse or owned jointly by both spouses, and used primarily for family purposes. It includes motor vehicles, furniture, furnishings and household appliances. However, it does not include property acquired by inheritance or gift from a third party.⁷¹

The court, when granting a limited divorce, an absolute divorce,⁷² or an annulment, is empowered to "determine which property is the family home and family use personal property."⁷³ As part of the court's *pendente lite* powers, the court may make this determination preliminarily and, after considering the factors for a final award, may award possession during the pendency of the divorce proceeding⁷⁴ to a spouse with custody of a minor child.⁷⁵

In determining whether to order use and possession, the court must consider

- (1) The best interests of any minor child;
- (2) The respective interests of each spouse in continuing to use the family use personal property or occupy or use the family home or any portion of it as a dwelling place;

70. *Id.* § 3-6A-01(b).

71. *Id.* § 3-6A-01(c).

72. A limited divorce is a divorce *a mensa et thoro*. Such a decree gives the injured spouse the right to live separate and apart from the one at fault. The parties, however, remain "*man and wife and there is no severance of the marital bonds.*" *Courson v. Courson*, 213 Md. 183, 188, 129 A.2d 917, 920 (1957) (emphasis in original). See also MD. ANN. CODE art. 16, § 25 (Supp. 1978). A divorce *a vinculo matrimonii* is a "divorce from the bond of marriage. It is a total divorce of husband and wife, dissolving the marital tie, and releasing the parties wholly from their matrimonial obligations." BLACK'S LAW DICTIONARY 566 (4th ed. 1968); See MD. ANN. CODE art. 16, § 24 (Supp. 1978).

73. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-06(b) (Supp. 1978).

74. *Id.* § 3-6A-06(d) (Supp. 1978). The court's *pendente lite* powers are broad with respect to property. See Md. Rule 532 (at law) and Md. Rule 572 (at equity).

75. *Id.* § 3-6A-06(a) (Supp. 1978). A minor child includes a child 18 years or older who is dependent upon a parent because of mental or physical disability. *Id.* § 3-6A-01(d). The statute does not include a requirement that the child be a product of the marriage between the two spouses involved in the divorce. Presumably, a child of either spouse by a prior marriage or even an unrelated child in the custody of a party would be sufficient to permit a use and possession award. See Law of May 29, 1978, ch. 794, 1978 Md. Laws 2304, 2309, where "children of the parties" was deleted from the original language of the statute.

- (3) The respective interest of each spouse in continuing to use the family use personal property or occupy or use the family home or any part of it for the production of income;
- (4) Any hardship imposed upon the spouse whose interest in the family home is infringed upon by a use and possession order.⁷⁶

A possession and use order may be granted for a period not to exceed three years from the date the divorce or annulment is granted. Therefore, if the grant is made pursuant to a divorce *a mensa et thoro*, it may not be lengthened by a subsequent divorce *a vinculo matrimonii*.⁷⁷ The court also has the concurrent authority to order either party, or both, to pay the mortgage, rent or other indebtedness as well as maintenance, insurance, taxes and similar expenses related to the property.⁷⁸ A use and possession award is not absolute, however, because it is subject to any terms or conditions imposed by the court and may be modified or dissolved as circumstances and justice require.⁷⁹ Moreover, the use and possession award terminates if the beneficiary spouse remarries.⁸⁰ Because the award of the family home and family use personal property is contingent upon the recipient's having custody of a minor child,⁸¹ presumably the award would terminate if the custody terminated or when the child reaches majority. Upon termination or expiration of the use and possession award, or if the court declines to make such an award, the family home and family use personal property is treated as marital property, provided it fits within the definition of marital property.⁸²

The statute provides that the determination of what is marital property be made at the time of granting of the divorce or within a ninety-day period following the granting of the divorce if the court expressly reserves such right.⁸³ Consequently, if this determination is to be postponed, the attorney drafting the decree of divorce must set forth this express reservation in the decree and be certain that the subsequent order is signed within the ninety-day time limitation.

76. *Id.* § 3-6A-06(a)(1)-(4). The considerations seem to reflect, in part, the purpose of the newly created court authority; that is, to "permit the children of the family to continue to live in the environment and community which is familiar to them" and to permit the use and possession of the family home and family use personal property by a spouse with custody of a minor child who is in need of such a use and possession award. *Id.*

77. *Id.* § 3-6A-06(e).

78. *Id.* § 3-6A-06(c)(2).

79. *Id.* § 3-6A-06(e).

80. *Id.* § 3-6A-06(a).

81. *Id.*

82. *Id.* § 3-6A-06(f)-(g). For the definition of marital property, see text accompanying notes 64 through 70 *supra*.

83. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05(a) (Supp. 1978).

Because of the ninety-day limit, practitioners should also request that the judge determine at the time of the initial divorce decree whether property subject to a use and possession award will be treated as marital property or separate property upon the expiration of the award.

D. *Personal and Real Property*

Because the definition of marital property excludes property acquired by gift or inheritance, property acquired prior to marriage, and property excluded by valid agreement,⁸⁴ the court is authorized, when granting a limited or absolute divorce or annulment, to resolve differences between the spouses regarding the ownership of this non-marital personal property. The court may also be asked to settle questions of ownership both of property that qualifies as marital property and of property that is jointly owned.⁸⁵ In determining ownership the court may,

- (1) Grant a decree which states what the ownership interest of each spouse is; and
- (2) As to any jointly held property, order a partition or sale in lieu of partition and a division of the proceeds.⁸⁶

Thus, the court's authority over personal property does not differ substantially from the former law.

Unlike the former law, which did not give courts jurisdiction over real property, the new statute provides the court with substantially the same powers over real property as it has over personalty. The court's jurisdiction is limited, however, to instances where an absolute divorce or annulment is granted.⁸⁷ Another significant change from the former law is that the court's new authority to partition or to order a sale and division of the proceeds of jointly owned property avoids the necessity for a separate court proceeding after divorce or annulment to divide jointly owned real property.⁸⁸

E. *Summary*

In summary, a court may, pursuant to a divorce *a mensa et thoro*, award use and possession of the family home and the

84. *Id.* § 3-6A-01(e).

85. *Id.* § 3-6A-03.

86. *Id.* § 3-6A-03(b).

87. *Id.* § 3-6A-04(a).

88. *Id.* § 3-6A-04(b)(2). See text accompanying notes 43 through 46 *supra*. This could create venue problems where real property located in one county is involved, and the bill for divorce or annulment is filed in another county. See *id.* § 6-203(b); Md. Rule BR 5.

personal property used in the home to a spouse with custody of a minor child. The court may also resolve disputes between the parties involving the ownership of personal property and may order a partition or a sale and division of the proceeds of the property that is jointly owned.

In granting a divorce *a vinculo*, the court has the same powers with respect to the disposition of property as it does in granting a divorce *a mensa*, except that if use of the family home has been previously awarded for three years pursuant to a divorce *a mensa*, it may not be awarded again. In addition, the court must also calculate the value of the property owned by each spouse, and, after considering enumerated equitable factors, may make a monetary award to ensure that the value of the property owned by each spouse is equitable. Additionally, the court may resolve ownership disputes involving real property and may partition jointly owned property or order its sale and a division of the proceeds.

IV. PROBLEMS REQUIRING FURTHER LEGISLATIVE ACTION OR JUDICIAL INTERPRETATION

The Maryland legislature, in adopting a statute with a unique system of allocating assets acquired during marriage, has created a disconcerting situation. The legislature not only abandoned the old Maryland statute, but also abrogated much of the Maryland decisional law that distributes property by means of a title theory. Had the legislature adopted a community property system, the body of case law that has developed in community property states would be strong authority in statutory interpretation. As it now stands, there are many ambiguities and problem areas that may require either further legislative action or judicial interpretation. While awaiting interpretation by the courts or amendment by the General Assembly, both attorneys and litigants will be faced with uncertainty about the meaning and scope of several provisions of the statute. Because the Maryland statute is a hybrid of other state systems that regulate the disposition of property upon dissolution of marriage, no one body of state law can provide guidance in interpreting the statute. Attorneys litigating issues will have to resort to analogous features in other state laws as authority until the issues presented are resolved by Maryland appellate courts. This section discusses some of the problem areas and, where possible, offers guidance from court decisions in other states.

A. *The Nature of the Right Created*

The resolution of several questions regarding the statute may turn on the characterization given to the nature of the right created

by this statute.⁸⁹ Although no state has a property disposition law that is similar in every respect to the Maryland statute, there are parts of other state statutes that are similar to parts of the Maryland statute.⁹⁰ Certain aspects of the Maryland statute also resemble support and maintenance as well as the common law right of dower.⁹¹ The methods of division of property in other states, although the details vary greatly, can be divided into three general categories: (1) the common law method of distribution solely on the basis of title, (2) the common law method that permits an equitable distribution of property, and (3) the community property method.⁹²

Unlike statutes in certain common law states,⁹³ the Maryland statute does not authorize an equitable distribution of property upon divorce. Instead, the statute authorizes a monetary award based upon the value of the property. Such an award, however, resembles an equitable distribution of property because it accomplishes the same purpose as a legal transfer of title, namely an adjustment of the equities of the parties concerning property acquired during marriage. Thus, common law states permitting an equitable distribution may provide appropriate authority for resolving problems concerning the monetary award, the factors to be considered, and the types of property subject to division. Unlike the common law states in which the property interest is inchoate and arises only upon divorce, community property states grant to a spouse an immediate interest in property acquired during the marriage.⁹⁴ Although the Maryland statute creates such an interest only in the event of marriage dissolution, nonetheless in both cases the interest arises out of the marital relationship.

89. The nature of the property right can be important in determining whether the monetary award can be discharged in bankruptcy, see text accompanying notes 209 through 211 *infra*; whether contempt may be used to enforce the order, see text accompanying notes 202 through 205 *infra*; and whether the statute contravenes due process of law by taking a vested property right, see text accompanying notes 109 through 119 *infra*. The nature of the property right created will also have important implications under the federal income tax laws. See, e.g., *United States v. Davis*, 370 U.S. 65 (1962). See generally Section Report of the MSBA Section of Taxation, *The Effect of 1978 Maryland Divorce Law Reform Upon the Income Taxation of Appreciated Property Incident to the Dissolution of a Marriage*, Winter 1978 MD. B.J. 30 (1978).

90. See notes 142 and 176 *infra*.

91. See notes 102 through 108 and accompanying text *infra*.

92. See Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1978*, 4 FAM. L. REP. (BNA) 4033, 4037 (1978).

93. *Id.* The jurisdictions are Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. See generally Freed, *Equitable Distributions in the Common Law States: A Bird's Eye View*, in *ECONOMICS OF DIVORCE* 21 (1978).

94. See Freed & Foster, *supra* note 92, at 4037. The states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington.

The philosophy of the community property system is that the husband and wife are one and the efforts expended by one during the marriage inure to the benefit of the other. This is similar to the philosophy of the Maryland statute in so far as it views marriage as a partnership between equals and values both monetary and non-monetary contributions to a marriage in the acquisition of property and compensates accordingly if a marriage is dissolved. Therefore, decisions in community property states may provide authority for determining, for example, whether a particular item is subject to division.⁹⁵

The monetary award authorized by the Maryland statute also has many similarities to alimony in gross,⁹⁶ which is a lump sum award for "the present value of a wife's inchoate marital rights."⁹⁷ Both the monetary award and alimony in gross are intended as a final termination of property rights.⁹⁸ The indicia of alimony in gross are an unequivocal provision in the divorce decree for payment of a sum certain at a time certain and a vested right to the amount.⁹⁹ Lump sum alimony survives the death of either spouse and is neither terminable nor modifiable. These enumerated characteristics are also present at least by implication in Maryland's statutorily created monetary award. Although the statutes in those states providing for alimony in gross do not specifically provide that its purpose is to effectuate an equitable distribution of the property, alimony in gross has been viewed by courts as a property settlement¹⁰⁰ to compensate a wife for her non-monetary contributions to the marriage.¹⁰¹

In addition, certain aspects of the property right created in Maryland also resemble alimony, support, and the common law doctrines of dower and curtesy. For example, the award of possession of the family home and family use personal property and the concomitant power to order payment of the mortgage and other expenses resemble alimony and child support rather than a division of property. Child support¹⁰² and alimony¹⁰³ are monetary allowances for the maintenance and support of a minor child and a spouse.

95. *E.g.*, *In re Graham*, ___ Colo. ___, 574 P.2d 75 (1978); *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Englert v. Englert*, 576 P.2d 1274 (Utah 1978); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1977).

96. *See Freed & Foster, supra* note 92, at 4037. The strict common law states that award alimony in gross are Alabama, Georgia, North Carolina, and Ohio.

97. *Hager v. Hager*, 293 Ala. 47, 55, 299 So. 2d 743, 750 (1974).

98. *Leo v. Leo*, 280 Ala. 9, 12-13, 189 So. 2d 558, 561 (1966) ("a final termination of the property rights and relations of the parties"); *Cann v. Cann*, 334 So. 2d 325, 328 (Fla. 1976) ("a final property settlement").

99. *Hardwick v. Hardwick*, 55 Ala. App. 156, 314 So. 2d 76 (1975).

100. *Ex parte Parker*, 334 So. 2d 911 (Ala. Civ. App. 1976); *Terry v. Terry*, 160 Ind. App. 653, 313 N.E.2d 83 (1974).

101. *Goldman v. Goldman*, 333 So. 2d 120 (Fla. 1976).

102. *Ross v. Pick*, 199 Md. 341, 86 A.2d 463 (1952).

103. *Roberts v. Roberts*, 160 Md. 513, 154 A. 95 (1931).

Both alimony and the use and possession award cease upon the remarriage of the recipient spouse.¹⁰⁴ Once decreed, the right to alimony may not be relitigated.¹⁰⁵ The amount awarded, however, is subject to modification for changed circumstances. Likewise, the use and possession award is subject to modification or termination as justice requires.¹⁰⁶ Because both the purpose and the conditions of the award are similar to support and alimony, principles governing support and alimony awards may be useful in interpreting the family home and family use personal property section of the statute.

Finally, two other concepts that may be of assistance in interpreting the new Maryland statute are the common law doctrines of dower¹⁰⁷ and curtesy.¹⁰⁸ These rights are inchoate, arising only upon death, and are created by operation of law because of the marital relationship. The spouse's interest created by the new Maryland statute is also an inchoate right, arising only upon divorce, and created by the law as a result of the marital relationship. Although the Maryland statute gives a spouse an interest in the value of an equitable portion of both the real and personal property owned at the time of divorce, rather than a life estate at death, many features are similar and the past treatment by the Maryland courts of dower and curtesy may prove to be useful in interpreting portions of this statute.

B. *Due Process*

Prior to January 1, 1979, the effective date of the new statute, each spouse upon divorce retained ownership, use, and possession of the property to which he held title. Sections 3-6A-05 and 3-6A-06 of the Courts and Judicial Proceedings Article, however, authorize a court to "grant a monetary award as an adjustment of the equities and rights of the parties concerning marital property" and to issue use and possession orders of the "family home" and "family use personal property" to a spouse with custody of a minor child. Because these provisions may apply to property acquired before January 1, 1979 and thus apply retroactively to affect vested property rights, the statute may be subject to constitutional challenge on the ground that it deprives a spouse of property

104. *Compare* Knabe v. Knabe, 176 Md. 606, 6 A.2d 366 (1939), and Simpson v. Simpson, 18 Md. App. 626, 308 A.2d 410 (1973) (alimony) with Md. Cts. & Jud. Proc. Code Ann. § 3-6A-06(a) (Supp. 1978) (use and possession award).

105. *Hughes v. Hughes*, 216 Md. 374, 377, 140 A.2d 649, 651 (1958) ("[T]he right to alimony cannot ordinarily be relitigated.").

106. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-06(e) (Supp. 1978).

107. Dower is the right of a surviving wife to a life estate in real estate owned by her husband during coverture. *Leteris v. Poole*, 234 Md. 34, 198 A.2d 250 (1964).

108. Curtesy is the interest of a husband in a life estate in all the lands of which his wife was seised during their marriage. *Rice v. Hoffman*, 35 Md. 344 (1872).

acquired before January 1, 1979 without due process of law.¹⁰⁹ Recent decisions in other jurisdictions, which have upheld similar statutes providing for equitable distribution of marital assets, indicate, however, that the Maryland statute would probably withstand such a constitutional attack.¹¹⁰

The courts that upheld statutes with a similar effect have used the following reasoning. Because marriage is a social relation subject to the police powers of the state,¹¹¹ the extent of the state's power over marriage and divorce is defined by the restrictions of its police power.¹¹² A limited, reasonable, nondiscriminatory invasion of property rights is permitted by a state in the exercise of its police power, provided the power is exercised for a legitimate state purpose.¹¹³ These courts have reasoned that the state has a legitimate interest in assuring that the contributions of a spouse to the prosperity of a marriage are recognized and that each spouse receives a fair share of the estate accumulated during the marriage.¹¹⁴ Thus, the courts concluded that the state's interest in creating an equitable disposition of property upon divorce outweighs

109. It is assumed for the purposes of this discussion that the Maryland courts will interpret this statute as affecting both marriages which have occurred and property which was acquired before the effective date of the statute. This is probably the interpretation that will be made by the courts. See Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974); Corder v. Corder, 546 S.W.2d 798 (Mo. Ct. App. 1977). See generally Bill Review letter from Francis B. Burch, Attorney General to Acting Governor Blair Lee (May 25, 1978).

110. Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); Fournier v. Fournier, 376 A.2d 100 (Me. 1977); Corder v. Corder, 546 S.W.2d 798 (Mo. Ct. App. 1977); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974) (statutes permitting property to be distributed on an equitable basis by actually changing title to property); Kittrell v. Kittrell, 56 Tenn. App. 584, 409 S.W.2d 179 (1966) (a statute enacted after title to property became vested could not be applied to effect a transfer of title from one spouse to another but a restriction on the alienation of the property to secure the payment of child support was permissible); Wilcox v. Pa. Mutual Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947) (statute that created a present vested interest in property solely owned before the effective date of the statute violated due process).

Constitutional issues based upon grounds other than due process were also dealt with by these state courts. Such a statute is not an *ex post facto* law because that concept applies only to criminal statutes. Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974). The marriage relation is not encompassed within the constitutional prohibition against impairment of contracts. *Id.*; Corder v. Corder, 546 S.W.2d 798 (Mo. Ct. App. 1977) (relying upon *Maynad v. Hill*, 125 U.S. 190 (1888)). Nor is a statute authorizing an "equitable" distribution of property without precise guidelines void for vagueness. *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974); Fournier v. Fournier, 376 A.2d 100 (Me. 1977).

111. *Loving v. Virginia*, 388 U.S. 1 (1967).

112. *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977).

113. *Nebbia v. New York*, 291 U.S. 502 (1934).

114. *M v. M*, 321 A.2d 115 (Del. 1974). In *M v. M* the former Delaware statute in question provided that at the time of divorce, the wife could be awarded the property of the husband but did not permit the husband to be awarded the property of the wife. In a challenge based on equal protection the court held that the classification was justified by a compelling state purpose.

the limited invasion of property rights.¹¹⁵ Under statutes authorizing an equitable distribution of property, the courts reasoned that either spouse may own or dispose of property in any fashion during the marriage. Because their property rights are affected only when divorce intervenes, a spouse is not denied due process of law.¹¹⁶ Furthermore, prior to the adoption of these statutes, property of one spouse was subject to interests of the other based upon general equitable principles.¹¹⁷ Thus, the new statutes were construed merely to extend existing ground for intervention by courts of equity by establishing an expanded basis for equitable jurisdiction.¹¹⁸ Thus, such statutes were held to be valid exercises of a state's police power and, therefore, constitutional.¹¹⁹

The statutes that were challenged and upheld on constitutional grounds in other states permitted a court to change title from one spouse to another. In certain respects, the case for the constitutionality of the Maryland statute is stronger than in the states where such statutes were upheld. First, unlike property disposition statutes in other jurisdictions, Maryland courts are not authorized to divest one spouse of title to property and vest it in the other as was the case in states where statutes have been upheld.¹²⁰ Rather, their power is limited to a monetary award based upon the value of the property.¹²¹ Second, although one party may be denied possession of the family home and the family use personal property for up to three years, even though that property is solely owned by one spouse, it is merely a temporary denial of possession rather than a permanent divestiture of title. Because the family home and family use personal property award more closely resembles support than property division and courts unquestionably have the power to award both

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115. *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Corder v. Corder*, 546 S.W.2d 798 (Mo. Ct. App. 1977); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).
 116. *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).
 117. Property in Maryland was also subject to equitable interests. *Reed v. Reed*, 109 Md. 690, 72 A. 414 (1909). *Cf. Brucker v. Benson*, 209 Md. 247, 121 A.2d 230 (1956) (court refused to consider the effect of fraud or undue influence because it was not raised below); *Mountford v. Mountford*, 181 Md. 212, 29 A.2d 258 (1942) (husband's evidence held insufficient to establish a resulting trust with respect to property in which wife held legal title).
 118. *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974).
 119. States are constitutionally permitted greater flexibility in regulating divorce than is permitted in regulating marriage. *Compare Loving v. Virginia*, 388 U.S. 1 (1967), *with Sosna v. Iowa*, 419 U.S. 393 (1975).
 120. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-6A-03(a), 3-6A-04(a), 3-6A-05 (Supp. 1978).
 121. *Id.* § 3-6A-05.

alimony and child support pursuant to a divorce,¹²² it would seem a court would also be found to have the power to award use of property.

Moreover, two decisions of the Court of Appeals of Maryland indicate that the court may look favorably upon this statute. In its 1970 decision in *Silberman v. Jacobs*¹²³ the court of appeals upheld a statute abolishing dower¹²⁴ notwithstanding argument that the statute was a taking of a vested property right.¹²⁵ The *Silberman* court reasoned that the Supreme Court had held that dower is not a vested right but is an inchoate right, which a state legislature has the power to abridge.¹²⁶ Because dower and the property right created by the new statute are similar in that both are inchoate and arise out of the marital relationship, it is likely that Maryland courts would apply the same broad standard of legislative authority in this area as was enunciated by the *Silberman* court.

The second more recent decision, *Bender v. Bender*,¹²⁷ adopted a presumption¹²⁸ that household furnishings and personal property used in the home are owned as tenants by the entirety despite the fact that the evidence in the case was undisputed that the husband was the only spouse with income and, therefore, the only one who could have purchased the property.¹²⁹ The court acknowledged that under the law prior to the *Bender* decision the husband would have had sole ownership of the property, but in adopting the *Bender* presumption, the court recognized non-monetary contributions to a marriage, thereby highlighting policy considerations similar to those motivating the General Assembly to adopt the statute. Thus, both the *Silberman* and the *Bender* decisions indicate that the Court of Appeals of Maryland views the policy considerations relevant to property disposition in a manner that parallels those influencing other state courts that have upheld statutes similar to the new Maryland law in the face of constitutional attack.

C. Spousal Death and the Use and Possession Award

The statute is silent as to the effect of spousal death on a use and possession award. It is not clear whether a personal representative would be required to honor an order to make mortgage payments

122. See text accompanying notes 102 through 106 *supra*.

123. 259 Md. 1, 267 A.2d 209 (1970).

124. The current provision is MD. EST. & TRUSTS CODE ANN. § 3-202 (1974). Section 3-202 provides as follows: "The estates of dower and curtesy are abolished."

125. *Silberman v. Jacobs*, 259 Md. 1, 22-23, 267 A.2d 209, 220 (1970).

126. *Id.* at 12-19, 267 A.2d at 215-19.

127. 282 Md. 525, 386 A.2d 772 (1978).

128. *Id.* at 534, 386 A.2d at 778-79.

129. *Id.* at 527, 386 A.2d at 774.

and maintenance expenditures.¹³⁰ In fact, the statute is unclear as to whether the use and possession award survives the death of a party. Because property subject to a use and possession award may not be distributed until the expiration of the award, this omission could delay estate settlement for up to three years. This is an area of the law that could be remedied by legislative amendment.

D. Scope of Marital Property

1. Division of property

One of the most important interpretative problems with the new statute is the absence of precise guidelines for the disposition of property. The statute does not provide a presumption of equality to begin the process of division of marital property. Both the language of the factors to be considered and the intent expressed both in the preamble to the bill and in the Report of the Domestic Relations Commission, however, indicate that the General Assembly may have intended the court to begin with an equal division of the property and use the enumerated factors only to justify variation from this equality.¹³¹ The Senate version of the bill specifically included the "presumption of equality,"¹³² but the Judiciary Committee of the House of Delegates deleted this provision.¹³³ It is difficult to tell whether this deletion was made because of an objection to the concept of equality or whether the Committee's position was that the presumption of equality was evident and the clause was redundant in view of the overall context of the bill. A presumption of equality would follow the judicial statutory construction of other states that have equally vague statutory language.¹³⁴

2. Homemaker Services

Under previous Maryland law, a wife's work either in the home or in the husband's business, absent a finding of a partnership, did not entitle her to a share of the property titled in her husband's name.¹³⁵ Even payment of the household expenses did not justify a division of property between the parties.¹³⁶ Presumably this rule was

130. See letter from Albert S. Barr, Chairman of the Section of Estate and Trust Law of the Maryland State Bar Association to Acting Governor Blair Lee, III (May 3, 1978).

131. The preamble states that the parties have "equal rights under the law." Law of May 29, 1978, ch. 794, 1978 Md. Laws 2304, 2305.

132. S. 604 (1978) (Senate 2nd Reader) lines 260-63.

133. See amendments to Senate Bill No. 604 (3d Reading File Bill by the House Judiciary Committee).

134. See, e.g., *Hatch v. Hatch*, 113 Ariz. 130, 547 P.2d 1044 (1976); *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977); *Sahs v. Sahs*, 48 Ill. App. 3d 610, 363 N.E.2d 156 (1977); *Roe v. Roe*, 556 P.2d 1246 (Mont. 1976).

135. *Gebhard v. Gebhard*, 253 Md. 125, 252 A.2d 171 (1969).

136. *Woodall v. Woodall*, 16 Md. App. 17, 293 A.2d 839 (1972).

a result of the early common law doctrine that the rendering of services in the home was the duty of the wife. In that context, the wife's duty was reciprocal to the husband's duty of support. The wife was considered the mistress of the household, and was responsible for maintaining the home and caring for the children with resources furnished by the husband.¹³⁷ She acquired no interest in property acquired during the marriage. Support by her husband was considered remuneration for her services. This rule survived in the early common law of Maryland.¹³⁸ It is slowly being transformed by the changing social and economic status of women and their legal positions,¹³⁹ but it has never been totally abrogated by either legislation or court decision.

The disposition of property statute does not explicitly mention homemaker services as a factor to consider in calculating a spouse's contribution to a marriage. Both the purpose of the statute and the factors for consideration, however, indicate that the probable legislative intent was to place a value on such services.¹⁴⁰ The report of the Commission on Domestic Relations Laws declared,

The Commission does not believe that the people of Maryland today hold the view that a spouse whose activities within the marriage do not include the production of income has 'never contributed anything toward the purchase of property acquired by either or both during the marriage. Its members believe that non-monetary contributions within a marriage are real and should be recognized in the event that the marriage is dissolved or annulled. As a homemaker and parent and housewife and handyman (of either sex) . . . each owes a duty to contribute his or her best efforts to the marriage, the undertakings of each are for the benefit of the family unit.¹⁴¹

137. H. CLARK, LAW OF DOMESTIC RELATIONS 181 (1968).

138. *Ewell v. State*, 207 Md. 288, 114 A.2d 66 (1955).

139. For example, the criminal statute penalizing non-compliance with the common law rule that a husband must support his wife has been amended to make it a crime for either spouse to fail to support the other. Law of May 29, 1978, ch. 921, 1978 Md. Laws 2703 (codified at MD. ANN. CODE art. 27, § 88(a) (Supp. 1978)). See generally Comment, *Decriminalization of Non-Support in Maryland — A Re-examination of a Uniform Act Whose Time Has Arrived*, 7 U. BALT. L. REV. 97 (1977).

140. *Id.* at 2305 and 2308-09. The trend among states recently adopting statutes authorizing a disposition of property based on equitable considerations is to include specifically homemaker services as a factor to consider. See, e.g., COLO. REV. STAT. § 14-10-113(1)(a) (1973); DEL. CODE ANN. tit. 13, § 1513(a)(b) (Supp. 1977); D.C. CODE ENCYCL. § 16-910(b) (West Supp. 1978); ILL. REV. STAT. ch. 40, § 503(c)(1) (Smith-Hurd Supp. 1978); IND. CODE ANN. § 31-1-11.5-11(a) (Burns Supp. 1978); ME. REV. STAT. tit. 19, § 722-A(1)(A) (Supp. 1978); MO. ANN. STAT. § 453.330.1(1) (Vernon 1977); MONT. REV. CODES ANN. § 48-321(1) (Supp. 1977).

141. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 3 (Jan. 1978) (quoting *Gebhard v. Gebhard*, 253 Md. 125, 130, 252 A.2d 171, 174 (1969)).

The report also refers to the "partnership" or unit theory of marriage, and the valuable contributions made by the non-earning and homemaker spouse. Accordingly, it appears that the intent was that the support of the husband is no longer per se adequate compensation for the non-cash contributions of the wife to the family, because such contributions directly assist the husband in acquiring real and personal property.

Assuming that the value of homemaker services is to be considered in calculating the contributions of each spouse to the family, a homemaker is faced with a difficult evidentiary burden. While the "value" of income contributed to a family is easily proved, providing a corresponding dollar value for household services presents difficulties. Indeed, if a homemaker's services are valued at the fair market value of replacement services, the salary of a cook, babysitter and maid, they may well exceed the value of the income contributed by a wage-earner, a result not likely to have been intended by the General Assembly.¹⁴²

A more direct statement of purpose in the preamble to the statute, and inclusion of a presumption of the equal value of the contributions by the homemaker and the wage-earner would have left no doubt as to the objectives of the legislation. Such a statement would have replaced the common law concepts of marital duties and furthermore declared that marriage is a partnership in which the contribution of each spouse is equal. There is, in the statute as it now exists, no presumption of the equality of services in the marriage and no true recognition that modern marriage is indeed a joint undertaking.

3. Types of marital property

An additional difficulty inherent in the new law is its failure to specify what types of property fall within the statutory category of "marital property." This difficulty arises because the statute provides a definition that specifies only the time period during which such property acquires its classification. The Maryland statutory definition expressly excludes from marital property, however, only property acquired prior to the marriage, received through gift or

142. An Indiana court has rejected the argument that a working wife who was also the homemaker should be entitled to a greater share of the property based upon her dual contributions as both a homemaker and a wage earner. *In re Patus*, ___ Ind. App. ___, 372 N.E.2d 493 (1978). The Court of Appeals of Indiana refused to adopt the dual contribution theory on the grounds that such an "argument presupposes that a wife who works is automatically contributing more to a marriage than a husband who works." The court held, *inter alia*, that the Indiana statute directing it to consider the value of homemaker services was not intended to apply to instances in which both spouses worked, absent "extreme circumstances in which one partner makes virtually no homemaker contribution." *Id.* at ___, 372 N.E.2d at 495-96.

inheritance, or excluded by a valid agreement. Thus, a wide range of property interests are potentially subject to classification as marital property.

Clarification of the ambiguities in such a vague definition may be aided by consideration of court decisions in not only community property states, but also common law states authorizing an equitable distribution of property. The approach to distribution of either group of states more closely resembles the Maryland statutory scheme than does that of states relying on the legal title theory. Unfortunately, court decisions in the community property and equitable division states are far from uniform. Some state courts, when determining whether property is subject to division, have emphasized the concept of "vesting." These courts hold that only property in which there is an immediate vested property right,¹⁴³ such as a cash surrender value, a loan value, a redemption value, a lump sum value or a value realizable upon death,¹⁴⁴ is subject to division as marital property. Other courts, however, permit the division of the present value of expectancy interest in property.¹⁴⁵

The great weight of out-of-state authority holds that certain benefits arising from employment during the marriage, such as vested retirement benefits,¹⁴⁶ contingent retirement benefits including unmatured military pensions,¹⁴⁷ and disability benefits,¹⁴⁸ are subject to division as marital property. A variety of business interests have also been held subject to division. For example, a spouse's interest in a corporation,¹⁴⁹ a partnership or professional

143. *Savage v. Savage*, ___ Ind. App. ___, 374 N.E.2d 536 (1978).

144. *Ellis v. Ellis*, ___ Colo. ___, ___, 552 P.2d 506, 507 (1976).

145. *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975) (dicta); *Grost v. Grost*, 561 S.W.2d 223 (Tex. Ct. App. 1977); *Englert v. Englert*, 576 P.2d 1274 (Utah 1978); *In re Jacobs*, 20 Wash. App. 272, 579 P.2d 1023 (1978).

146. *In re Pope*, ___ Colo. ___, 544 P.2d 639 (1975); *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (1976); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (1975); *Englert v. Englert*, 576 P.2d 1274 (Utah 1978); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975).

147. *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Beggs v. Beggs*, 479 S.W.2d 598 (Ky. 1972); *Schroeder v. Schroeder*, 271 Or. 582, 533 P.2d 350 (1975); *Grost v. Grost*, 561 S.W.2d 223 (Tex. Ct. App. 1977); *In re Jacobs*, 20 Wash. App. 272, 579 P.2d 1023 (1978); *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978). *Contra*, *Ellis v. Ellis*, ___ Colo. ___, 552 P.2d 506 (1976); *Savage v. Savage*, ___ Ind. App. ___, 374 N.E.2d 536 (1978); *Baker v. Baker*, 546 P.2d 1325 (Okla. 1975).

148. *E.g.*, *Flowers v. Flowers*, 118 Ariz. 577, 578 P.2d 1006 (1978) (civil service disability benefits); *Hughes v. Hughes*, 132 N.J. Super. 559, 334 A.2d 379 (1975) (workman's compensation claim); *Grost v. Grost*, 561 S.W.2d 223 (Tex. Ct. App. 1977) (disability retirement). *Contra*, *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (veterans disability benefits not marital property).

149. *Lavene v. Lavene*, 148 N.J. Super. 267, 372 A.2d 629 (1977).

association,¹⁵⁰ including the value of goodwill¹⁵¹ and accounts receivable,¹⁵² has been considered to be marital property. A variety of other interests have been subject to division such as a tort cause of action,¹⁵³ employee stock incentive plans,¹⁵⁴ termination benefits under an employment contract not yet terminated,¹⁵⁵ employer paid retirement¹⁵⁶ and life insurance benefits, vested annuities,¹⁵⁷ and the cash surrender value of life insurance policies.¹⁵⁸

While the value of an education is not an asset subject to division, it is a factor courts may consider in determining how to divide property.¹⁵⁹ There is a conflict as to whether an increase in value in property acquired prior to the marriage is subject to division,¹⁶⁰ although several state statutes expressly provide that it is not.¹⁶¹ Difficulty in determining the present value of property interests, however, will not prevent property from being classified and divided as marital property.¹⁶²

The recent decision of the United States Supreme Court in *Hisquierdo v. Hisquierdo*¹⁶³ reversed a state court decision which held that a spouse's expectancy interest in federal railroad retirement benefits was community property despite an express statutory provision that such benefits were non-assignable.¹⁶⁴ The

150. *In re Goger*, 27 Or. App. 729, 557 P.2d 46 (1976) (interest of a dentist in a professional association); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Ct. App. 1977) (interest in a professional association of a doctor). *Contra*, *Johnson v. Johnson*, 78 Wis. 2d 137, 254 N.W.2d 198 (1977) (accounts receivable relevant to alimony and support, but because to be received as income, not a community asset).
151. *In re Goger*, 27 Or. App. 729, 557 P.2d 46 (1976); *In re Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976).
152. *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975). *Contra*, *Johnson v. Johnson*, 78 Wis. 2d 137, 254 N.W.2d 198 (1977).
153. *Flowers v. Flowers*, 118 Ariz. 577, 578 P.2d 1006 (1978); *In re Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977); *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (1974).
154. *Tucker v. Tucker*, 121 N.J. Super. 539, 298 A.2d 91 (1972); *In re Mollier*, 33 Or. App. 575, 577 P.2d 94 (1978).
155. *In re Skaden*, 19 Cal. 3d 249, 566 P.2d 249, 139 Cal. Rptr. 615 (1977).
156. *Sims v. Sims*, 358 So. 2d 919 (La. 1978).
157. *Whittenburg v. Whittenburg*, 523 S.W.2d 797 (Tex. Ct. App. 1975).
158. *Grost v. Grost*, 561 S.W.2d 223 (Tex. Ct. App. 1977).
159. *In re Graham*, ___ Colo. ___, 574 P.2d 75 (1978); *In re Horstmann*, 263 N.W.2d 885 (Iowa 1978).
160. *Compare Corkern v. Corkern*, 270 So. 2d 209 (La. Ct. App. 1972) and *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974) (not subject to division) with *In re Mallett*, 540 P.2d 1190 (Colo. Ct. App. 1975) (subject to division).
161. DEL. CODE ANN. tit. 13, § 1513(b)(3) (Supp. 1977); ILL. REV. STAT. ch. 40, § 503(a)(5) (Smith-Hurd Supp. 1978); ME. REV. STAT. tit. 19, § 722-A(2)(E) (Supp. 1978); MO. ANN. STAT. § 452.330.2(5) (Vernon 1977).
162. *Rothman v. Rothman*, 65 N.J. 219, 320 A.2d 496 (1974); *In re Goger*, 27 Or. App. 729, 557 P.2d 46 (1976); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Ct. App. 1977); *In re Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976).
163. 99 S. Ct. 802 (1979).
164. The statute at issue in *Hisquierdo* contained a provision that "no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . ." 45 U.S.C.

Hisquierdo decision could have a substantial impact upon the scope of marital property because the Court's rationale that the division of the benefits would frustrate Congressional intent could apply to many other federally created retirement benefits subject to similar limitations. The Court's decision, however, specifically recognized that it was not applicable to private and state pension plans and retirement benefits.¹⁶⁵ Thus, the validity of state court decisions that considered such purely private or state created rights to be marital property subject to division would appear to be unaffected by the *Hisquierdo* decision.¹⁶⁶

E. Definitions

1. Estrangement

One of the factors that the new statute directs be evaluated by the court in the division of marital property is estrangement.¹⁶⁷ Unfortunately, this term is not defined in the statute, nor does it have a precise legal meaning.¹⁶⁸ Although the popular meaning

§ 231m (1976). Thus, the Court found that the California Supreme Court's decision holding Railroad Retirement Act benefits subject to community property division,

promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

Hisquierdo v. Hisquierdo, 99 S. Ct. 802, 813 (1979) (footnote omitted).

165. The Court limited the impact of its decision by observing that,

In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. . . . Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics.

Id. at 813 n.24.

166. See, e.g., *In re Pope*, 37 Colo. App. 237, 544 P.2d 639 (1975); *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (1976); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (1975).

State court decisions that relied upon the California Supreme Court's decision in *In re Hisquierdo*, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *rev'd sub nom.* *Hisquierdo v. Hisquierdo*, 99 S. Ct. 802 (1979), to divide federal benefits, however, would appear to be overruled by the Court's decision in *Hisquierdo*. One such decision that was expressly noted by the Court is *Eichelberger v. Eichelberger*, 557 S.W.2d 587 (Tex. Ct. App. 1977), in which a Texas court relied upon the California Supreme Court's *Hisquierdo* opinion and divided Railroad Retirement Act benefits as community property. *Hisquierdo v. Hisquierdo*, 99 S. Ct. 802, 808 n.15 (1979).

167. Md. Cts. & Jud. Proc. Code Ann. § 3-6A-05(b)(4) (Supp. 1978).

168. Estrangement is not defined in either BLACK'S, BALLANTINE'S, or BOUVIER'S law dictionaries.

suggests the development of hostility in separation and divorce, implying a consideration of all of the facts and circumstances involved in the separation and divorce,¹⁶⁹ the Domestic Relations Commission interpreted this factor to mean "fault."¹⁷⁰

If the legislature intended estrangement to mean "fault" it is unclear how the factor would be applied. Several of the factors for consideration in making a monetary award that are enumerated in the property disposition statute are similar to factors a court considers in making an award of alimony.¹⁷¹ The award of alimony is affected by fault, but the effect varies depending upon the kind of fault and the grounds for divorce. A spouse without grounds for divorce is precluded from receiving alimony.¹⁷² In a non-culpatory divorce based on separation, however, fault has a varying effect. Under such circumstances, any conduct that contributed to the destruction of the marriage is a relevant consideration but does not preclude alimony, unless the separation was caused by adultery or abandonment. If such was the case, adultery and abandonment preclude the award of alimony.¹⁷³ Therefore, it is unclear whether

169. WEBSTER'S UNABRIDGED INTERNATIONAL DICTIONARY 875 (2d ed. 1936).

170. REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAWS 11 (Jan. 1978).

171. The factors to be considered in awarding alimony are the husband's wealth and earning capacity, the station in life of the parties, their physical condition and ability to work, the length of time they have lived together, the circumstances leading up to the divorce, and the fault that destroyed the home. *Newmeyer v. Newmeyer*, 216 Md. 431, 434, 140 A.2d 892, 894 (1958).

172. *Brown v. Brown*, 278 Md. 672, 366 A.2d 18 (1976); *Flanagan v. Flanagan*, 270 Md. 335, 311 A.2d 407 (1973); *Stein v. Stein*, 251 Md. 300, 247 A.2d 266 (1968). Grounds for divorce are specified in MD. ANN. CODE art. 16, §§ 24 (*a vinculo*), 25 (*a mensa*) (Supp. 1978).

173. *Rhoad v. Rhoad*, 273 Md. 459, 330 A.2d 192 (1975); *Flanagan v. Flanagan*, 270 Md. 335, 311 A.2d 407 (1973).

In *Flanagan*, the court of appeals discussed this point at some length, observing that:

However, in those suits in which the actions of the party seeking such a pecuniary award constitute the sole cause for the demise of the marriage, and this wrongdoing consists of acts which are either adultery or abandonment, then, except in rare instances where there exist extremely extenuating circumstances, the award of any alimony would be an abuse of discretion. We have designated adultery and abandonment not on a whim, but because these are the only direct culpatory deeds that the Legislature has selected by name which either authorize or can ripen into grounds for an *a vinculo* divorce thereby indicating that it considers them the more heinous of the acts which can terminate a marriage. But, if there exists separation causing culpability other than adultery or abandonment on one side, or fault on both sides which caused the separation of the parties, the chancellor should consider the parties' degree of blame as well as their relative guilt in those cases where applicable and, in conjunction with the factors quoted earlier in this opinion, decide upon the proper award. In this thought process, the greater degree of fault on the part of the wife demonstrated, the greater the need which she must show to entitle her to an award of alimony appropriate to the circumstances otherwise existing.

Flanagan v. Flanagan, 270 Md. 335, 341-42, 311 A.2d 407, 411 (1973).

estrangement would mean grounds for divorce, adultery, or abandonment, or simply any conduct contributing to the destruction of the marriage. Because there is a lack of clarity as to how the factor of estrangement was intended to apply as well as an ambiguity in the meaning of the term, a statutory definition is in order, especially in view of the modern trend not to consider fault in dividing property.¹⁷⁴

2. Inconsistent statutory definitions

Amendments by the General Assembly to the definitions in the statute¹⁷⁵ created several ambiguities because of inconsistencies between the definitions and the balance of the bill. It is difficult to determine whether the intention was to change the meaning of the substantive provisions of the statute by changing the definition, or whether the failure to amend later sections in the statute was inadvertent. For example, the definition of family home excludes prior acquired property or property acquired by gift or inheritance,¹⁷⁶ but the section concerning the distribution of property after the expiration of the use and possession award includes provisions for distributing prior acquired property or property acquired by gift or inheritance.¹⁷⁷ Similarly, the definition of marital property permits the tracing of assets acquired by gift or inheritance,¹⁷⁸ but the definitions of neither the family home nor family use personal property include this tracing provision.¹⁷⁹ Consequently, for example, a house received as an inheritance would not be subject to a use and possession award, but a house purchased with funds traceable from an inheritance would be subject to such an award. The marital property definition excludes property governed by a valid agree-

174. COLO. REV. STAT. § 14-10-113(1) (Supp. 1978); DEL. CODE ANN. tit. 13, § 1513(a) (Supp. 1977); ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd Supp. 1978); MONT. REV. CODES ANN. § 48-321(1) (Supp. 1977). *Contra*, MO. ANN. STAT. § 452.330.1(4) (Vernon 1977).

In a recent case, the Missouri Court of Appeals unanimously interpreted its legislative mandate to consider the conduct of the parties when making a division of marital property as one requiring the court to "refer to [the] general conduct of the parties during the marriage," thereby rejecting the husband's contention that relevant conduct was only that "which affects the marital property." *Butcher v. Butcher*, 544 S.W.2d 249, 256 (Mo. Ct. App. 1977).

The situation is not so clear, however, in states in which the statutory language is silent with respect to consideration of fault in making marital property divisions. At least one state court has held that the "concept of fault is not relevant to such distribution[s]." *Chalmers v. Chalmers*, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974).

175. Amendments to Senate Bill No. 604 (3d Reading File Bill) by the House Judiciary Committee, amendments 2 through 7.

176. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01(b) (Supp. 1978).

177. *Id.* § 3-6A-06(f).

178. *Id.* § 3-6A-01(e).

179. *Id.* § 3-6A-01(b)-(c).

ment¹⁸⁰ as does the family home definition.¹⁸¹ Property governed by a valid agreement, however, is not excluded from the definition of family use personal property.¹⁸² Because the sections of the statute dealing with the family home and family use personal property are drafted in a parallel manner,¹⁸³ it is unlikely that a different treatment of these categories was intended.

3. "Value" of the property

Presumably, the "value" of the property means the fair market value either on the date of filing for divorce¹⁸⁴ or at the time of the hearing.¹⁸⁵ It seems likely that the fair market value would be decreased by specific liabilities relating to the property. It is not clear, however, whether the general indebtedness of a spouse would decrease the value, if such general indebtedness were not used to purchase that specific property.¹⁸⁶

In determining whether a property disposition is equitable, other states have considered not only the fair market value of property but also the type of property owned by each spouse, that is, whether the property was income-producing or income-consuming.¹⁸⁷ The distribution must be equitable both in terms of fair market value and the income producing capacity of the property. In most cases where property interests of the parties are substantial and varied, the court's decision-making process will be lengthy and complicated.

4. Property acquired in contemplation of marriage

The definitions in the statute exclude property acquired prior to marriage from the classifications of marital property, the family

180. *Id.* § 3-6A-01(e).

181. *Id.* § 3-6A-01(b).

182. *Id.* § 3-6A-01(c).

183. *Id.* § 3-6A-01(b)-(c).

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

185. *Flowers v. Flowers*, 118 Ariz. 577, ___, 578 P.2d 1006, 1009 (1978). (Community property rights continue "until the final dissolution [of the marriage] is ordered by the court."); *In re Carruthers*, ___ Colo. App. ___, 577 P.2d 773 (1978) (property acquired after the parties separated but before the divorce is marital property). *In re Johnson*, ___ Colo. App. ___, 576 P.2d 188 (1978) (value at the time of the hearing).

186. The Missouri Court of Appeals upheld a monetary award to a wife for the amount of joint indebtedness of the parties, despite the husband's argument that debts did not fall within the definition of marital property, and despite the fact that the husband's obligation for the joint debts had been discharged in bankruptcy. *McCully v. McCully*, 550 S.W.2d 911 (Mo. Ct. App. 1977).

187. *In re Johnsrud*, 572 P.2d 902 (Mont. 1977) (in a state authorizing an equitable distribution, it was error to award the wife one-third of the property, which was income consuming, and two-thirds of the property to the husband, which was income producing); *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974) (the current value and the income producing capacity of the property).

home and family use personal property. In *Bender v. Bender*,¹⁸⁸ the court of appeals included property acquired in contemplation of the marriage as part of the property presumed to be jointly owned. *Bender* was decided two days after the disposition of property statute was signed by the Governor and the decision specifically took note of the statute.¹⁸⁹ Thus, it appears that the court may be favorably inclined to adopt an argument that the statutory definition should be broadly interpreted to include property acquired in contemplation of marriage. Because the *Bender* case raised a presumption of a gift of joint ownership, under the new statute the court would also appear to have the authority to divide property acquired prior to, but in contemplation of, marriage under its power over personal property.¹⁹⁰

5. Property acquired by gift or inheritance

The statutory definitions of marital property, the family home, and family use personal property all exclude property acquired by gift or inheritance. Inheritance, in a strict legal sense, is property that passes upon death by operation of law. Bequest, on the other hand, is property disposed of by will. Because inheritance in its popular sense means the passing of property by any means at death,¹⁹¹ and "words of [a] statute are deemed to be used in their ordinary and popular sense,"¹⁹² it is likely a court would interpret these exclusions to include property passing both by law and by will.¹⁹³

F. Miscellaneous Considerations

Particular attention should be paid to the fact that *lis pendens* does not attach automatically upon the filing of a bill of complaint and, therefore, must be specifically requested¹⁹⁴ in order to prevent the alienation of property titled in the name of one spouse only to a bona fide purchaser for value while the proceeding is pending. Even if *lis pendens* is ordered by the court, it attaches only for the county in which the divorce proceeding has been filed.¹⁹⁵ Therefore, an analysis will have to be made to determine whether *lis pendens* should be requested in other counties.

188. 282 Md. 525, 386 A.2d 772 (1978).

189. *Id.* at 534 n.7, 386 A.2d at 778 n.7.

190. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-03 (Supp. 1978).

191. BLACK'S LAW DICTIONARY 922 (4th ed. 1951).

192. *Subsequent Injury Fund v. Thomas*, 275 Md. 628, 632, 342 A.2d 671, 674 (1975).

193. Such an interpretation would follow a court of appeals interpretation of the meaning of inheritance in the inheritance tax statute. *Mylander v. Connor*, 172 Md. 329, 334, 191 A. 430, 432 (1937).

194. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-07(b) (Supp. 1978).

195. Md. Rule BD 2.

The court has discretion to determine the manner of payment of the monetary award. In order to enforce child support and alimony awards, Maryland courts may place a lien on property, enjoin a spouse from alienating property, or require a spouse to assign property as security for the obligation.¹⁹⁶ Presumably, these methods would be available to a judge to enforce or secure a monetary award pursuant to a disposition of property. Methods upheld in other states include a husband's option to sell the property and divide the proceeds, or to retain ownership and pay installments over twenty years.¹⁹⁷ If part of the division of property is unmatured retirement benefits, courts have also deferred payment to one spouse until the other spouse begins receiving the benefits.¹⁹⁸

Although alimony is not generally dischargeable in bankruptcy,¹⁹⁹ if it is intended as a property settlement it is dischargeable.²⁰⁰ Because the statutory monetary award serves as a substitute for a division of marital property, and thus may also be viewed as a property settlement, it may be dischargeable as well. Thus, an attorney should be aware of the affect of bankruptcy law.

V. CONCLUSION

The property disposition statute has certain disadvantages compared to the prior law. Under the prior law, an attorney could reasonably predict the outcome of a property dispute because title to the property was the paramount consideration. The interpretation of many areas of the new statute will not be certain for many years until ambiguous points are finally decided by appellate courts or resolved by the legislature. Legal expenses for parties involved in a divorce and property dispute will undoubtedly rise because more property will be subject to dispute and more litigation will be required. A disturbing side effect of this statute is the probability of increased child custody disputes. Because custody of a minor child is a prerequisite for the award of the family home and family use personal property, there is a likelihood of not only a greater number of but also more vigorous custody disputes either to secure the award of the family home or to prevent its award to the other spouse.

196. *Donigan v. Donigan*, 208 Md. 511, 119 A.2d 430 (1956).

197. *In re Harding*, 533 P.2d 947 (Colo. Ct. App. 1975).

198. *Savage v. Savage*, ___ Ind. App. ___, 374 N.E.2d 536 (1978); *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (1976); *Trevino v. Trevino*, 555 S.W.2d 792 (Tex. Ct. App. 1977); *In re Jacobs*, 20 Wash. App. 272, 579 P.2d 1023 (1978). It should be noted, however, that the Supreme Court recently rejected a similar argument with respect to federal benefits under the Railroad Retirement Act of 1974. *Hisquierdo v. Hisquierdo*, 99 S. Ct. 802, 810 (1979). See notes 163 through 166 and accompanying text *supra*.

199. 11 U.S.C. § 35(a)(7) (1976).

200. *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976). See generally *Branca, Dischargeability of Financial Obligations in Divorce: the Support Obligation and the Division of Marital Property*, 9 FAM. L.Q. 405 (1975).

Children of the family will become pawns in the fight over property, thereby increasing what is already the most painful aspect of domestic relations disputes.

This statute could also precipitate other intense disputes in the early stages of litigation. A judge has discretion to award the family home and family use personal property *pendente lite*. Because of the currently perceived tendency of judges to continue *pendente lite* awards for alimony and child custody and support, and because the most substantial asset of the average family is the family home, more vigorous disputes of *pendente lite* awards can be anticipated.

Practitioners who do not practice domestic relations law must also carefully analyze the new statute to determine its effect on their clients in other matters. For example the value of business interests, including accounts receivable and goodwill, would probably be classified as marital property, and thus business interests could become involved in valuation disputes between divorcing spouses. Therefore, agreements for valuation, joined by spouses, should be considered in the creation of business interests such as partnerships, joint ventures, and close corporations. It should be noted that this particular problem should be considered not only for the protection of clients but also in an attorney's agreement with his partners.

Finally, because at least two of the major statutory categories of property permit the exclusion of property from the provisions of the statute if governed by a valid agreement, practitioners should consider increased counseling and education in the field of antenuptial agreements.²⁰¹

Ambiguities and disadvantages notwithstanding, this statute makes important reforms to Maryland law and represents a first step toward marital property reform. As a result of its enactment, a more equitable relationship exists between spouses at the time of divorce or annulment. Of particular importance is the fact that a wife who chooses to remain in the home to care for her family will no longer be penalized for such a decision should marital property be divided pursuant to a divorce or annulment proceeding. This statute has the additional advantage of making the law conform to public expectations that property acquired during a marriage belongs to

201. Although a discussion of what constitutes a valid antenuptial agreement is beyond the scope of this article, antenuptial agreements are "not unlawful." *Cohn v. Cohn*, 209 Md. 470, 475, 121 A.2d 704, 706 (1956). Antenuptial agreements waiving alimony are "void as against public policy." *Hilbert v. Hilbert*, 168 Md. 364, 375, 177 A. 914, 919 (1935). "[A]greements settling or barring property rights," however, are valid and proper, provided they are fair and equitable. *Hartz v. Hartz*, 248 Md. 47, 55, 234 A.2d 865, 870 (1967). The subject of antenuptial agreements is one which the Commission on Domestic Relations plans to address. See letter from Beverly Anne Groner to Hon. Blair Lee, III (January 9, 1978) in REPORT OF THE GOVERNOR'S COMMISSION ON DOMESTIC RELATIONS LAW (Jan. 1978).

both parties equally, excepting only property that one party inherited or received as a gift. In all likelihood the second step toward reform will be made by the appellate courts as they interpret various areas of the new law within the framework of the concept that the modern marriage is a joint enterprise.

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ADDENDUM

Since the initial printing of this article, the Maryland General Assembly has amended the new divorce property disposition statute. As this issue goes to press, however, the Governor has yet to approve the Act. Although most of the amendments are cosmetic, Senate Bill 983 (1979) eliminates one of the definitional inconsistencies noted in the text of this article. The bill adds the words "or property excluded by valid agreement" to the definition of family use personal property provided in Section 3-6A-01(c) of the Courts and Judicial Proceedings Article. Thus, that definition now contains identical exclusions to those found in the definitions of family home and marital property. Therefore, the applicable portions of the article should be read accordingly.²⁰²

202. See text accompanying notes 71, 182, and 201 *supra*.