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THE NEW PENNSYLVANIA DIVORCE CODE

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I. INTRODUCTION

THE ENACTMENT OF THE NEW PENNSYLVANIA DIVORCE CODE (Code)\(^1\) has effected sweeping reform of the Commonwealth’s antiquated laws dealing with the marital relationship.\(^2\) Previously, Pennsylvania had been one of three states requiring only fault grounds for divorce.\(^3\) Moreover, as of 1980, it was the only state in the nation which allowed neither alimony nor post-divorce distribution of marital property.\(^4\)


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2. Pennsylvania’s divorce laws prior to the new Divorce Code had remained essentially unchanged since 1785. See generally Teitelbaum, The Pennsylvania Divorce Law, PA. STAT. ANN. tit. 23, Commentary at 343-60 (Purdon 1955). This commentary which precedes the codified version of Pennsylvania’s old divorce laws gives a brief synopsis of the historical development of those laws. See id. While the old laws have been repealed by the new Code, the commentary still has historical and analytical value. It is hoped that it will not be lost in subsequent recodifications.


Now that Pennsylvania allows alimony after divorce "AVM," Texas is the only state in the union where such alimony is not available. See TEX. FAM. CODE ANN. tit. 1, § 3.63 (Vernon 1975). In Texas, however, the harshness of the rule prohibiting post-divorce alimony is somewhat mitigated by the fact that Texas is a community property jurisdiction. See id. §§ 5.01-02.

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The divorce reform legislation thus attempts to bring Pennsylvania into the mainstream of American jurisdictions which adhere to more modern and realistic views of marriage and divorce. Toward this end, the Pennsylvania Legislature has adopted a Code which contains no-fault provisions, provisions for alimony, and provisions for equitable distribution of marital property.

These provisions, however, are not without ambiguity. Thus, the approach of this article will be to take the practitioner through the major sections of the Code thereby attempting to discern the Act's meaning and ultimate impact. The framework for this analysis will be a comparison of the new Code with the laws of the contiguous states of Delaware, New Jersey, and Ohio which have adopted comparable legislation.

II. THE LAW IN PENNSYLVANIA

A. Grounds for Divorce and the Elimination of the Fault Requirement

1. Prior Law

The most pronounced change in terms of grounds for divorce in the new Code is that it is no longer necessary for the party seeking the divorce to show that the other party was at fault. Previously, community property is generally defined as all property acquired by either spouse during the marriage. See Hisquiendo v. Hisquiendo, 439 U.S. 572, 579 (1979). By statute, some property acquired during the marriage may remain separate property. See, e.g., Tex. Fam. Code Ann. tit. 1, § 5.01(a) (Vernon 1975). For a comparison of divorce in community property jurisdictions with divorce in common law jurisdictions, see Greene, Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women, 13 Creighton L. Rev. 71, 97-104 (1979). See also notes 53-62 and accompanying text infra.

See Divorce Code, supra note 1, § 102(a)(1). This section specifically states that it is the policy of the Commonwealth to "[m]ake the law for legal dissolution of marriage effective for dealing with the realities of matrimonial experience." Id.

For a discussion of the no-fault aspect of the new Code, see notes 26-48 and accompanying text infra.

For a discussion of the pertinent alimony provisions, see notes 86-92 and accompanying text infra.

For a discussion of equitable distribution under the new Code, see notes 63-79 and accompanying text infra.

For a discussion of equitable distribution under the new Code, see notes 63-79 and accompanying text infra.

See Divorce Code, supra note 1, §§ 401-404. For a discussion of equitable distribution under the new Code, see notes 63-79 and accompanying text infra.

See notes 26-48, 86-87, & 63-392 and accompanying text infra.


See Divorce Code, supra note 1, § 201(b)-(d).
Pennsylvania law required that the party seeking divorce be "injured and innocent" and that the other spouse be at fault (i.e., have done something which would be considered the cause of the divorce under the statute).\textsuperscript{12} The old statute delineated the following as grounds for divorce: impotency, bigamy, adultery, desertion for two years, cruel and barbarous treatment, indignities, fraud, duress or coercion in the procurement of marriage, and conviction of a felony with a resulting sentence of at least two years imprisonment.\textsuperscript{13}

As a result of the concomitant requirements that the petitioner spouse be injured and innocent and that the respondent spouse be at fault, few truly contested divorces were granted.\textsuperscript{14} Petitioner spouses simply could not meet the burden which these requirements imposed.\textsuperscript{15} This should not be surprising when one recognizes that in almost any marriage each partner is capable of listing a string of indignities allegedly performed by the other, thus removing that spouse from the status of innocent and injured. However, like Diogenes in his search for an honest man,\textsuperscript{16} the courts eventually recognized the impossibility of finding a spouse who was totally free from fault\textsuperscript{17} and, thus, granted a divorce to the more innocent and injured of the two parties.\textsuperscript{18} As many courts have stated of the "at fault" and "injured and innocent spouse" requirements, "[t]o be innocent and injured, a spouse need not be totally free from fault."\textsuperscript{19}

Therefore, despite the judicial recognition that a truly innocent spouse existed only in fantasy, there was still great difficulty in obtaining a contested divorce in Pennsylvania.\textsuperscript{20} As a result, the majority of divorces were granted as "uncontested" after lengthy periods of negotiation between the parties concerning child custody, property rights, support, etc.\textsuperscript{21} In order to meet the statutory requirements

\textsuperscript{13} Id. § 10(1) (repealed 1980). For a discussion of the existing fault grounds under the new Code, see notes 36-49 and accompanying text infra.
\textsuperscript{14} See Morrissey, supra note 4, at 505-06.
\textsuperscript{16} R. HOISTAD, CYNIC HEROS AND CYNIC KING (1949).
\textsuperscript{19} See notes 14-15 and accompanying text supra.
\textsuperscript{20} See notes 14-15 and accompanying text supra. Since there was no alimony or equitable distribution of marital property under the old divorce act, these considerations often provided fertile subjects for negotiation in uncontested divorces. Id.
for divorce, however, it became generally recognized that in most cases the parties were forced to exacerbate petty marital wrongs in their testimony. In many cases, they chose not to contest the action at all.

In our research we have been unable to find statistics which indicate how many unhappy spouses fled Pennsylvania to states with less harsh divorce laws. It is clear, however, that if an uncontested divorce could not be negotiated in the Commonwealth, migratory divorce was a viable option, for Pennsylvania could only be described as a fault island in a no-fault sea.

2. The New Code

The new Divorce Code now provides that a court can grant a divorce if the marriage is determined to be “irretrievably broken.” Irretrievable breakdown is defined in the Code as “[e]strangement due to marital difficulties with no reasonable prospect of reconciliation.”

Where a spouse alleges irretrievable breakdown, a court may grant the divorce after ninety days from the filing of the complaint if the other spouse consents. The Code also provides that, at the request of either party, the court must order marital counseling sessions (up to a maximum of three) to take place within the ninety-day period.

If, after one spouse files a complaint alleging irretrievable breakdown, the other fails to consent or denies that the marriage is irretrievably broken, a different procedure for divorce applies. The Code provides that if the complaining party files an affidavit alleging that he

23. See id.; Morrison, supra note 4, at 505-06.
24. See R. RAMON, D. CURRIE & H. KAY, CASES—COMMENTS—QUESTIONS ON CONFLICT OF LAWS 752 (2d ed. 1975) (in states where there are harsh grounds, the escapist impulse is only human).
25. As a practical matter, many lawyers recognized that the emotional trauma and financial outlay which accompanied a contested divorce rarely justified the results. As one marriage counselor has stated of contested divorces: “[T]here is a far greater amount of anger between the parties at the end of the legal proceedings than there was actually at the time they made the decision to divorce.” Note, supra note 22, at 851, quoting Hearings on Domestic Relations Before the Assembly Interim Comm. on Judiciary, California Assembly 42 (Jan. 8-9, 1964). Therefore, due to the short residency requirements in contiguous states, migratory divorce was often a realistic alternative. See, e.g., Del. Code Ann. tit. 13, § 1504(a) (Supp. 1978) (six months); N.J. Stat. Ann. § 2A:34-10 (West Supp. 1979-1980) (one year); N.Y. Dom. Rel. Law § 231 (McKinney 1977) (no minimum time; domicile within state at the commencement of action is sufficient); Ohio Rev. Code Ann. § 3105.03 (Page 1980) (six months).
26. See Divorce Code, supra note 1, § 201(c)-(d).
27. Id. § 104.
28. Id. § 201(c).
29. Id. § 202(b).
or she has lived "separate and apart" from the other spouse for at least three years, the court may grant the divorce so long as the allegations in the affidavit are not denied.\textsuperscript{30} If those allegations are denied, the court may still dissolve the marriage after a hearing on the questions of whether the marriage is irretrievably broken and whether the parties have, in fact, lived "separate and apart,"\textsuperscript{31} a phrase which the Code defines as "complete cessation of cohabitation."\textsuperscript{32} After this hearing, as an alternative to granting the divorce, if the court finds that there is a reasonable prospect of reconciliation, it can continue the matter while the parties seek counseling.\textsuperscript{33} The continuation must be for a period of at least ninety but not for more than 120 days.\textsuperscript{34} After this period, if one party still alleges irretrievable breakdown, then the court may grant the divorce, even over the defendant's opposition, upon the court's determination that the marriage is irretrievably broken.\textsuperscript{35}

In addition to the irretrievable breakdown grounds, the Code retains the traditional fault grounds.\textsuperscript{36} These fault grounds are desertion for one year, cruel and barbarous treatment, bigamy, conviction of a crime accompanied by a two-year prison sentence, and indignities.\textsuperscript{37} The Code also retains the existing common law defenses to these grounds.\textsuperscript{38}

Thus, a radical change has occurred in Pennsylvania law. It is a change which brings this Commonwealth into modern times as well as into the mainstream of American jurisprudence. Prior to July 1, 1980, Pennsylvania was one of only three states requiring fault for a divorce.\textsuperscript{39} A brief survey indicates that, with the passage of the Code, Pennsylvania has joined thirty-four other jurisdictions which permit divorce on grounds no more stringent than irretrievable

\begin{footnotesize}
\begin{enumerate}
\item Id. § 201(d)(1)(i).
\item Id. § 201(d)(1)(ii).
\item Id. § 104.
\item Id. § 201(d)(2).
\item Id.
\item Id. As a practical matter, it is hard to imagine a court not finding the marriage to be irretrievably broken after a three-year separation.
\item Id. Two former fault grounds, fraud and duress, have become grounds for annulment. Id. § 205(a)(5).
\item Id. Notice that the desertion provision in the new Code provides for a one-year standard, whereas under the old law, the standard was two years. \textit{See} \textit{Pa. Stat. Ann. tit. 23, § 10(1) (Purdon 1953 & Supp. 1980) (repealed 1980); note 13 and accompanying text supra.}
\item Divorce Code, supra note 1, § 207. The defenses of condonation, connivance, collusion, recrimination and provocation, however, are not applicable to a no-fault divorce. Id. For a discussion of these defenses, see A. Momjian & N. Perlberger, \textit{Pennsylvania Family Law} § 3.3 (1978).
\end{enumerate}
\end{footnotesize}
breakdown.40 Twenty jurisdictions, including Pennsylvania, allow divorce if the parties have lived “separate and apart” for a defined period.41 Additionally, with the passage of the Code, Pennsylvania joins six other states where divorce can be granted upon mutual consent of the parties.42

Although the Commonwealth’s Divorce Code still retains fault grounds,43 the addition of no-fault grounds to Pennsylvania’s law of


42. See, e.g., ARK. STAT. ANN. § 34-1202 (Supp. 1979) (three years); CONN. GEN. STAT. ANN. § 46b-40 (West Supp. 1980) (eighteen months); D.C. CODE ENCYCL. § 16-904 (West Supp. 1979-1976) (seven months voluntary; one year involuntary); HAWAI’I REV. STAT. § 580-41 (1976) (two years); IDAHO CODE § 32-610 (1963) (five years); LA. REV. STAT. ANN. § 9-301 (West Supp. 1980) (one year voluntary; three years involuntary); NEV. REV. STAT. § 125.010(9) (1969) (one year); N.H. REV. STAT. ANN. § 458.7 (1955) (two years); N.J. STAT. ANN. §§ 2A:34-4 (West Supp. 1979) (six months); N.C. GEN. STAT. § 50-6 (Supp. 1979) (one year); OHIO REV. CODE ANN. § 3105.61 (Anderson 1980) (two years); DIVORCE CODE, supra note 1, § 201(d)(1) (three years); P.R. LAWS ANN. tit. 31, § 321(9) (Supp. 1978) (two years); R.I. GEN. LAWS § 15-5-3 (Supp. 1979) (three years); S.C. CODE § 20-3-10 (Supp. 1979) (one year); TEX. FAM. CODE ANN. tit. 1, § 3.06 (Vernon 1979) (three years); VT. STAT. ANN. tit. 15, § 551(7) (1974) (six months); VA. CODE § 20-91(9) (1975) (on year); VA. CODE § 48-2-4(a)(7) (Supp. 1979). See also Freed & Foster, supra note 3, at 4030.


The new Pennsylvania Code does not go as far as a number of states which allow divorce on the ground of incompatibility. See, e.g., ALA. CODE § 30-2-1(7) (1977); ALASKA STAT. § 09.55.110(5)(C) (1978); CONN. GEN. STAT. ANN. § 46b-40 (West Supp. 1980); KAN. STAT. ANN. § 60-1601 (1976); NEV. REV. STAT. § 125.010(10) (1969); N.M. STAT. ANN. § 40-4-1 to -2 (1978); OKLA. STAT. ANN. tit. 12, § 1271 (West 1961).

43. See DIVORCE CODE, supra note 1, § 201(d)(2); note 38 and accompanying text supra.
divorce allows courts to grant or deny divorce on the basis of a determination regarding the continued viability of the marital relationship and the welfare of the family. Therefore, the reforms initiated by the Divorce Code should alleviate much of the hardship which existed under the prior fault system. Considerations of fault or innocence cannot impede a no-fault divorce since the focus of the no-fault inquiry is on the existence of a marital breakdown, rather than on the cause of the breakdown. Nevertheless, the inclusion of marital fault as a factor in the awarding of alimony, unfortunately, returns the element of fault to even a no-fault divorce. An additional consequence of the Act may be that the availability of alimony and property distribution will temper the incentives that fueled contested divorces in the past. Thus, the passage of the Divorce Code should reduce the number of contested divorce cases, shifting the battleground from the divorce itself to questions of support and property division. It will also reduce the impetus for migratory divorce, since the contiguous jurisdictions have similar support and property division statutes.

B. Division of Property Following Divorce

1. Prior Law

Principally, American jurisdictions adhere to one of the following three approaches to post-divorce division of property: common law, community property, or equitable distribution of property.

In some of the states which adhere to a community property scheme, all property acquired during marriage, regardless of who

44. See Divorce Code, supra note 1, § 102.
45. See Note, supra note 22, at 850-51.
46. See Divorce Code, supra note 1, § 501(a)(14).
47. See id. §§ 401, 501.
48. See notes 20-25 and accompanying text supra.
49. See notes 150-390 and accompanying text infra.
50. For a discussion of common law property systems, see generally Greene, supra note 4, at 76-82. For a discussion of how this system operated in Pennsylvania prior to the adoption of the new Code, see Perlberger, Marital Property Distribution: Legal and Emotional Considerations, Symposium: Recent Developments in Pennsylvania Family Law, 25 Vill. L. Rev. 662, 666-71 (1980).
52. See, e.g., Divorce Code, supra note 1, § 401(d).
53. For a list of the states which follow the community property approach, see note 51 supra.
has title, is presumed to be owned equally by both parties unless protected by statute or agreement.\(^54\) In these jurisdictions, each spouse has a vested one-half interest in the property at the time of acquisition.\(^55\)

Prior to the enactment of the Code, Pennsylvania was a common law jurisdiction.\(^56\) In such a jurisdiction, property is distributed upon marital dissolution, solely on the basis of in whose name title is held.\(^57\) Thus, except for property held jointly or by the entirety,\(^58\) either spouse could acquire property in his or her name during the period of the marriage and not have that property affected by divorce.\(^59\) The only exception to this rule was that instances of fraud or deceit by either party might cause the courts to impose a constructive trust.\(^60\) Therefore, the old law in Pennsylvania provided virtually no protection for the dependent spouse upon divorce since not only was that spouse denied post-divorce alimony,\(^61\) but he or she was also without rights in property acquired during the marriage that was titled solely in the name of the other spouse.\(^62\)

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54. See Greene, supra note 4, at 87, 102. For an example of statutory classifications which remove certain types of property from the "community," see Tex. Fam. Code Ann. tit. 1, § 5.01(a) (Vernon 1975).
55. See Greene, supra note 4, at 87, 102.
56. See Morrissey, supra note 4, at 511 & n.45.
57. See A. Momjian & N. Perlberger, supra note 38, § 3.4.5(c) (1978); Morrissey, supra note 4, at 510-11.
58. See Shapiro v. Shapiro, 424 Pa. 120, 136, 224 A.2d 164, 172 (1966) (property conveyed to both spouses created a tenancy by the entirety). Upon divorce, property held by the entirety becomes a tenancy in common, and both spouses normally receive half on partition. See Perlberger, supra note 50, at 670.
59. The harsh operation of the common law approach has been described as follows: [The old Code] it is true, converts entieties property into tenancy in common after an absolute divorce, but, even so, it puts the parties through a tedious and expensive partition action to achieve it. And if, as often happens, nothing is held by the entieties, or if such property as is owned has been titled in the sole name of one party, the statute will find nothing to partition, and the other party . . . comes out with nothing. Morrissey, supra note 4, at 505.
60. See Greene, supra note 4, at 99.
61. See notes 80-85 and accompanying text infra.
62. See notes 56-60 and accompanying text supra. Prior to 1978, both spouses had either common law dower rights or curtesy rights in the property. See Wood, Deeds of Conveyancing in Pennsylvania, Pa. Stat. Ann. tit. 21, Commentary at 6-7 (Purdon 1955). These rights often were important negotiating tools in noncontested divorces and property settlements because neither spouse could convey without release of them during the marriage. Id. Dower and curtesy were deleted from Pennsylvania jurisprudence by an amendment to the probate code in 1978. Pa. Stat. Ann. tit. 20, § 2105 (Purdon Supp. 1980).

Even under the old law, there was one form of post-divorce economic protection available, but it was contained in a federal statute. The social security laws provide that a "divorced wife" may receive payments if she was married to her former husband for at least 10 years prior to the divorce. See 42 U.S.C. §§ 402(b), 402(e), 416(d) (1976 & Supp. II 1978).
2. The New Code

As stated previously, the third possible mode of property distribution is equitable distribution.63 With the passage of the Divorce Code, Pennsylvania joins thirty-six other jurisdictions64 and now adheres to this doctrine. Essentially, equitable distribution, as stated by the Code, means that the court is empowered to "equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors."65 The Code defines marital property as "all property acquired by either party during the marriage."66 There are, however, a number of statutory exceptions to this definition,67 including property conveyed in good faith and for value prior to divorce.68

The Code lists a number of nonexclusive factors, similar to the alimony provisions, which a court should consider in determining

63. See note 52 and accompanying text supra.
65. Divorce Code, supra note 1, § 401(d).
66. Id. § 401(e). All property acquired during marriage is presumed to be marital property no matter which party holds title. Id. § 401(f). The presumption can be overcome only by a showing that the property fits within an exception listed in § 401(e)(1)-(6). Id. § 401(f).
67. Id. § 401(e)(1)-(6). The exclusions are 1) property acquired in exchange for property acquired prior to the marriage except for the increase in value during the marriage; 2) property excluded by valid agreement of the parties; 3) property acquired by gift, bequest, devise, or descent except for the increase in value during the marriage; 4) property acquired between separation and divorce; 5) property which a party has sold, granted, conveyed, or disposed of in good faith and for value prior to the commencement of divorce proceedings; 6) veterans' benefits which, by federal law, are exempt from attachment, levy, or seizure except those retirement benefits which the veteran has waived in order to receive veterans' compensation; and 7) property to the extent it has been mortgaged or otherwise encumbered in good faith for value prior to the divorce proceedings. Id.
68. Id. § 401(e)(5). For a discussion of the practical limitations on a spouse's ability to execute such transactions, see notes 73-76 and accompanying text infra.
how the property should be divided,69 excluding marital fault.70 They are 1) the length of the marriage; 2) any prior marriage of either party; 3) the age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties; 4) the contribution of either party to the education or increased earning power of the other party; 5) the opportunity of each party for future acquisitions of capital and income; 6) the sources of income of both parties, including medical, retirement, insurance, or other benefits; 7) the contribution or dissipation allocable to each party in the acquisition, preservation, depreciation, or appreciation of the marital property, including the contribution of a party as a homemaker; 8) the value of the property set apart to each party; 9) the standard of living of the parties established during the marriage; and 10) the economic circumstances of each party at the time the division is to become effective.71

An enforcement provision is also included in the equitable distribution section of the Code.72 In the event a party attempts to remove property from the court’s jurisdiction or disposes of the property in order to avoid alimony, child support, equitable distribution, or spousal support, the court can enjoin such action.73 Additionally, any grantee or mortgagee of property from one of the parties who had notice of the pendency of a matrimonial action, or who paid an inadequate consideration for the property, faces the possibility that the transaction will be deemed null and void.74 Therefore, although a party can transfer property during marriage,75 the Code seems to mandate that such transfers must be carefully scrutinized for any sign of bad faith.76

In general, the adoption of the equitable distribution provisions reflects a modern, realistic view of the marriage as a partnership.77 Furthermore, it recognizes the nonmonetary as well as monetary contributions of both spouses to the economic viability of the marriage.78 Thus, the equitable distribution provisions, in conjunction
with the alimony provisions, represent a giant step toward economic justice and financial independence for divorced spouses, the effect of which can only be to mitigate the emotional trauma associated with marital breakdown.  

C. Alimony

1. Prior Law

Prior to the enactment of the new Code, the law of alimony in Pennsylvania was concisely summarized by one court as follows: "The Pennsylvania Divorce Law does not provide for alimony following any divorce from the bonds of matrimony, except in cases of insanity." While the courts did not order alimony in order to effectuate a non-contested divorce, many parties agreed to contractual alimony provisions. However, since the law of Pennsylvania dictated that the duty to provide spousal maintenance terminated upon divorce, the only remedies to enforce this agreed-upon alimony were contractual. Thus, litigation to enforce consensual alimony provisions, like most civil litigation, was long and drawn out, resulting in financial hardship to the obligee-spouse. Additionally, the Pennsylvania courts would not enforce alimony provisions which were part of a divorce decree rendered by another state; rather, they required that the dependent spouse reduce the current alimony debt to a judgment or sue repeatedly on the contract. Thus, the law in Pennsylvania as it pertained to alimony often left dependent spouses in very precarious financial situations.

81. For a discussion of the preferability of noncontested divorces under the old law, see notes 14-21 and accompanying text supra.
84. See, e.g., Silvestri v. Slatowski, 423 Pa. 498, 501-03, 224 A.2d 212, 214-15 (1966) (the original complaint in Silvestri was filed in December 1964; the case was reversed and remanded in November 1966).
85. See A. Momjian & N. Perlberger, supra note 38, § 6.9.
2. The New Code

As a result of the passage of the new Code, the days of a dependent spouse being forced either to rely on slow-moving contractual remedies or to stay in a broken marriage in order to effectuate financial survival are over. The new Divorce Code makes post-divorce alimony available to either spouse and provides several mechanisms to enforce the obligation.

The award of alimony, however, is within the court’s discretion and may be granted only when the court finds that the party seeking alimony "(1) lacks sufficient property [after equitable distribution] . . . to provide for his or her reasonable needs; and (2) is unable to support himself or herself through appropriate employment." The Code enumerates fourteen nonexclusive factors similar to the property division factors which the court shall take into account in determining whether alimony is necessary and what the amount and the duration of the award should be. These factors are 1) the parties’ relative earnings and earning capacities; 2) the ages and health of the parties; 3) the source of the parties’ income, if any (i.e., employment, insurance, retirement benefits); 4) the parties’ expectancies and inheritances; 5) the length of the marriage; 6) any contribution made by one spouse to the other’s education, training, or increased earning power; 7) the extent to which it would be inappropriate for one spouse to work or refrain from working because that spouse is the custodian of minor children; 8) the standard of living established by the parties during marriage; 9) the relative education and the time necessary for the party seeking alimony to acquire sufficient education in order to obtain appropriate employment; 10) the relative assets and liabilities of the parties; 11) the property either party brought to the marriage; 12) the contribution of a spouse as a homemaker; 13) the relative needs of the parties; and 14) marital misconduct during the marriage prior to the filing of the divorce complaint. The Code limits the duration of alimony to that period necessary for the party receiving the award to obtain appropriate employment or to develop

86. Divorce Code, supra note 1, § 501(a). The new Code also continues the allowance of alimony pendente lite. Id. § 502.
87. See id. § 503. The court may enter judgment, seize goods, attach wages up to 50%, and award interest on unpaid installments. Id.
88. Id. § 501(a)(1)-(2).
89. See id. § 501(b).
90. Id. When making or denying an award, the court is obliged to set forth the reasons for its order. Id. § 501(d).
an appropriate employable skill, unless that party's ability to do so has been diminished by age, health, custody of minor children, or some other compelling impediment. It further bars an award of alimony to a petitioner cohabitating with a member of the opposite sex.

Like other equitable awards, awards of alimony under the Code are subject to modification upon a showing of changed circumstances. Significantly, however, remarriage of the obligee-spouse will automatically terminate the award.

In order to alleviate the problems which existed under the prior law of contractual alimony arrangements enforceable only by time-consuming contract remedies, the new Code provides that, upon court approval, such agreements are court orders and are enforceable as such under the Code. Additionally, the new Code provides that an alimony award by a sister state may be enforced if the obligor is present in Pennsylvania or has property located in the state.

By providing for alimony, the Divorce Code shifts the emphasis away from bitterly contested suits for divorce. The need for migratory divorce or "captive marriage" is greatly reduced. The new Code will not, however, eliminate the contest over marital assets, although it does provide the framework for the equitable division of these assets. It is hoped that the Code's enforcement of private agreements will encourage consensual alimony contracts like those negotiated under the prior law. Thus, the alimony provisions serve the policies of the Code by comporting with the economic realities of marriage and by recognizing the contribution of both parties in the acquisition of the marital assets.

91. Id. § 501(c).
92. Id. § 507.
93. Id. § 501(e). The statute forbids retroactive modifications of alimony awards; subsequent orders of the court affect only those payments which accrue after the filing of a petition for modification. Id.
94. Id.
95. See notes 81-85 and accompanying text supra.
96. DIVORCE CODE, supra note 1, § 501(f). Willful violation of such a court-approved agreement could be deemed civil contempt. Id. § 503(g).
97. Id. § 506. The statute provides that jurisdiction based on property located within the state is quasi in rem jurisdiction. Id. Of course, such jurisdiction must comport with the notions of due process elucidated by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 205-16 (1977).
98. See DIVORCE CODE, supra note 1, § 102.
III. A COMPARISON OF THE PENNSYLVANIA DIVORCE CODE AND THE LAWS OF NEIGHBORING STATES

A. No-Fault Divorce

There is much to be learned from a comparison of the Pennsylvania no-fault law99 and the divorce laws of neighboring states since a comparative analysis reveals substantial similarities between them.

1. Delaware

Like Pennsylvania, Delaware presently permits divorce where the court finds "that the marriage is irretrievably broken and that reconciliation is improbable."100 "Irretrievably broken" is statutorily characterized by "(1) voluntary separation, or (2) separation caused by respondent's misconduct, or (3) separation caused by respondent's mental illness, or (4) separation caused by incompatibility."101 Separation in Delaware is defined as living separate and apart for at least six months.102

The voluntary separation provision in the Delaware Act is analogous to the Pennsylvania provision which allows divorce upon mutual consent if there is irretrievable breakdown.103 The voluntary separation provision has been interpreted as requiring true mutuality of consent before there can be voluntary separation.104 For example, in Wife S. v. Husband S.,105 the court found that since the separation resulted from the husband's sexual misconduct, the wife's consent to the divorce was not voluntary106 and, therefore, the divorce could not be granted under the voluntary separation section.107

99. For a discussion of the basic no-fault provisions of the Pennsylvania Code, see notes 26-49 and accompanying text supra.
100. DEL. CODE ANN. tit. 13, § 1505(a) (Supp. 1978). In addition, Delaware has abolished the defenses to fault grounds, except in the situation where separation is caused by marital misconduct. Id. § 1505(c)-(d).
101. Id. § 1505(b).
102. Id. § 1503(7). The minimum time period does not apply when the separation is due to marital misconduct. Id.
103. See notes 26-28 and accompanying text supra. The reader will note that the Pennsylvania Code has no requirement of separation in its mutual consent provision. See DIVORCE CODE, supra note 1, § 201(c); notes 26-29 and accompanying text supra. Under the Pennsylvania Code, separation need only be alleged when the respondent spouse fails to consent. See DIVORCE CODE, supra note 1, § 201(d).
107. 375 A.2d at 453.
In addition, Delaware law also makes contested no-fault divorce available through a liberal construction of the statutory requirements for irretrievable breakdown.\textsuperscript{108} Such a flexible approach allows realization of an express legislative purpose of the Delaware Act—\textit{i.e.}, to "permit dissolution of a marriage where the marriage is irretrievably broken despite the objections of an unwilling spouse."\textsuperscript{109}

2. New Jersey

New Jersey's divorce laws are also similar to the Pennsylvania Divorce Code in that New Jersey retains some fault grounds in addition to its no-fault provision.\textsuperscript{110} The rationale for the development of a no-fault system in New Jersey was stated as follows: "It is not in the public interest to require dead marriages to continue for the sake of statistical neatness or comparison or on a misguided assumption that thereby family life is strengthened."\textsuperscript{111} Hence, the legislature established a no-fault ground for divorce in accord with the policy stated above.\textsuperscript{112}

The New Jersey provision states that a divorce can be granted upon the following ground:

Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least 18 or more consecutive months \textit{and there is no reasonable prospect of reconciliation}; provided, further that after the 18 month period there shall be a presumption that there is no reasonable prospect of reconciliation.\textsuperscript{113}

This provision does not require that the separation be voluntary; rather, it only requires that there be no reasonable prospect of reconciliation.\textsuperscript{114} Therefore, assuming no prospect of reconciliation exists,
the statutory language supports an inference that a simple separation for the requisite eighteen months would enable the “deserting” spouse to obtain a divorce under the no-fault provision despite the other spouse’s objection. At least one New Jersey court has recognized that reconciliation cannot be achieved unilaterally and, hence, that a divorce should be granted because the state’s interest is in preserving viable marriages—not dead ones.

The unilateral character of this provision parallels the Pennsylvania unilateral provision except that the qualifying time periods are different. The Pennsylvania Act requires that the parties live separate and apart for three years, whereas the New Jersey Act requires only eighteen months. One wonders whether this significant time differential for unilateral divorce will lead citizens of Pennsylvania to seek a migratory divorce in light of New Jersey’s one-year residency requirement.

Since both the New Jersey and Pennsylvania statutes require that the parties live separate and apart for specified times, it is enlightening to see how the New Jersey provision has been interpreted. While the statutory language requires different habitations, one court has interpreted this language as allowing the parties to live in separate units in the same apartment house. The Pennsylvania statute has no requirement of living in separate habitations but merely requires “cessation of any or all cohabitation.” There is, however, no definition of “cohabitation.” Therefore, the stage is set for litigation over the question whether there can be a cessation of cohabitation while the parties remain living in the same residence.

husband’s incarceration. _Id._ at 283, 300 A.2d at 185. Thus, because there was no reasonable prospect of reconciliation, the court granted the divorce under the separation provision despite the husband’s objections. _Id._ at 283-84, 300 A.2d at 185.

115. The “deserted” spouse could, of course, file for divorce under the fault provision of desertion. See N.J. STAT. ANN. § 2A:34-2(b) (West Supp. 1979-1980). In New Jersey, the question of whether the divorce was granted on fault or no-fault grounds may be relevant in determining the amount of an alimony award. See notes 157-77 and accompanying text infra.


117. See _id._; note 111 and accompanying text supra.

118. See _Divorce Code, supra_ note 1, § 201(d)(1); note 30 and accompanying text supra.


121. See _id._ § 2A:34-2(d); _Divorce Code, supra_ note 1, § 201(d)(1).


123. _Divorce Code, supra_ note 1, § 104.

3. Ohio

The Ohio statute, revised in 1974, is similar to the Pennsylvania and New Jersey statutes in that it, too, retains some fault grounds while adding the following no-fault provision: "The court of common pleas may grant divorces . . . [o]n the application of either party, when husband and wife have, without interruption for two years, lived separate and apart without cohabitation . . . ."126

Additionally, the Ohio divorce statute has a provision which allows dissolution of the marriage upon joint petition of the parties.127 If the parties wish to proceed under this section, however, they must attach to their petition for marital dissolution a separation agreement bilaterally settling any issues concerning alimony, property distribution, or child custody.128 The rationale for this provision "is that the parties themselves can best explore the viability of their own marriage relationship and the possibility of reconciliation."129

While the Ohio marital dissolution provision is somewhat similar to the Pennsylvania Code in that it allows divorce on mutual consent, there are some seemingly significant differences. First of all, the Pennsylvania statute appears more liberal to the extent that the parties do not have to agree on anything except that the marriage is irretrievably broken—i.e., a bilateral separation agreement is not required as in Ohio.130 As a practical matter, however, it is unlikely that parties to a Pennsylvania divorce will agree that the marriage is irretrievably broken unless they have agreed to a division of their assets or have agreed to have the court divide them.

On the other hand, the Pennsylvania statute seems to be more conservative in that it still requires irretrievable breakdown,131 whereas Ohio only requires consent.132 One wonders, however, if this apparent conservativeness in the Pennsylvania statute is merely illusory. In effect, when one compares the Ohio mutual consent provision and the Pennsylvania provision with the exception of the separation agreement they are substantively similar.133 It seems,

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125. See OHIO REV. CODE ANN. § 3105.01 (Anderson 1980).
126. Id. § 3105.01(K).
127. Id. §§ 3105.61, .63.
128. Id. § 3105.63. The court decree issued upon mutual marital dissolution has the same effect as a decree of divorce. Id. § 3105.65(B).
129. Note, supra note 22, at 867.
130. See DIVORCE CODE, supra note 1, § 201(c).
131. See id.
132. See OHIO REV. CODE ANN. § 3105.01(K) (Anderson 1980).
133. Both statutes require a cooling off period after the filing of the complaint. Compare DIVORCE CODE, supra note 1, § 201(c) (90 days) with OHIO REV. CODE ANN. § 3105.64 (Anderson 1980).
therefore, that the Pennsylvania mutual consent provision is really a divorce upon agreement provision as opposed to a grounds provision.

The mutual consent and two-year separation provisions in the Ohio statute reflect the legislative awareness "that continuation of marriages that have ceased to exist in fact is against society's best interest."\textsuperscript{134} Thus, the Ohio legislature went farther than Pennsylvania and abolished recrimination\textsuperscript{135} and condonation\textsuperscript{136} as defenses to all forms of divorce.\textsuperscript{137} This reform was apparently in recognition of the use of these defenses to unjustly "punish two hopelessly estranged spouses."\textsuperscript{138}

As a result of this legislative policy and the abolition of defenses, the only areas of contest in an action brought under the unilateral two-year separation provision\textsuperscript{139} are whether or not the parties had 1) lived separate and apart, 2) without cohabitation, 3) for the requisite two-year period. An Ohio lower court has stated in regard to the cohabitation requirement that isolated acts of sexual intercourse do not constitute cohabitation where the parties do not otherwise function as husband and wife.\textsuperscript{140} However, another Ohio court has interpreted the "separate and apart" requirement as not being satisfied where the parties lived in different structures on the same premises with one party continuously visiting the other to do household chores.\textsuperscript{141} Thus, the question of whether the statutory requirements

\textsuperscript{134} See Note, supra note 22, at 845. As one Ohio court has stated:

"Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself, will be furthered by enabling them to "extricate themselves from a perpetual state of marital limbo."\textsuperscript{135}


135. Under the doctrine of recrimination, if the conduct of both husband and wife has been such as to furnish grounds for divorce, neither is permitted to obtain relief. See BLACK'S LAW DICTIONARY 1147 (5th ed. 1979). Moreover, "to bar divorce, complainant's misconduct need not be of equal degree with that of defendant, but must be of [the] same general character."\textsuperscript{136} Id.

136. Condonation is the "conditional remission or forgiveness, by means of continuance or resumption of marital cohabitation, by one of the married parties, of a known marital offense committed by the other, that would constitute a cause of divorce, the condition being that the offense shall not be repeated."\textsuperscript{137} Id. at 268.

137. OHIO REV. CODE ANN. \S 3105.10(c) (Anderson 1980). The Pennsylvania Code has abolished these defenses only with respect to no-fault grounds. See DIVORCE CODE, supra note 1, \S 207(a).

138. See Note, supra note 22, at 847.

139. For the terms of this provision, see text accompanying note 126 supra.


have been satisfied is a highly sensitive factual inquiry. As of yet, the Ohio courts have given little guidance as to what will be the ultimate parameters of the requisite elements.

One thing that is clear in the Ohio law is that, as in the New Jersey statute, the “separate and apart” provision requires only unilateral action. Other than failure to satisfy the statutory requirements, there are no defenses to an action brought under this section. While there is no language in the Ohio statute comparable to the “no reasonable prospect of reconciliation” language which appears in the New Jersey statute, Ohio’s two-year separation requirement is similar to the New Jersey provision in that it functions as an irrebuttable presumption that the marriage is dead. Thus, if one partner to the marriage chooses to withdraw from the marital residence for the requisite period of time, the statute requires neither the consent of the other party nor a finding by the court of no prospect of reconciliation. As one commentator has stated: “This rule effectuates the underlying policy of no-fault divorce to terminate marriages that have failed in fact. Where one party, although acting unilaterally, wishes to discontinue the marriage, it is logical to conclude that the marital unit has no chance of survival.”

While the effects of the Pennsylvania Code seem to be essentially the same, it must be noted that under Pennsylvania’s unilateral provision, a party can contest the action and the court, if it finds a reasonable chance of reconciliation, can require the parties to try to reconcile for a period of time before it grants the divorce on a unilateral basis. It is hoped that the Pennsylvania courts, like those of the surrounding jurisdictions, will recognize the underlying policy of the Code and conclude that, when there has been a three-year separation and one party desires to discontinue the marriage, the marriage is irretrievably broken.

142. See notes 113-24 and accompanying text supra.
143. See Ohio Rev. Code Ann. § 3105.01(K) (Anderson 1980).
146. See Note, supra note 22, at 854 n.54. The sponsor of Ohio’s two-year separation statute, Representative Alan E. Norris, has stated that “[t]he practical effect of this provision is to define a marriage which is beyond saving, where one spouse has absented himself for two years, the possibility of reconciliation is remote indeed.” Norris, Divorce Reform: Ohio’s Alternative to No-Fault, 48 State Gov’t 52, 54 (1975), quoted in Note, supra, at 854 n.54.
147. Note, supra note 22, at 864 (footnote omitted).
148. See Divorce Code, supra note 1, § 102.
149. Id. § 201(d)(2).
B. Alimony

1. New Jersey

The New Jersey statute provides for alimony to be awarded, as the court deems reasonable and just, to either party based upon actual need, ability of the parties to pay, and the duration of the marriage. When the divorce is granted on fault grounds, the court may consider the proofs made in the divorce action for the purpose of ascertaining the amount of the alimony award. Over the years, the Superior Court of New Jersey has noted that the rationale for the granting of alimony is as follows: 1) to permit a wife to share in the accumulation of the marital assets; 2) to prevent her from becoming a public charge; and 3) “to permit a wife to share in the economic rewards occasioned by her husband’s income level (as opposed merely to the assets accumulated), reached as a result of their combined labors, inside and outside the home.”

Our discussion will focus on two aspects of alimony in New Jersey: the role of marital fault and the amount of the award.

a. Marital Fault

Only where a divorce has been granted on the basis of marital fault does the New Jersey statute allow the court in its discretion to consider evidence of fault in determining the size of the alimony award. By contrast, the Pennsylvania Divorce Code allows marital misconduct during the marriage to be reflected in the alimony determination, without regard to the grounds for divorce.

New Jersey’s experience with the use of marital fault, especially adultery, as a consideration in the alimony determination is enlightening. Initially, the New Jersey courts took a hard line toward an adul-

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151. Id.
155. See notes 157-77 and accompanying text infra.
156. See notes 178-227 and accompanying text infra.
157. See N.J. Stat. Ann. § 2A:34-23 (West Supp. 1979-1980). The section provides in pertinent part: “In all actions for divorce other than those where judgment is granted solely on the ground of separation, the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.” Id.
158. See Divorce Code, supra note 1, § 510(b)(14). This section specifically excludes consideration of conduct during any separation subsequent to the filing of a divorce petition. Id.
acterous spouse who sought alimony. In *Mahne v. Mahne*, the Appellate Division of the New Jersey Superior Court refused to award alimony to an adulterous wife, spawning an inference that adultery was an automatic bar to alimony. The Appellate Division, however, clarified the *Mahne* decision in *Nocherson v. Nocherson*, explaining that fault, and in particular adultery, is merely one factor in the decision to award alimony. *Mahne* was distinguished on the ground that on the facts of that case, where the wife committed adultery with her husband’s best friend, the equities precluded an award of alimony.

The New Jersey courts’ original hard line attitude may have resulted from the fact that adultery was previously a crime in that state. For example, in *Lynn v. Lynn*, the lower court had denied alimony to an adulterous wife, even though the adultery had occurred months after her husband had deserted her, on the theory that the wife should not be permitted to profit from the commission of a crime. During the pendency of the *Lynn* appeal, *Nocherson* was decided and the legislature struck the crime of adultery from the books. Without relying on the legislative action, the Appellate Division of the Superior Court reversed the lower court’s decision in *Lynn*, holding that adultery does not raise a per se bar to alimony, “especially where the adultery is post-separation or post-desertion and the extra-marital sexual activity did not precipitate the breakup of the union.”

Thus, it is now clear that marital fault is just one of many factors to be used in determining alimony. An example of the post- *Nocherson* approach is *Gugliotta v. Gugliotta*. In *Gugliotta*, the court awarded alimony to a wife of twenty-three years despite the fact that she had committed adultery with her former employer.

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160. *Id.* at 329, 371 A.2d at 315.
163. *Id.* at 449-50, 372 A.2d at 1140.
169. *Id.* at 383, 379 A.2d at 1048 (Super. Ct. Ch. Div.).
171. 165 N.J. Super. at 335, 398 A.2d at 144 (Super. Ct. App. Div.).
though the husband knew of the affair and made at least three attempts at reconciliation, the court believed that the equities of the situation required an award of alimony.\textsuperscript{174} The court explained its decision as follows:

The capital assets accumulated during this marriage and divided under the principle of equitable division may have been relatively small, but the parties' standard of living was also as much a part of her efforts as his, and alimony is the vehicle by which the wife is permitted to share in this standard of living after the divorce.\textsuperscript{175}

The conclusion to which cases such as Mahne, Lynn, and Gugliotta lead is that a court deciding alimony questions in a fault divorce should consider the petitioner's fault, if at all, in the context of the entire marital relationship. Fault should operate as a bar only when the misconduct is outrageous\textsuperscript{176} or has directly contributed to the breakdown of the marriage.\textsuperscript{177}

\begin{itemize}
\item[b.] \textbf{Ascertaining the Amount of the Award}
\end{itemize}

Where the alimony sought is in a no-fault divorce action, the New Jersey statute provides that a court can grant alimony without regard to fault,\textsuperscript{178} and, in computing the amount, a court "shall consider the actual need and ability to pay of the parties and the duration of the marriage."\textsuperscript{179} Judicial interpretations of this provision are especially illustrative of the types of issues which may face the Pennsylvania courts.

One such case is Khalaf v. Khalaf\textsuperscript{180} which involved parties who had been married for twenty-six years before divorcing.\textsuperscript{181} The parties had two children, one a college student and one who chose to live with her father.\textsuperscript{182} The husband was a dentist who had his office in part of the eleven room marital residence.\textsuperscript{183} The parties lived a comfortable lifestyle, owning two cars, a summer home, and a membership in a local country club.\textsuperscript{184} Mrs. Khalaf had no independent source of income and was dependent on her husband for support.\textsuperscript{185}

\begin{itemize}
\item[174.] Id.
\item[175.] Id. at 164, 388 A.2d at 1341.
\item[176.] See Mahne v. Mahne, 147 N.J. Super. at 328, 371 A.2d at 315.
\item[177.] See Gugliotta v. Gugliotta, 160 N.J. Super. at 165-66, 388 A.2d at 1341.
\item[178.] N.J. STAT. ANN. § 2A:34-23 (West Supp. 1979-1980).
\item[179.] Id.
\item[180.] 58 N.J. 63, 275 A.2d 132 (1971).
\item[181.] Id. at 66, 275 A.2d at 134.
\item[182.] Id. at 67, 275 A.2d at 134.
\item[183.] Id. at 66, 275 A.2d at 134.
\item[184.] Id.
\item[185.] Id. As a hobby, the wife had operated a yarn shop for several years but the venture lost money until she finally gave it up. Id. at 66-67, 275 A.2d at 134.
\end{itemize}
In determining the amount of the award which the wife should receive, the court set forth the following test:

The amount is not fixed solely with regard, on the one hand, to the actual needs of the wife, nor, on the other, to the husband's actual means. There should be taken into account the physical condition and social position of the parties, the husband's property and income, . . . and also the separate property and income of the wife. Considering all these, and any other factors bearing upon the question, the sum is to be fixed at what the wife would have the right to expect as support, if living with her husband.\textsuperscript{186}

The court ascertained that $29,500 was the net amount upon which support could be calculated, and that $150 a week was the amount needed by the wife for support.\textsuperscript{187} The court then proceeded to award her the full $150 a week, emphasizing that after being married for twenty-six years without being gainfully employed, the wife should not be expected to work.\textsuperscript{188} Indeed, the court stated that the wife "is entitled to carry on as if still married . . . as long as her husband's means are reasonably able to meet these needs."\textsuperscript{189} The court did indicate, however, that the same result might not obtain in the event that the parties before the court were married for only a short time and the spouse seeking alimony had not sacrificed any vocational potential for the care of her family.\textsuperscript{190}

Many of the factors considered by the court in Khalaf are also present in the Pennsylvania statute, e.g., the length of the marriage, the parties' standard of living, and the wife's contribution as homemaker.\textsuperscript{191} Thus, for purposes of comparative analysis, Khalaf illustrates the equitable nature of an alimony award and judicial rejection of rigid adherence to mathematical formulae.

A further example of this approach is found in Capodanno v. Capodanno,\textsuperscript{192} where the court considered the amount of alimony to be awarded where the parties had been married for thirty-three

\textsuperscript{186} Id. at 66-67, 275 A.2d at 134, quoting Bonanno v. Bonanno, 4 N.J. 268, 274, 72 A.2d 318, 321 (1950) (other citations omitted) (emphasis in original).
\textsuperscript{187} 58 N.J. at 69, 275 A.2d at 135.
\textsuperscript{188} 1d.
\textsuperscript{189} Id. at 69-70, 275 A.2d at 135.
\textsuperscript{190} Id. at 70, 275 A.2d at 136. The court observed:

The position of a woman who has given the greater part of her adult life to the care of husband and home, and has remained vocationally dormant, is far different from that of a healthy young woman without children, who in a brief period of married life has remained all but alien to her husband's interests. The law should heed their contrasting requirements.


\textsuperscript{191} See Divorce CODE, supra note 1, § 501(b). For a discussion of the relevant factors in the Pennsylvania Code, see notes 86-82 and accompanying text supra.
\textsuperscript{192} 58 N.J. 113, 275 A.2d 441 (1971).
Unlike Khalaf, however, the wife in Capodanno was gainfully employed. At the time of the hearing, the wife was fifty-six years old and had been teaching for fifteen years. Her income was $8,864 per year, while her husband earned $35,000 annually. The court found that, despite the fact that she was earning money, the wife was entitled to an award of $400 per month. The criteria which the court seemed to be applying included consideration of the lifestyle that the parties had enjoyed prior to separation, the duration of the marriage, the ages of the parties, and the husband's ability to pay—as well as the wife's earnings. The award also allowed the wife to retain savings for "an uncertain future."

The New Jersey Superior Court considered the question of how much alimony a well-to-do husband could receive in D'Arc v. D'Arc. In this case, the husband, a psychiatrist who earned $50,000 per year, asked for support from his wife, an heiress whose income was in excess of $1,000,000 per year. Although their divorce was grounded on an eighteen-month separation, the parties had stipulated that each retained the right to offer marital fault as evidence in the alimony determination. While the court found the husband guilty of misconduct, it concluded unequivocally that even without regard to fault he was not entitled to alimony. The court declared that "not only is Dr. D'Arc not in 'need' of support, but the record clearly shows that he is able to provide a comfortable living for himself."

In Lavene v. Lavene, the New Jersey Superior Court gave another example of its flexible approach to alimony. The duration of the marriage in Lavene had been much shorter than in the cases previously discussed. Upon divorce, the wife had received $16,050 by virtue of a property distribution, an amount equal to approxi-
mately one-half of her husband's interest in a closely held corporation.\textsuperscript{208} Although there were no barriers to her becoming gainfully employed,\textsuperscript{209} the court ruled that $400 per month was a reasonable award.\textsuperscript{210}

Similar in its flexible approach is the superior court's decision in \textit{Stout v. Stout}.\textsuperscript{211} In \textit{Stout}, the parties had been married for seventeen years and had supported four children including one who was disabled.\textsuperscript{212} The wife had custody of the children.\textsuperscript{213} The husband was a teacher and had additional income from service in the Army Reserves.\textsuperscript{214} The lower court awarded the wife $165 a week, $50 of which was alimony.\textsuperscript{215} On appeal, the husband argued that this sum, which represented 55\% of his income, was excessive.\textsuperscript{216} The court, however, affirmed the award, holding that alimony and support awards "should not be made to depend solely upon a percentage of net earnings which is left to the husband."\textsuperscript{217} In its determination that the award was correct, the court was swayed by the fact that the husband could supplement his income through summer employment.\textsuperscript{218}

The concept of rehabilitative alimony\textsuperscript{219} has also been addressed in New Jersey. In \textit{Turner v. Turner},\textsuperscript{220} the parties had been married for twenty-two years and had three children, only one of whom had reached the age of majority.\textsuperscript{221} The wife was attending college and anticipated that she would graduate approximately one year from the date of the award.\textsuperscript{222} Her potential earnings were $12,000 per year, whereas her husband, a disabled veteran, had an income of $31,000 plus a $5,000 military pension.\textsuperscript{223} After equitable distribution of

\textsuperscript{208} 162 N.J. Super. at 202, 392 A.2d at 629.
\textsuperscript{209} Id. at 203, 392 A.2d at 629.
\textsuperscript{210} Id.
\textsuperscript{211} 155 N.J. Super. 196, 382 A.2d 659 (1977).
\textsuperscript{212} Id. at 201, 382 A.2d at 661.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 202, 382 A.2d at 661.
\textsuperscript{216} Id. at 206, 382 A.2d at 664.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} See \textit{Divorce Code}, supra note 1, \S 501(c). The concept of rehabilitative alimony is incorporated into the new Pennsylvania Code which limits alimony to the period necessary for the beneficiary spouse to 1) obtain employment, or 2) develop an appropriate employable skill. \textit{Id.} The statute exempts from this limitation anyone whose ability to secure employment is "substantially diminished." \textit{Id.} See text accompanying note 91 supra.
\textsuperscript{220} 158 N.J. Super. 313, 385 A.2d 1280 (1978).
\textsuperscript{221} Id. at 323, 385 A.2d at 1285.
\textsuperscript{222} Id. at 324, 385 A.2d at 1285.
property, the wife would receive $80,000.\textsuperscript{224} On these facts, the court awarded alimony of $50 per week limited to a period of time to end after the wife had been employed for one year.\textsuperscript{225}

The New Jersey alimony cases are helpful because they illustrate a pragmatic and highly flexible approach. As these cases indicate, awards are not based mechanically on need, ability to pay, or the length of the marriage; rather, other factors such as amount of property owned, standard of living, employment potential, and homemaker contributions are also relevant considerations.\textsuperscript{226} The length of the marriage often appeared to be a predominant factor. This apparently was so not only due to the statutory requirements but also because of the court's recognition of the severe difficulties which confront a beneficiary spouse who attempts to attain occupational independence and continue a prosperous lifestyle after years of financial dependence.\textsuperscript{227}

2. Ohio

The Ohio statute provides for the award of alimony to either party, as the court deems reasonable.\textsuperscript{228} The statute also provides the following list of factors to guide the court in determining the alimony award:

(1) The relative earning abilities of the parties;
(2) The ages, and the physical and emotional conditions of the parties;
(3) The retirement benefits of the parties;
(4) The expectancies and inheritances of the parties;
(5) The duration of the marriage;
(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;
(7) The standard of living of the parties established during the marriage;
(8) The relative extent of education of the parties;
(9) The relative assets and liabilities of the parties;
(10) The property brought to the marriage by either party;
(11) The contribution of a spouse as homemaker.\textsuperscript{229}

\textsuperscript{224} Id.
\textsuperscript{225} Id. at 324, 385 A.2d at 1285-86.
\textsuperscript{226} See notes 178-225 and accompanying text supra.
\textsuperscript{228} OHIO REV. CODE ANN. § 3105.18(A) (Anderson 1980).
\textsuperscript{229} Id. § 3105.18(B)(1)-(11).
These factors are clearly similar to those in the new Pennsylvania Code\(^{230}\) and therefore are extremely pertinent to our discussion. As was done with the New Jersey statute, we will focus primarily on how the Ohio courts view marital fault in the determination of the award\(^{231}\) and how the courts weigh various other factors in assessing the award.\(^{232}\)

a. Marital fault

Since the statutory list of factors is not exhaustive,\(^ {233}\) marital fault, which is not included in the list, may still be considered by the courts in the award of alimony. Its omission is significant, however, and is evidence of Ohio's "recent movement away from both strict guidelines and fault orientation in divorce law and towards investing the courts with much discretion."\(^ {234}\) This movement, however, is not inconsistent with a consideration of fault in some contexts.

In Wolfe v. Wolfe,\(^ {235}\) for example, the Ohio Supreme Court stated that post-divorce unchastity can be a factor in modifying an alimony award.\(^ {236}\) The court maintained that although unchastity per se does not require a termination of alimony,\(^ {237}\) the unchaste conduct could justify an inquiry into whether the illicit relationship "produced a change of circumstances sufficient to entitle the former husband to relief."\(^ {238}\) The Wolfe court applied the statutory guidelines\(^ {239}\) in two ways: first, to determine if alimony was needed; and second, if needed, to determine the amount.\(^ {240}\) However, by emphasizing Mrs. Wolfe's "unchastity," rather than her de facto marriage, the court may have shifted the analysis from the needs of a former spouse

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230. See Divorce Code, supra note 1, § 501(b)(1)-(14), notes 89-90 and accompanying text supra.
231. See notes 223-43 and accompanying text infra.
232. See notes 244-55 and accompanying text infra.
235. 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976).
236. Id. at 420, 350 N.E.2d at 426. In Wolfe, a former husband sought relief from alimony payments on the ground that his former wife was living with her paramour and using her alimony for their mutual benefit. Id. at 400, 350 N.E.2d at 415. The trial court terminated the award, reasoning that the former wife's attempt to enjoy the benefits of marriage with her paramour without losing her alimony placed an inequitable burden on her former husband. Id. at 401, 350 N.E.2d at 416. On appeal, the Supreme Court of Ohio found that the trial judge had not abused his discretion in terminating the award. Id. at 421-22, 350 N.E.2d at 427.
237. Id. at 420, 350 N.E.2d at 426.
240. 46 Ohio St. 2d at 420-21, 350 N.E.2d at 426-27.
to the equities of having one former spouse support the other under "immoral" conditions.241

The drafters of the Pennsylvania Code attempted to deal with the situation where a former spouse has been living with a paramour at the time of the request for alimony.242 The Code provides that cohabitation with a member of the opposite sex, not a blood relative, is an automatic bar to an alimony award.243

b. Ascertaining the Amount of the Award

In determining the amount of a judicial alimony award, Ohio requires not only that the amount be within the obligor's ability to pay, "but it must also leave that individual the means to maintain his own health and well being by obtaining proper food, shelter and clothing, and it must not burden him to the extent his incentive to pay is destroyed."244 Even under this standard, however, the court may base an alimony award on earning capacity as well as on actual earnings.245 The cases decided thus far under the statute evaluate the needs of the obligee-spouse and the equities of the award in the context of any property settlement agreement or division previously made.246 Indeed, one court has maintained that "[o]nly after a division of property is made, is the court statutorily authorized to consider whether an additional amount is needed for sustenance, and for what period will such necessity persist."247 This interpretation is similar to the approach taken by the Pennsylvania Code which declares that alimony will be awarded only to a dependent spouse who lacks sufficient property to provide for his own needs or who is not self-supporting.248

Like Pennsylvania,249 Ohio provides for court adoption of voluntary alimony agreements.250 Under the Ohio law, where the amount of alimony is the result of an agreement between the parties, it will only be adopted by the court if it is found to be equitable to both

242. See Divorce Code, supra note 1, § 507.
243. Id. It is not clear, however, if subsequent cohabitation will terminate an existing award, especially if the need continues. It is also not clear from the language of the Code whether an incestuous or homosexual relationship will bar an award or terminate an existing award.
248. See Divorce Code, supra note 1, § 501(a).
249. See id. § 501(f); notes 95-96 and accompanying text supra.
parties, and once such an agreement is adopted by the court, it may only be modified if the court specifically reserved continuing jurisdiction to do so. The Pennsylvania provision on court adoption of voluntary alimony agreements does not specifically state that the court may refuse to adopt an agreement which it finds is inequitable to one of the parties, but the power to so reject an agreement is certainly implicit in the express power to approve the agreement. In contrast to the Ohio provision, the Pennsylvania Code does not appear to require express retention of jurisdiction by the court as a prerequisite to modification of an approved voluntary alimony agreement since the Code provides that an approved agreement becomes an "order of the court" and that all alimony orders are subject to modification by further court orders upon a showing of changed circumstances.

3. Delaware

Delaware's policy in regard to the award of alimony is like Pennsylvania's and is succinctly stated in the alimony provision of the Delaware Code. The state's policy is to award alimony in essentially two situations: 1) where one spouse is dependent on the other for support, the alimony to last for the period of continuing dependency; and 2) where alimony would help the respondent spouse become self-supporting. Consistent with this policy, either petitioner or respondent may receive alimony if he or she can prove that he or she

251. Popovic v. Popovic, 45 Ohio App. 2d 57, 63-64, 341 N.E.2d 341, 346 (1975). A husband or wife may contract as if unmarried, but contracts between them are subject to "the general rules which control the actions of persons occupying confidential relations with each other." Ohio Rev. Code Ann. § 3103.05 (Anderson 1980).

252. Popovic v. Popovic, 45 Ohio App. 2d 57, 64, 341 N.E.2d 341, 346 (1975). This rule is based on a public policy favoring the finality of judgments. Id. Where no agreement is involved, a reservation on continuing jurisdiction will be implied if the court awards permanent alimony for an unspecified or indefinite total amount or if the court sets no termination date for an alimony award. Id. at 64-66, 341 N.E.2d at 347-48.

253. See Divorce Code, supra note 1, ¶ 501(f).

254. Id.

255. Id. ¶ 501(c).

256. See notes 86-87 and accompanying text supra.


258. Id. §§ 1502(5) & 1512(a) (Michie Interim Supp. 1979). It should be noted, however, that even where one spouse is dependent on the other, alimony can be awarded for a maximum of only two years unless 1) the parties had been married for at least 20 years, or 2) the divorce was grounded upon the mental illness of one of the parties. Id. ¶ 1512(a)(2)-(3).

259. Id. ¶ 1512(b)(2)-(3). The statute also provides a third situation whereby alimony can be awarded in the event a party is the custodial parent. Id. ¶ 1512(b)(3). See text accompanying note 260 infra.
(1) [i]s dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment; (2) [l]acks sufficient property including any award of marital property, to provide for the party’s reasonable needs; and (3) [i]s unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.260

The statute then proceeds to list seven factors which are relevant in the alimony determination. They are 1) the financial resources of the party seeking alimony including his or her share of the marital property, as well as the ability to meet his or her needs independently;261 2) the time necessary to develop an employable skill and become employed; 3) the parties’ standard of living; 4) the duration of the marriage; 5) the age and physical and emotional condition of the party seeking alimony; 6) the ability of the obligor-spouse to meet his or her needs while meeting those of the obligee; and 7) tax consequences.262

Significantly, the Delaware statute expressly disallows any consideration of marital fault in the alimony determination.263 Therefore, our discussion will focus only on the award criteria which are similar to those used in Pennsylvania.

a. Ascertain the Amount of the Award

As previously indicated through our analysis of the Ohio and New Jersey statutes,264 and as required by the Delaware statute,265 the amount of alimony is generally determined on a case-by-case basis and, thus, few generalizations can be gleaned. One recent case,266 however, is especially illustrative of Delaware’s flexible, nondogmatic approach to alimony and of its view that a divorced dependent spouse

260. Id. § 1512(b) (Michie Interim Supp. 1979).

261. Id. § 1512(c)(1). This factor also includes all sums in a child support order which are earmarked for the custodial parent. Id.

262. Id. § 1512(c)(2)-(7).

263. Id. § 1512(c). While it has been previously noted that there is no mention of marital fault in the Ohio statute, it was also pointed out that marital fault can be considered because the statutory factors are not deemed exclusive. See notes 233-41 and accompanying text supra. By contrast, although the list of factors in the Delaware statute is also nonexclusive, it specifically forbids the use of marital fault as a consideration in the alimony determination. See DEL. CODE ANN. tit. 13, § 1512(c) (Michie Interim Supp. 1979).

264. See notes 150-252 and accompanying text supra.

265. See notes 257-63 and accompanying text supra.

is entitled to retain, upon marital dissolution, a standard of living similar to that which the spouse enjoyed during the marriage. In Husband B. v. Wife B., the husband was an attorney who earned $37,000 a year. The wife had reentered the job market in 1970 after raising three children; however, she had never earned more than $7,000 a year. At the time of the divorce in 1978, she was enrolled in an interior design school and expected to graduate in three years. Although the wife had an income, the court nonetheless awarded her $850 per month for the three years that she would be in school. In making the award, the court recognized that the policy of the Delaware statute is to award alimony in such a manner as to completely sever the economic relations of the parties when circumstances permit. Yet, the court also pointed out that this policy must be balanced against the policy which allows the obligee-spouse to maintain, as much as possible, the predivorce standard of living. Since there was an insufficient amount of marital property on divorce to permit the wife to support herself independently, the court concluded that the alimony award was necessary.

The only factor which the Delaware statute includes which is not present in the Pennsylvania Code is that of tax consequences. The Pennsylvania practitioner should note this consideration since the statutory factors in the Pennsylvania Code are not exclusive and, therefore, tax considerations may be relevant in appropriate cases.

4. Summary of the Alimony Laws in Neighboring States

The laws of three of the states contiguous with Pennsylvania—New Jersey, Ohio, and Delaware—all provide alimony for dependent spouses. As indicated, all of these states apply a flexible and pragmatic approach to determining the amount. In these states, however, the existence of marital fault or misconduct plays different roles.
In Ohio, marital fault is not an express statutory factor but has been considered in an alimony modification situation.\(^{279}\) In New Jersey, marital fault is a statutory consideration, yet its application is discretionary and has been considered only where the misconduct was so outrageous as to directly affect the marital relationship.\(^{280}\) The State of Delaware completely disallows consideration of marital fault as a factor in determining alimony.\(^{281}\)

The new Pennsylvania Code lists marital misconduct as a factor,\(^{282}\) yet it is hoped that the courts will apply this concept only to extreme cases, employing a restrained approach similar to that of either Ohio\(^{283}\) or New Jersey.\(^{284}\) Such an approach recognizes that the notion of alimony is not punitive but rather is a form of distribution of marital property to which both the husband and wife have contributed and in which both should share.\(^{285}\) It should also be recognized that fault is difficult to translate into a dollar amount and that its inclusion as a factor in awarding alimony undermines the concept of no-fault divorce. The notion of using marital fault as a major factor in determining alimony seems contrary to public policy for it may turn a fault-ridden dependent spouse into a public charge.\(^{286}\) Clearly such a result is inconsistent with the policy of the Pennsylvania Code which is, \textit{inter alia}, to promote "economic justice between [the] parties"\(^{287}\) and to ensure the welfare of the family, as opposed to vindicating private rights or punishing marital wrongs.\(^{288}\)

\section*{C. Equitable Distribution}

New Jersey, Delaware, and Ohio all provide for equitable distribution\(^{289}\) of property. Therefore, an analysis of the manner in

\begin{footnotes}
\footnotetext{279}{See notes 233-41 and accompanying text \textit{supra}.}
\footnotetext{280}{See notes 157-77 and accompanying text \textit{supra}.}
\footnotetext{281}{See note 263 and accompanying text \textit{supra}.}
\footnotetext{282}{See \textit{Divorce Code, supra note 1, § 501(b)(14)}.}
\footnotetext{283}{See notes 233-41 and accompanying text \textit{supra}.}
\footnotetext{284}{See notes 157-77 and accompanying text \textit{supra}.}
\footnotetext{287}{\textit{Divorce Code, supra note 1, § 102(6)}.}
\footnotetext{288}{\textit{Id.} § 102(3). The Uniform Marriage and Divorce Act, which is similar to all the statutes considered in this article, states that a court should not consider misconduct but rather should focus on the parties needs and contributions. See \textit{Uniform Marriage and Divorce Act} § 308(h), Commissioner's Comment, \textit{reprinted in 9A Uniform Laws Ann.} 160 (1979).}
\footnotetext{289}{For a discussion of the different types of marital property systems, see notes 50-79 and accompanying text \textit{supra}.}
\end{footnotes}
which the system operates in those states may give one a better idea of how equitable distribution will develop under the new Pennsylvania Divorce Code. 290

1. New Jersey

   a. The Statute

   The New Jersey Divorce Code provides that, pursuant to a judgment of divorce, the courts may equitably divide both real and personal property. 291 Unlike the Pennsylvania Code, 292 the New Jersey statute does not include a list of factors to guide a court in its determination. 293 The New Jersey Supreme Court in Painter v. Painter, 294 however, approved a list of "illustrative but not exhaustive" criteria. 295 The factors are

   (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current value and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment at present earnings or better in the future; (12) effect of distribution of assets on the ability to pay alimony and support, and (13) gifts from one spouse to the other during marriage. 296

   The Painter court also cited with approval the equitable distribution approach taken by the drafters of the Uniform Marriage and Divorce

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290. For a discussion of the pertinent equitable distribution provisions of the new Code, see notes 63-79 and accompanying text supra.
291. N.J. STAT. ANN. § 2A:34-23 (West Supp. 1979-1980). The statute provides that "the court may make such award or awards to the parties . . . to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." Id. Thus, title is no longer relevant.
292. See notes 69-71 and accompanying text supra.
295. Id. at 212, 320 A.2d at 492.
296. Id. at 211, 320 A.2d at 492, quoting Painter v. Painter, 118 N.J. Super. 322, 335, 287 A.2d 467, 469 (1972).
Act which considers similar factors and simply allows each party to keep what is his or her own.

Due to the lack of legislative criteria throughout the equitable distribution provision, the court had to develop a definition of the marital property subject to distribution. Therefore, in Painter, the court ruled that "all property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce." In defining what timespan is intended by the phrase "during the marriage," the court stated that the period commences as soon as the marriage ceremony has taken place and terminates the day the complaint is filed.

In the absence of legislative guidance, the New Jersey Supreme Court has specifically held that considerations of marital fault have no place in the property distribution process. In Chalmers v. Chalmers, the court explained this position by stating that "fault may be merely a manifestation of a sick marriage" and that, in any event, it is often difficult to assess responsibility for the breakup. Also, and more importantly, the court recognized that the doctrine of equitable distribution assumes that both parties have contributed equally to the marriage and that all property acquired during marriage should be shared equally after the divorce. The reader should be aware that this definition is broader than Pennsylvania's which contains specific statutory exclusions.

b. The Case Law

Because of the lack of detail in the New Jersey statute, case law has played a significant role in the development of the law of

297. See 65 N.J. at 212, 320 A.2d at 492, reprinted in 9A UNIFORM LAWS ANN. 143 (1979). This section provides that four factors are pertinent in the property distribution determination:

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


298. 65 N.J. at 212, 320 A.2d at 492.
299. Id. at 217, 320 A.2d at 495.
300. Id. at 217-18, 320 A.2d at 495.
303. Id. at 193, 320 A.2d at 482.
304. Id. at 194, 320 A.2d at 493.
305. See notes 67-68 and accompanying text supra.
equitable distribution in New Jersey. The nature of equitable distribution requires a judge to engage in a three-step procedure: first, the court must identify the property available for distribution—i.e., the marital property; second, a value must be assigned to the property; and third, the judge must arrive at an equitable allocation. Problems may arise at each stage of the process, and it is instructive to examine the New Jersey courts' handling of the more common issues.

One of the more interesting problems which the New Jersey courts have faced is that of assigning a value to the economic interests. When the property to be divided is subject to fluctuations in value, the valuation date may be extraordinarily significant. While the parties may, of course, stipulate to a valuation date, in the absence of such a stipulation, the court will use the date the divorce action was commenced to determine the value of the property.

The more difficult problem is the valuation of an interest which has no readily discernable fair market value. Consider the issue faced by the New Jersey Supreme Court in *Stern v. Stern* where the court had to determine the value of a divorced spouse's interest in a law partnership, recognizing that the spouse intended to continue as a member of the firm. The court determined that the measure of the partner's interest was that sum which would have gone to his estate pursuant to the partnership agreement if he had died. The court stated:

> Generally speaking the monetary worth of this type of professional partnership will consist of the total value of the partners' capital accounts, accounts receivable, the value of work in progress, any appreciation in the true worth of tangible personality over and above book value, together with good will, should there in fact be any; the total so arrived at to be diminished by the amount of accounts payable as well as any other liabilities not reflected on the partnership books.

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310. *Id.* at 345, 331 A.2d at 360. If the spouse did not intend to continue as a partner, there would be no valuation problem for the value of the interest would be that sum paid to the partner upon his or her withdrawal.
311. *Id.* at 346, 331 A.2d at 360.
312. *Id.* at 346-47, 331 A.2d at 261 (footnotes omitted). The court rejected an argument made by the defendant that the accounts receivable should not be included in the valuation because they are not vested rights. See *id.* at 348, 331 A.2d at 261-62. In rejecting this contention, the court stated that the concept of "vesting" is best left in the law of future interests and it "should probably find no significant place in the developing law of equitable distribution." *Id.*, 331 A.2d at 262. Significantly, however, the court left open the question of what future interests may be considered marital property—an area where the concept of vesting may play a crucial role. *Id.* at 348-49, 331 A.2d at 262.
The court further stated that if a partnership agreement contains a stated sum payable to a partner's estate upon death then presumptively that sum, plus the value of the partner's interest above stated capital, is the value of the interest upon divorce.\(^{313}\) The presumption is rebuttable, however, upon a showing that the stated figure has not been periodically updated to show increases in value or that the books of the partnership are not well kept.\(^{314}\)

The New Jersey Superior Court faced a similar problem in the case of \textit{Lavene v. Lavene},\(^{315}\) wherein the court was required to place a value upon a spouse's interest in a closely held corporation.\(^{316}\) In \textit{Lavene}, the court recognized that, in assessing this type of property, "[e]ach case presents a unique factual question" which cannot be solved by rigid adherence to mathematics.\(^{317}\) The court thus opined that the method of valuation of close corporations used by the Internal Revenue Service for estate and gift tax purposes\(^{318}\) is equally applicable in the equitable distribution context.\(^{319}\) It should be noted that the federal tax approach to valuation of close corporations is a multifactored, nonrigid method.\(^{320}\) Therefore, in both \textit{Lavene} and \textit{Stern}, the courts involved used all relevant factors in determining the valuation of interests which did not have a stated fair market value.

Another interesting problem that has arisen in New Jersey is the effect of a judgment lien held by a third party which has attached to one of the spouses' interests in the marital property. In \textit{Sisco v. New Jersey Bank},\(^{321}\) title to the marital home was held by the en-

\footnotesize{
\begin{itemize}
\item 313. \textit{Id.} at 346, 331 A.2d at 260.
\item 314. \textit{Id.} at 346-47, 331 A.2d at 261.
\item 316. \textit{Id.} at 192-203, 392 A.2d at 623-29. The defendant owned 42.8% of the outstanding stock of the corporation. \textit{Id.} at 192, 392 A.2d at 623.
\item 317. \textit{Id.} at 193, 392 A.2d at 624.
\begin{enumerate}
\item The nature of the business and the history of the enterprise from its inception.
\item The economic outlook in general and the condition and outlook of the specific industry in particular.
\item The book value of the stock and the financial condition of the business.
\item The earning capacity of the company.
\item The dividend-paying capacity.
\item Whether or not the enterprise has goodwill or other intangible value.
\item Sales of the stock and the size of the block to be valued.
\item The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.
\end{enumerate}
\item 319. 162 N.J. Super. at 195, 392 A.2d at 625.
\item 320. See note 318 supra.
\end{itemize}
}
The parties were divorced and the decree provided that the home should be sold with 60% of the proceeds accruing to the wife and 40% to the husband. The court also ordered that certain indebtedness, including accrued support payments, be paid out of the husband's 40% share. On March 21, 1977, the defendant-bank obtained a judgment against the husband and levied on all of his interest in the marital property. The wife, of course, claimed priority over the bank's lien. The lower court held that she had such priority with respect to both her 60% interest in the property and the accrued indebtedness which was to be paid from the husband's 40% share.

On appeal, the Superior Court determined that the original divorce decree's order as to the indebtedness created only a money judgment in favor of the wife, and therefore, since the bank was first to execute, it had priority over any sums gained from the husband's 40% interest. The court also determined, however, that the divorce decree gave the wife an undivided 60% equitable interest in the proceeds of the marital home. Applying the rule that a legal lien can only bind the actual interest of the debtor, the court stated that the wife's 60% interest was not subject to the bank's lien and, hence, all that the bank could levy on was the husband's 40% share.

Thus, Sisco apparently holds that equitable distribution effectuates a partition of jointly held marital property with each spouse's share subject to execution by his or her own creditors but immune from execution by the other spouse's creditors. Sisco also illustrates a fundamental point in an equitable distribution system: the irrelevancy of who has title. Remember that the marital home in Sisco was held by the entirety. At common law, divorce destroyed this estate creating in its stead a tenancy in common which gave each spouse a one-half interest in the property. Under equitable distribution, while the tenancy by the entirety is still destroyed, on divorce the parties' share of the property is determined according to all relevant

322. Id. at 114, 385 A.2d at 891.
323. Id.
324. Id.
325. Id. at 115, 385 A.2d at 891.
326. Id. at 116, 385 A.2d at 892.
327. Id. at 119-20, 385 A.2d at 894.
328. Id. at 123, 385 A.2d at 895.
329. Id.
330. Id.
331. See text accompanying note 322 supra.
factors. For example, in Sisco, the wife’s share was 60% and the husband’s was 40%.

Identifying what constitutes “marital property” has also been addressed by the New Jersey courts. We have already indicated that interests in professional partnerships and close corporations are considered marital property. Additionally, the New Jersey courts have determined that an increase in the value of property acquired by one of the spouses prior to marriage becomes marital property if the increase in value is attributable to the contributions of both spouses. Because the increase must be due to the contribution of both spouses, increases in value due to inflation or other economic factors are not considered marital property in New Jersey. Compare this with the Pennsylvania Code which recognizes that an increase in value to premarital property is marital property. The Pennsylvania statute makes no distinction on its face between inflationary increases in value and increases due to other factors. Pennsylvania courts when presented with the question would do well to consider New Jersey’s rejection of increases not directly related to spousal efforts.

What is an “equitable” distribution is an unanswerable question and will depend upon the facts of each case before the court. Yet the New Jersey courts have been rather innovative in their approach to this problem and have not hesitated to award numerically unequal shares. In one especially pragmatic decision, the court awarded the wife the right to live in the marital residence. However, because there was an insufficient amount of remaining assets to give the husband his fair share, the court directed the wife to give the husband a mortgage with interest and principal to be paid at a date designated in the future.

The New Jersey Supreme Court has articulated the public policy considerations behind equitable distribution as being the furtherance

333. See text accompanying note 324 supra. See also Pascarella v. Pascarella, 165 N.J. Super. 558, 562, 398 A.2d 921, 923 (1979) (40% award of entireties property to wife was excessive on the facts of the case).
334. See notes 309-14 and accompanying text supra.
335. See notes 315-19 and accompanying text supra.
337. Id. at 9, 370 A.2d at 509.
338. DIVORCE CODE, supra note 1, § 401 (e)(1), (3).
341. Id. at 282, 369 A.2d at 944.
342. Id. at 284, 369 A.2d at 945.
of the financial welfare of a dependent spouse and a recognition of that spouse's contributions to the economic efficacy of the marriage.\textsuperscript{343} The policy considerations in the Pennsylvania Code imply a similar approach.\textsuperscript{344}

2. Delaware

\textbf{a. The Statute}

The Delaware Act provides for equitable distribution of marital property upon request of the parties, without regard to marital misconduct.\textsuperscript{345} The statute includes a list of eleven factors which are to be considered in making an equitable distribution.\textsuperscript{346} In this respect, the Delaware provision is more inclusive than the New Jersey statute which includes no guidelines,\textsuperscript{347} and thus, the Delaware law is similar to that of Pennsylvania.\textsuperscript{348} In addition, the Delaware statute gives a reasonably detailed definition of marital property: "[A]ll property acquired by either party subsequent to the marriage except: (1) [p]roperty acquired in exchange for property acquired prior to the marriage; (2) [p]roperty excluded by valid agreement of the parties; and (3) [t]he increase in value of property acquired prior to the marriage."\textsuperscript{349} Furthermore, the statute expressly states that regardless of who holds title, property acquired during the marriage is presumed to be marital property.\textsuperscript{350}

\begin{footnotesize}
\begin{enumerate}
\item See Divorce Code, supra note 1, § 102; notes 287-88 and accompanying text supra.
\item Id. § 1513(a). The court is to consider "all relevant factors" including 1) the length of the marriage; 2) any prior marriage of the party; 3) the age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; 4) whether the property award is in lieu of or in addition to alimony; 5) the opportunity of each for future acquisitions of capital assets and income; 6) the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation of the marital property, including the contribution of a party as homemaker or husband; 7) the value of the property set apart to each party; 8) the economic circumstances of each party at the time the division of property is to become effective, taking into account the desirability of awarding the family home or the right to live therein for reasonable periods to the party with whom any children of the marriage will live; 9) whether the property was acquired by gift, bequest, devise, or descent; 10) the debts of the parties; and 11) tax consequences. Id.
\item For a discussion of New Jersey's equitable distribution law, see notes 291-343 and accompanying text supra.
\item Id. § 1513(c). The presumption may be rebutted by a showing that the property falls within one of the categories listed in text accompanying note 349 supra. See id.
\end{enumerate}
\end{footnotesize}
b. The Case Law

The relative explicitness of the definition of marital property in the Delaware Act has had the beneficial result of minimizing litigation concerning this issue. Nonetheless, the courts have been called upon to answer a number of questions in this area. For example, in Wife J. v. Husband J., the Delaware Superior Court was presented with the question of when marriage terminates for purposes of defining marital property. In this case, the wife received the proceeds of a life insurance policy after the filing of the complaint but before the rendering of a final decree. The court held that "in the absence of unfair tactics by the other spouse, property received by a spouse subsequent to the marriage and prior to the divorce decree is marital property."

The Pennsylvania Code would seem to dictate a result contrary to the Delaware court's holding in Wife J. because property acquired after separation is excluded from the Code's definition of marital property. It is not clear, however, if the Pennsylvania statute excludes post-separation increases in value as in the situation where an asset has been defined as marital property and assigned a value at a hearing but then increases in value prior to the issuance of a decree. The new Code's provisions are seemingly in conflict on this issue. On the one hand, the Code provides that increases in value to property during the marriage are marital property yet, on the other hand, the Code excludes post-separation acquisitions. It is possible that the Pennsylvania courts can avoid this conflict by interpreting the post-separation acquisition provision as not encompassing post-separation increases in value when the underlying asset was acquired prior to the separation. The Delaware Supreme Court has held in this regard that, upon a showing of a substantial post-hearing change in value to marital property, the court should revalue the property.

352. Id. at 656.
353. Id. at 657. The court reasoned that since other marital obligations, such as support or alimony pendente lite, continue until a final decree is rendered, there was no justification for applying a different rule in equitable distribution context. Id.
354. See Divorce Code, supra note 1, § 401(e)(4).
355. Id. § 401(e).
356. Id. § 401(e)(4).
357. See Wife F. v. Husband F., 358 A.2d 714, 716 (Del. 1976) (per curiam). In Wife F., the asset involved was a retail liquor store. Id. The lower court valued the business at $26,722. Id. Subsequent to this valuation, but prior to the rendering of the decree, the husband entered into an agreement to sell the business for $100,000. Id. The lower court refused to revalue the asset. Id. On appeal, the Delaware Supreme Court reversed, stating that, while "not every post-
The Delaware Supreme Court faced an interesting marital property classification problem in *J.D.P. v. F.J.H.* 358 In this case, the husband was the controlling stockholder in two Delaware corporations which were acquired prior to marriage and thus were not marital property under Delaware law. 359 The question arose, however, as to how increases in the value of these interests attributable to the corporations’ retained earnings should be classified.360 The court rejected the husband’s argument that these increases should be excluded and held that “an increase during the marriage of retained earnings of a corporation controlled by a spouse may be included in the calculation of the couple’s marital property.” 361 The court maintained that to hold otherwise would give one spouse the ability, through corporate control, to insulate assets from equitable distribution.362

What constitutes an equitable distribution is within the court’s discretion, subject to the statutory guidelines. 363 Thus, there is no requirement that the property be divided equally. 364 Despite the discretionary nature of the process, the Delaware Supreme Court has implied that the lower court must develop a sufficient record to allow appellate courts to determine if the statutory criteria are being applied correctly or if the lower court is abusing its discretion. 365

In exercising its discretion, the trial court must take into account legal interests in the marital property. For example, in *Wife (L.R.) v. Husband (N.G.)*,366 the lower court awarded the wife only twenty-five percent of the property which the parties held as tenants by the entirety, justifying its action on the following grounds: 1) the marriage was relatively short; and 2) the wife had taken some marital assets. 367 On appeal, the Delaware Supreme Court stated that the hearing change in asset value requires reexamination, . . . the difference here was so substantial that the Court . . . should have determined to what extent . . . the sale price required a change in its award.” *Id.*

358. 399 A.2d 207 (Del. 1979).
359. *Id.* at 209. It should be noted that, whereas the Pennsylvania Code specifically includes increases in value to premarital property within its definition of marital property, the Delaware Code expressly excludes such increases. Compare Del. Code Ann. tit. 13, § 1513(b)(3) (Supp. 1978) with Divorce Code § 401(e)(1), (3). Nevertheless, the *J.D.P.* court’s decision is of interest for Pennsylvania considering the equitable nature of its approach. See notes 360-62 and accompanying text infra.
360. 399 A.2d at 209. The court defined “retained earnings” as “net income which would be available for distribution as dividends.” *Id.* at 210 n.1.
361. *Id.* at 211 (footnote omitted) (emphasis in original).
362. *Id.* at 210.
365. See *Wife (L.R.) v. Husband (N.G.),* 406 A.2d 34, 35 (Del. 1979) (per curiam).
366. 406 A.2d 34 (Del. 1979) (per curiam).
367. *Id.* at 35.
record was insufficient to determine if the lower court had abused its discretion because no values had been assigned to the marital property removed by the wife. The court also held that the duration of the marriage is not a relevant factor when dividing property held by the entirety. Since the wife had an undivided interest in the property by nature of the tenancy by the entirety, the court opined that "while the shortness of the marriage may be a persuasive factor for limiting assignment of [the husband’s] property to the wife, it does not make sense to use it as a basis for divesting the wife of what she has and giving it to the husband." Thus, the court remanded with instructions to the lower court to determine the nature and origin of the wife’s interest.

The Delaware Supreme Court has also determined that a lower court abused its discretion when it ordered a husband to obtain a life insurance policy with the ex-wife as sole beneficiary. The Pennsylvania statute contains a similar rule which limits the court to orders affecting policies acquired during the marriage.

Finally, the Delaware court has also indicated that trial courts have no power to order one of the spouses to place marital property in trust, stating that because the statute requires division of the property between the parties, it is impermissible to order a trust which would grant rights in the property to someone other than the recipient spouse. The Pennsylvania Code, like the Delaware Act, contains language to the effect that property shall be divided. However, the Pennsylvania Code also gives courts handling matrimonial causes broad equity powers, thus apparently granting them the power to establish trusts.

3. Ohio

a. The Statute

The Ohio Act does not include an isolated provision addressing equitable distribution. Instead, the court’s jurisdiction over equitable distribution of marital property in divorce actions stems from two

368. Id.
369. Id.
370. Id.
371. Id.
373. See Divorce Code, supra note 1, § 401(i).
375. See Divorce Code, supra note 1, § 401(d).
376. See id. § 401(c).
separate statutes. Under the first, the court is empowered to award alimony in the form of real or personal property or both, or to award a sum of money to be paid either in a lump sum or in installments. This kind of distribution of property will be governed by the factors set forth in the statute to be considered in the award of alimony. The second statute, which may be construed as giving the court the power to equitably divide, is a general grant of full equity power and jurisdiction to courts hearing domestic relations matters. This permits property to be distributed independently of any alimony award. Additionally, when there is a property settlement agreement pendent to a marital dissolution, the court must approve the agreement prior to entering a decree.

b. The Case Law

The Ohio requirement of a property settlement agreement as a prerequisite to a no-fault marital dissolution has resulted in a simplified property distribution procedure as compared to that of New Jersey or Delaware. The court will approve such an agreement if it is "fair, just and equitable." but if "the spouse in the poorest position to strike a bargain for himself" is unrepresented by counsel and the agreement is inequitable, the court may set it aside. Alternatively, instead of setting aside the agreement completely, the court may, at the parties’ option, modify it.

378. Id. § 3105.18(A).
379. See id.; notes 228-47 and accompanying text supra.
380. OHIO REV. CODE ANN. § 3105.011 (Anderson 1980). The section reads:
The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters. This section is not a determination by the general assembly that such equitable powers and jurisdiction do not exist with respect to any such matter. Id.

Id. In the absence of statutory authorization, courts have no jurisdiction over divorce, property distribution, or alimony actions which were unknown at common law. Soyk v. Soyk, 45 Ohio App. 2d 319, 321, 345 N.E.2d 461, 463 (1975). Therefore, in 1951, a provision conferring equity powers and jurisdiction on the courts in domestic relations cases was passed, allowing for property distribution absent alimony. Id. Upon repeal of this provision in 1971, the courts were without authority to distribute property unless it—the distribution—was pursuant to an alimony award. Id. at 322, 345 N.E.2d at 464. See OHIO REV. CODE ANN. § 3105.18 (Anderson 1980). In 1975, § 3105.011 became effective and the courts regained the authority to distribute property independently of an alimony award. Id. § 3105.011.
382. For a discussion of Ohio’s marital dissolution procedure, see notes 125-49 and accompanying text supra.
383. See OHIO REV. CODE ANN. § 3105.63 (Anderson 1980); note 128 and accompanying text supra.
386. See id. at 42, 392 N.E.2d at 911.
Even though distribution of property is often accomplished through application of the factors in the Ohio alimony statute (because of the jurisdictional necessity of relying, in part, on the alimony section), it has been held that nonperiodic, property alimony in Ohio is generally not subject to future modification. It should also be noted that marital misconduct is not a controlling factor in property distribution in Ohio, although some cases indicate that it may be a relevant factor affecting the court’s discretion.

4. Summary of the Equitable Distribution Laws in Neighboring States

The experiences of neighboring states with respect to equitable distribution of marital property gives some clue as to the future of equitable distribution in Pennsylvania. While the statutory provisions limit and guide the judiciary in the identification and valuation of the marital assets, it is clear from the experiences of New Jersey, Ohio, and Delaware that the word “equitable” provides the element of flexibility which courts require if they are to deal with the parties in a fair and just manner. It is hoped that judicial interpretation of the equitable distribution provisions in the Pennsylvania Code will provide a similar fair and just distribution of marital assets in Pennsylvania.

IV. CONCLUSION

We have presented this analysis of the Pennsylvania Divorce Code and this brief survey of the divorce laws of the states of New Jersey, Ohio, and Delaware under no illusion that all questions which will arise under the new Code will be answered by looking to our sister states. It was our intention, however, to try to illuminate through this survey some of the more pertinent and common problem areas which have arisen in those states and which very likely will arise in Pennsylvania. While the decisions of these contiguous jurisdictions do not always comport with our idea of how the Pennsylvania system ought to operate, they are an invaluable source of alternatives which can be applied to the many complex problems which may now arise in the area of family law in Pennsylvania.

387. For a discussion of this jurisdictional mechanism, see notes 377–81 and accompanying text supra. For a discussion of the Ohio alimony statute, see notes 228–52 and accompanying text supra.
388. See Olney v. Watts, 43 Ohio St. 499, 507, 3 N.E. 354, 356 (1885).
In summary, the law of divorce, alimony, and property distribution in Pennsylvania has entered the modern world after a long history of obstinate legislative adherence to stereotypical notions of the family. We are certain that the new Code will put an end to many of the draconian results which were prevalent under the old law. We hope that the Pennsylvania courts will liberally interpret the new Act so that the progressive notions of modern-day family life, which are fundamental policies of the Code, will be furthered.

392. See Divorce Code, supra note 1, § 102.