BYU Law Review

Volume 2001 | Issue 3 Article 14

9-1-2001

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I. INTRODUCTION

After a twenty-two-year marriage, a husband left his wife and children and filed for divorce. The couple's property included the marital residence, valued at $83,000, a second property, valued at $1,900, the wife's pension, a third property comprised of fifty acres, and a one-half interest, valued at $34,500, in two other parcels of land.[1] The court awarded the husband $34,500 and one-half of the proceeds from the sale of the fifty acres, and the wife received the rest of the property.[2] The husband complained about the unequal property division. Under the American Law Institute's *Principles of the Law of Family Dissolution*,[3] ("*Principles*"), the husband would have had claim to one-half of all the property, including the wife's pension.

Equal division on its face seems fair enough, but consider the facts of the case. During the course of the marriage, the husband was sporadically employed but never had a permanent job, and he would disappear for months at a time.[4] On the other hand, the wife was employed full-time beginning a few years after their marriage and all

* This article was presented at the Symposium on the ALI *Principles of the Law of Family Dissolution*, held at Brigham Young University's J. Reuben Clark Law School on February 1, 2001.

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1. *See* Matwijczuk v. Matwijczuk, 690 N.Y.S.2d 343, 344–45 (N.Y. App. Div. 1999).

2. *Id.* at 345.

3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Proposed Final Draft, Part I, Feb. 14, 1997) [hereinafter PRINCIPLES (Proposed Final Draft, pt. I)]. Chapter 4 concerning division of property upon dissolution is primarily in the Proposed Final Draft, Part I, but some sections are reprinted in PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter PRINCIPLES (Tentative Draft No. 4)], and a new comment h to section 4.15 was added in Tentative Draft No. 4.

4. *Matwijczuk*, 690 N.Y.S.2d at 344–47.

the household expenses were paid from her salary. In addition to paying all the household expenses, she did all the housework, cooking, sewing, cutting the grass, gardening, and was the children's primary caregiver.[5] Does an equal property division really make any sense in cases like this?[6]

The courts, in case after case, grapple with the question of how a couple's property should be divided when they divorce. The *Principles*, in their comprehensive treatment of divorce law, propose rules governing the division of property in chapter 4. This chapter thoroughly discusses property division law and proposes a careful framework of rules with illustrations and comments to guide property division.[7] This article compares chapter 4 with current divorce property division law and concludes that chapter 4 is generally consistent with current law. Where chapter 4 is not consistent with current law, it is likely to have only a modest impact on family law, either because in most cases it will not change the ultimate property division, or because it will likely be rejected. Part II discusses the objectives, theoretical bases, and major features of chapter 4. The rules promoted in the *Principles* recognize marriage as a joint enterprise where both spouses contribute to the marriage in different but equally important ways. The ALI strives to achieve fair allocation of the spouses' property while insisting on consistent and predictable results.

Part III considers the impact chapter 4 will have on family law and identifies some possible concerns. Property division rules promoted by the *Principles* are built on familiar concepts and generally are consistent with the majority views and current trends. There are, however, three important areas where chapter 4 does not follow current majority views. First, the ALI rejects equitable distribution and adopts a strong presumption of equal division. Second, the ALI re-

5. *Id.*

6. For discussion of these types of cases and the ALI's response, see *infra* notes 104–18.

7. The *Principles* are not a model statute. They suggest rules but anticipate implementing legislation or judicial adoption. *See, e.g.*, PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.18(1) ("In marriages that exceed a minimum duration specified in a uniform rule of statewide application, a portion of the separate property . . . should be recharacterized at dissolution as marital property."). Much, though perhaps not all, of chapter 4 would require legislative enactment. *See* Wendt v. Wendt, No. FA96-0149562-S, 1998 WL 161165, at *87, *115 (Conn. Super. Ct. Mar. 31, 1998) (rejecting section 4.15 and the equal division presumption as violating state statute, and holding that section 4.15 cannot become law "until the legislature sees fit to change the statutes"), *aff'd*, 757 A.2d 1225 (Conn. Ct. App. 2000).

jects the discretionary factors currently used by most courts in equitable distribution. Third, the ALI proposes recharacterization of separate assets to marital assets over the course of a long marriage. Part III questions whether chapter 4's limitation of judicial discretion, with the concurrent loss of flexibility, is the best approach. It further considers whether the no-fault approach to property division in the *Principles* is justified. Finally, Part IV applauds the ALI's overall effort, but concludes that chapter 4 is likely to have only a modest impact on family law.

II. FAIRNESS, CONSISTENCY, AND MAJOR FEATURES OF CHAPTER 4

A. Theoretical Bases and Objectives of Chapter 4

Any analysis of rules governing property division upon marriage dissolution should identify the policy objectives those rules seek to achieve.[8] The analysis should consider the appropriateness of the objectives and also should evaluate whether the rules succeed in achieving those objectives. Chapter 4's objectives for property division at divorce are to (1) respect spousal ownership rights and equitable claims resulting from the marriage, (2) facilitate satisfaction of child support obligations and financial losses arising from the marriage dissolution, and (3) apply rules consistently and predictably.[9] These objectives correspond to the goals long held by many family law scholars.[10]

Different approaches to property division tend to give preeminence to certain of these factors over others. Historically, American jurisdictions followed the common law "title theory" approach to property distribution, which placed great emphasis on respect for ownership rights (as evidenced by title), but had little regard for eq-

8. *See* Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 255, 277 (1989) (urging articulation of purpose and goals for both property division and alimony); Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 148 (1989) (noting that purposes of equitable distribution scheme for property division "are not necessarily consistent").

9. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.02.

10. *See* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 29 (2d ed. 1994) (listing the goals of property division as fairness, ease of computation, predictability, and consistency); Krauskopf, *supra* note 8, at 256–57 (stating that purpose is "to assure a fair allocation of the gains and losses when the marriage relationship ends").

uitable claims.[11] The title theory approach proved to be highly consistent and predictable,[12] but also led to harsh and inequitable results.[13] The title theory approach has been universally discredited and replaced by community property and equitable distribution schemes.[14]

All American jurisdictions now are either community property or common law property jurisdictions. The laws governing property division at divorce in the various jurisdictions are not uniform, but do include many common features. For example, the majority of jurisdictions in divorce actions classify all property of the spouses as either marital property or separate property[15] and typically divide only the

11. One authority explained the common law approach:

> Title was all that mattered. Assets in one spouse's name were considered to be that spouse's separate property; the other (non-titled) spouse's contributions toward amassing family wealth were not an appropriate subject of inquiry. Thus, upon divorce under the common law system, a wife without assets titled in her own name was left with nothing other than the expectant hope of court-ordered alimony.

Ann B. Oldfather et al., *Basic Property Disposition Rules*, *in* 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 1.02[1] (2000); *see also* JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION ¶ 1.01 at 1-1 (1989) (discussing common law title approach); TURNER, *supra* note 10, § 1.02, at 3–4 (discussing history of the title theory). The theory was also referred to as the "separate property" method of distribution. *See* Ferguson v. Ferguson, 639 So. 2d 921, 926 (Miss. 1994).

12. Application of the rule usually meant the husband got everything and the wife got little or nothing. *See, e.g.*, PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 1; 1 Oldfather et al., *supra* note 11, § 1.02[1], at 1–5; Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 118 (1997); *see also, e.g.*, *Ferguson*, 639 So. 2d at 926 (noting unjust distributions in cases of traditional family "where most property was titled in the husband, leaving a traditional housewife and mother with nothing but a claim for alimony, which often proved unenforceable").

13. *See Ferguson*, 639 So. 2d at 926 (noting that "system at times resulted in unjust distributions" and "unfair results"); GREGORY, *supra* note 11, ¶ 1.01 at 1-2 (noting "the harshness and injustice of the common law approach" and citing cases); J. THOMAS OLDHAM, DIVORCE, SEPARATION, AND THE DISTRIBUTION OF PROPERTY § 3.02[2], at 3–4 (2000) (discussing unfairness of title system).

14. The last state to completely abandon the title theory was Mississippi in 1993. *See* Draper v. Draper, 627 So. 2d 302, 305 & n.2 (Miss. 1993) (noting that prior to the decision "the old title theory . . . was eroded, but not dead," and holding "[t]oday we write its obituary").

15. These are the terms used by the *Principles* and most jurisdictions. *See, e.g.*, COLO. REV. STAT. § 14-10-113(1), (2) (2000) (defining marital property and discussing division); MINN. STAT. § 518.54 (Supp. 2001) (defining marital property and nonmarital property); N.Y. DOM. REL. LAW § 236 (McKinney Supp. 2001) (defining marital property and separate property); TENN. CODE ANN. § 36-4-121(b) (Supp. 2000) (defining marital property and separate property). Community property states refer to "community property" and "separate property." *See, e.g.*, IDAHO CODE § 32-712 (Michie 1996) (discussing division of community

marital property.[16] A substantial minority of jurisdictions allow division of all property regardless of how it might otherwise have been classified, whether as marital or separate.[17] Notwithstanding the divergence concerning which property is divisible, the large majority of jurisdictions, including most community property states, apply a rule of equitable distribution that requires equitable division of property at divorce. Equitable division does not mean "equal" division, and, as its label implies, it focuses on the objectives of ownership rights and fairness.

Equitable distribution, however, involves an enormous amount of judicial discretion. This broad discretion comes at the expense of consistency and predictability.[18] Scholars and judges have bemoaned the inconsistent and unpredictable results in divorce property division cases, noting that judges are given little guidance, comparatively few cases are reversed on appeal, and nearly any conceivable division of property is possible.[19] This uncertainty may discourage settlement

property).

16. *See, e.g.*, COLO. REV. STAT. § 14-10-113(1) (2000) (providing that the "court shall set apart to each spouse his property and shall divide the marital property"); N.Y. DOM. REL. LAW § 236 Part B(5) (McKinney Supp. 2001) (dividing marital property, maintaining separate property); TENN. CODE ANN. § 36-4-121(a)(1) (Supp. 2000) (dividing marital property).

17. *See, e.g.*, CONN. GEN. STAT. ANN. § 46(b)-81 (West Supp. 2000) ("court may assign to either the husband or wife all or any part of the estate of the other"); N.H. REV. STAT. ANN. § 458:16-a (Supp. 2000) (property to include "all tangible and intangible property and assets . . . belonging to either or both parties"); Krafick v. Krafick, 663 A.2d 365 (Conn. 1995) (discussing all property approach); Wetzel v. Wetzel, 589 N.W.2d 889, 895 (N.D. 1999) (noting that "all property, including separate property, is subject to distribution"); Brewer v. Brewer, 976 P.2d 102, 109 (Wash. 1999) ("[A]ll property, both separate and community, is before the court."). This approach is sometimes referred to as the "all property," "kitchen-sink," or "hotchpot" system. Some states, following the majority dual-classification approach, do allow division of separate property under some conditions. This is sometimes referred to as the "hybrid" system.

18. *See* John C. Sheldon, *Anticipating the American Law Institute's Principles of the Law of Family Dissolution*, 14 ME. B.J. 18, 22 (1999) (stating that "[d]oing equity in the distribution of marital property is a complex proposition . . . if one also aspires to consistency" and noting that "[m]arital property issues tend to be fact-intensive, and marital distribution statutes tend to be vague and to rely heavily on judicial discretion").

19. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 86 (1987) (discussing "virtually unfettered judicial discretion" and noting effect "is to deprive the spouses and their legal representatives of any clear principles that could serve as a background for negotiation"); Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 868–69 (1999) (discussing problem of broad discretion); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51, 63 (1998–99) (noting "virtually any outcome is legally possible").

and generate unnecessary litigation by often emotional and angry parties.[20]

The ALI strives to encourage fairness and simultaneously to limit the seemingly unbounded judicial discretion that has often resulted in inconsistent and unpredictable results.[21] The ALI attempts to balance the competing considerations of fairness and consistency by (1) establishing an unambiguous framework that generally follows the approach adhered to in most jurisdictions,[22] (2) adopting specific classification rules in areas that have sometimes divided courts,[23] and (3) adopting a strong presumption of equal division with only limited, defined exceptions.[24] To the extent the ALI is able to promote reliable and simplified property division rules, the cost and complexity of divorce litigation should be reduced and settlement should be encouraged.[25]

The ALI approach furthers the objectives of fairness and consistency by dividing a couple's marital property equally. This approach reflects, to some degree, the view that marriage is like a partnership. The partnership theory underpins much of current divorce property division law[26] and analogizes marriage to a business partnership where both partners, absent an agreement to the contrary, join in a common enterprise, and all gains and debts generated by the partnership are shared equally, regardless of the nature of the parties'

20. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15 cmt. a, at 195 (noting that unpredictability breeds litigation).

21. *See* PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 4.02(1), (3) & cmt. c (stating objectives of chapter 4); *id.* at 70 (identifying "consistency and predictability of trial court decisions" as "major theme of the *Principles*").

22. *See infra* Parts II.B, III.A (discussing major features of chapter 4 and noting consistency with current law).

23. *See infra* Part II.B (discussing chapter 4 classification rules).

24. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15 (directing division of marital property in shares equal in value).

25. *See, e.g.*, *id.* at 11 (valuing "[e]xpeditious settlement with a minimum of legal process" and finding that predictability in litigation outcomes facilitates out-of-court settlements); *id.* § 4.15 cmt. a at 195 (noting that "unpredictability . . . breeds litigation").

26. *See* Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 139–41 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (discussing partnership theory and its application to property division at divorce); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 (1990) (noting that "[n]early every state currently embraces the community-property concept of marriage as a partnership"); TURNER, *supra* note 10, § 1.02, at 16 (noting that marital partnership theory is "mentioned in almost every case today"); *id.* § 8.01, at 551 (discussing marital partnership theory).

contributions during the marriage.[27] As explained by Professor Joan A. Krauskopf, the theory recognizes that "both partners contribute to the success of the marital unit in different but equally important ways."[28] On the other hand, assets and debts of individual spouses brought into the partnership, or received and maintained outside of the partnership, are not partnership assets or debts.

Consistent with the marital partnership theory, chapter 4 views property division as a matter of compensation for gains and losses from the marriage. Theoretically, property division is a straightforward division of property based on ownership rights; need and standard of living concerns are irrelevant. This differs from the law in many jurisdictions, where property division is partly a need-based determination considering age, health, and economic need of the spouses.[29]

By directing a more equal division of marital property, the ALI draws the law closer to partnership theory. The ALI consciously and explicitly shifts the policy behind property division (and alimony) from need relief to loss compensation.[30] Under chapter 4, need is

27. *See, e.g.*, Tougas v. Tougas, 868 P.2d 437, 445–46 (Haw. 1994) (finding property distribution to be guided by partnership principles with each to share profits equally); Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 72–76 & n.66 (2001) (discussing marital partnership concept and its manifestations in current law); Smith, *supra* note 26, at 697 (noting that "[c]ommon-law states largely borrowed the partnership model from community-property states, which recognize married women's independent legal identity as equal partners in marriage—partnership entitled to half of all assets acquired during marriage"); Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 286 (1989) (noting "modern notion of partnership based on equally valued, though different in kind, contributions to the marriage"); *but cf.* TURNER, *supra* note 10, § 8.01, at 551 (arguing that under theory parties' interests in marital partnership "are not equal" and each is entitled in proportion to their respective contributions).

28. Joan M. Krauskopf, *Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 998 (1987).

29. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 9 (noting that "[u]nder existing law 'need' is the most common rationale" for alimony and award of enhanced share of marital property). *See, e.g.*, CONN. GEN. STAT. § 46b-81(c) (West Supp. 2000) (requiring court to consider age, health, income, employability, needs of parties); N.H. REV. STAT. ANN. § 458:16-a (Supp. 2000) (same); IDAHO CODE § 32-712 (1996) (same); TENN. CODE ANN. § 36-4-121(c) (Supp. 2000) (requiring courts to consider age, physical and mental health, earning capacity, economic circumstances of the parties).

30. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 9 (noting shift from need to loss for both alimony and property division); *id.* § 4.15 cmt. d (discussing property division and need); *id.* § 5.02 cmt. a (discussing alimony and need).

generally not relevant to property division determinations.[31]

B. Major Features of Chapter 4

The ALI directs property division by a straightforward and familiar method. Sections 4.03 to 4.08 identify and classify the spouse's property as either marital or separate property. Sections 4.15 to 4.18 allocate marital property and separate property between the parties. Marital property is divided equally unless a specific exception applies; separate property is assigned to its owner.[32]

Chapter 4 defines "marital property" and "separate property."[33] Marital property includes "[p]roperty acquired during marriage," property acquired during cohabitation immediately prior to marriage, and interspousal gifts.[34] Separate property generally includes property acquired before the marriage,[35] a spouse's inheritances or gifts by third parties, and property acquired during a period of separation under a written agreement or judicial decree.[36] Property acquired during marriage that is traceable to separate property remains separate property.[37]

Several areas of classification are specifically addressed by chapter 4. Income from, and appreciation of, separate property during the marriage are generally separate property unless the increase is attributable to a spouse's labor during the marriage.[38] Business and profes-

31. Even under the *Principles*, need continues to play a part in property division when marital debts exceed marital assets. *See id.* § 4.15(2)(c) (permitting unequal division if "marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses' financial capacity").

32. *Id.* § 4.15 (marital property is divisible); *id.* § 4.18 (separate property should be assigned to owner). Note that chapter 4 consists of sections 4.01 to 4.08, 4.15 to 4.18. There are no sections 4.09 to 4.14.

33. *Id.* § 4.03.

34. *Id.* § 4.03(1), (6) & cmts. b, d.

35. This is not explicitly stated in section 4.03, though it is negatively implied by the definition of marital property. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.03 (defining marital property as "[p]roperty acquired during marriage"). It is expressly stated in the comments. *Id.* § 4.03 cmt. d ("As a general matter premarital acquisitions are classified as separate property."); *cf. id.* § 4.08(1) ("Property earned by labor not performed during marriage is the separate property of the laboring spouse even if received during marriage.").

36. *Id.* § 4.03(2) (inheritances and gifts); *id.* § 4.03(4) (after living apart).

37. *Id.* § 4.03(3). Tracing rules are not set forth by the *Principles. Id.* § 4.03 cmt. c (noting that examination of tracing rules is outside the scope of the *Principles*).

38. *Id.* §§ 4.04–4.05.

sional goodwill are marital property in some circumstances.[39] Vested and unvested pension rights earned during the marriage are marital property.[40] Personal injury tort recoveries, insurance proceeds, and disability pay are marital property to the extent they compensate for lost income that would have been earned during the marriage or depletion of marital assets.[41]

For dissolution of long-term marriages, the ALI recharacterizes what would otherwise have been considered separate property as marital property.[42] The *Principles* call for states to establish a formula for converting a percentage of the value of separate property into marital property over the passage of years and for states to recharacterize the full value after a specified number of years.[43] A spouse, by written notice, may opt out of this provision as it applies to gifts or inheritances received during the marriage.[44]

Although chapter 4 defines marital and separate property, it does not attempt to define "property."[45] Section 4.07 does state, however, that spousal earning capacity, spousal skills, occupational licenses, and educational degrees are not divisible property.[46]

After the spouses' property is classified as either marital or separate, the marital property is divided into "shares equal in value."[47] A court may deviate from the equal division requirement only if the

39. *Id.* § 4.07.

40. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.08(1)(a)(b).

41. *Id.* § 4.08(2).

42. *Id.* § 4.18. What is a long-term marriage is an open question to be determined on a jurisdiction-by-jurisdiction basis. The comments do provide some guidance, however, and suggest that 30–35 years is certainly long enough for complete recharacterization of separate property held at the time of marriage, while a two- or three-year marriage is certainly too short for any recharactization. *See id.* cmt. b, at 242. An example in the illustrations suggests recharacterization beginning after the fifth year of marriage and completed by the thirtieth year. *See id.*, illus. 1, at 243–44.

43. *Id.* § 4.18.

44. *Id.* § 4.18(4).

45. "The *Principles* would require a definition of 'property' if the term was meant to have a special meaning different from its meaning in other areas of the law, but no such special definition is necessary or desirable." PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.03 cmt. b, at 90. Professor Parkman has criticized the *Principles* for failing to define property. *See* Parkman, *supra* note 19, at 63–64. He argues that "a clear understanding of what is property and how it is affected by marriage is important," *id.* at 64, and is concerned that "[d]ivorce courts often resist expanding the definition of property to include intangible rights." *Id.* at 65.

46. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.07(1), (2).

47. *Id.* § 4.15(1).

court decides (1) that compensatory spousal payments should be made in the form of unequal property division under chapter 5, (2) that marital misconduct directly has diminished marital property, or (3) that marital debts exceed marital assets.[48] This strong presumption in favor of equal division is intended to limit judicial discretion and increase consistency and predictability of awards.[49] The ALI would also permit an unequal division of property by enforcing a valid contract entered into by the parties concerning the division of property on divorce.[50]

III. IMPACT OF CHAPTER 4 AND CONCERNS

A. Chapter 4 is Consistent with Much of Current Property Division Law

Typically, ALI pronouncements receive substantial attention and have significant impact. Indeed, the *Principles of the Law of Family Dissolution*, including chapter 4, have already been cited by numerous courts[51] and authorities,[52] even prior to their final adoption and publication. On the other hand, many aspects of chapter 4 are already the law in many jurisdictions,[53] and the basic concepts behind

48. *Id.* § 4.15(2).

49. *See id.* § 4.15 cmt. a, at 195–96 (discussing variability in current system and need to establish statewide rules).

50. *Id.* § 4.01(2).

51. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 77–78 (2000) (Kennedy, J., dissenting) (citing ALI's criticism of best interests of the child standard); Rubano v. DiCenzo, 759 A.2d 959, 974–75 (R.I. 2000) (citing §§ 2.03–2.21); Bonds v. Bonds (*In re* Bonds), 5 P.3d 815, 831 (Cal. 2000) (citing §§ 7.02, 7.05, 7.07); Smith v. Francisco, 737 A.2d 1000, 1006 (Del. 1999) (citing § 3.14); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (citing § 2.03); Erickson v. Erickson, 978 P.2d 347, 352 (N.M. Ct. App. 1999) (citing § 3.14); Hayes v. Gallacher, 972 P.2d 1138, 1140 (Nev. 1999) (citing § 2.20); Weber v. Weber, 598 N.W.2d 358, 360 (N.D. 1999) (citing § 4.01); Blanchard v. Blanchard, 731 So. 2d 175, 181 (La. 1999) (citing § 4.08); Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998) (citing § 2.20); Young v. Hector, 740 So. 2d 1153, 1157 (Fla. Dist. Ct. App. 1998) (citing §§ 2.09, 2.14).

52. *See, e.g.*, LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 460, 472, 506–07, 586–91, 822–23 (2d ed. 2000) (citing and discussing the *Principles*); D. KELLY WISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 659–60, 663–64 (1998) (quoting and discussing § 4.18); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2069–73, 2082, 2087, 2092–93 (2000) (discussing the *Principles*); J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments,* 1997 U. ILL. L. REV. 801 (1997) (discussing the *Principles*).

53. *See* J. Thomas Oldham, *The American Law Institute's Principles of the Law of Fam-*

chapter 4 are not new. In those specific aspects where jurisdictions differ from the proposals in chapter 4, many jurisdictions have made their decisions with awareness of the concepts now embodied in chapter 4.[54]

The *Principles* are titled and promoted as "Principles" rather than a "Restatement." The difference between Principles and a Restatement, according to the ALI, is that Principles emphasize emerging concepts rather than describing or merely restating the current position of the law.[55] Although the work as a whole may best be characterized as Principles (consider for example, chapters 2, 5, and 6), chapter 4 itself is much more like a Restatement; it adopts many already generally accepted approaches to property division at divorce.[56] Although particular jurisdictions will differ with the ALI proposals, there also will be much common ground.[57]

Chapter 4 and current property division law are consistent in several ways. Both are built upon the theory that marriage is like a partnership.[58] This theory posits that both spouses, as equal partners in the marriage, have claim to property accumulated during the marriage, regardless of who has legal title to the property.[59] Chapter 4 follows the majority approach that divides property owned by the

ily Dissolution: Its Impact on Family Law, 7 TEX. J. WOMEN & L. 161, 163 (Spring 1998) (noting that as it concerns property division, "the ALI proposal does not seem too different from current Texas (and national) law"); Oldham, *supra* note 52, at 802 (stating that "[t]he recommendations regarding property are, with a few exceptions, a restatement of the current majority views on this subject").

54. *See infra* Parts III.C.1 (discussing equal division), III.C.2 (discussing elimination of fault).

55. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at xiii ("The idea of Principles gives greater weight to emerging legal concepts than does a Restatement.").

56. *See* Oldham, *supra* note 52, at 802 (characterizing the *Principles'* recommendations regarding property division as "a more conventional ALI restatement project").

57. *See* Oldham, *supra* note 53, at 163 (stating that "at least for purposes of property division rules, the ALI proposal does not seem too different from current Texas (and national) law").

58. *See* Smith, *supra* note 26, at 696 (discussing current law and noting that "[n]early every state currently embraces the community-property concept of marriage as a partnership"); *id.* at 697 (noting that "[c]ommon-law states largely borrowed the partnership model from community-property states"); TURNER, *supra* note 10, § 1.02, at 16 (noting that marital partnership theory is "mentioned in almost every case today"); *id.* § 8.01, at 551 (discussing marital partnership theory).

59. *See* Bea Ann Smith, *Why the Community Property System Fails Divorced Women and Children*, 7 TEX. J. WOMEN & L. 135, 136 (1998) (discussing partnership theory of marriage).

spouses into marital and separate property. The concept that property should be divided into divisible and non-divisible property is familiar to most, though not all, jurisdictions. Classification of property as "community" or "separate" is a hallmark of the eight traditional community property states[60] with significance that transcends property division at divorce. Non-community property states have borrowed heavily from the community property schemes, and the majority of non-community property states now also divide property at divorce into marital and separate property.[61] Under both the *Principles* and the current majority view, marital property is divisible between the spouses; separate property generally is not.[62] The ALI also follows the majority view by requiring consideration of financial misconduct when dividing marital property.[63]

60. The traditional community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *See generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 5.14, at 224 (3d ed. 2000) (identifying and discussing community property states). Puerto Rico is also a community property jurisdiction. 31 P.R. LAWS ANN. §§ 3621, 3631, 3641 (Supp. 1999). Since its adoption of the Uniform Marital Property Act in 1983, Wisconsin has also been regarded as a community property state, though not for purposes of property division at divorce. *See, e.g.*, Joseph W. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L.Q. 193, 195 n.7 (1989).

61. *See* McKnight, *supra* note 60, at 193–97 (discussing and identifying approaches in all fifty states).

62. There is a group of states that distinguishes between marital and separate property, but allows division of separate property under certain circumstances. This system is sometimes referred to as the "hybrid" system. *Id.*; 1 Oldfather et al., *supra* note 11, § 1.04[2], at 1–20 & n.11 (identifying Alabama, Alaska, Arkansas, Iowa, and Minnesota in this group). The classification as a "marital property" system, an "all property" system, or a "hybrid system" is not always easy and results are sometimes confusing. For example, Utah is characterized by some commentators as an "all property" state, see McKnight, *supra* note 60, at 197; Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 524 (1990), yet it follows the rule that marital property generally is equally divided and separate property is awarded to its owner except where it is just and equitable to divide it. *See, e.g.*, Bradford v. Bradford, 993 P.2d 887, 893 (Utah Ct. App. 1999); Thomas v. Thomas, 987 P.2d 603, 610 (Utah Ct. App. 1999); Dunn v. Dunn, 802 P.2d 1314, 1321 (Utah Ct. App. 1990). Nebraska is characterized as a "marital property" state, *see* McKnight, *supra* note 60, at 196, but it allows division of separate property when equitable. *See, e.g.*, Grace v. Grace, 380 N.W.2d 280, 284–85 (Neb. 1986) (affirming award to wife based on husband's shares of stock in a closely-held business brought into marriage and inherited during marriage); Matlock v. Matlock, 287 N.W.2d 690, 691 (Neb. 1980) (affirming award from separate property).

63. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.16; Harris v. Harris, 621 N.W.2d 491, 501 (Neb. 2001) (holding husband responsible for unaccounted-for withdrawals of marital funds); Bratcher v. Bratcher, 26 S.W.3d 797, 799–800 (Ky. Ct. App. 2000) (unaccounted-for marital assets enough to demonstrate dissipation of marital assets); *In re* Marriage of Morrical, 576 N.E.2d 465, 468 (Ill. App. Ct. 1991) (husband responsible for dissipated funds).

Although a significant minority of jurisdictions include all the spouses' property in the divisible estate,[64] even in these "all property" states division of property into marital and separate property in substance is not unfamiliar.[65]

There are a number of other areas dealing with property classification where the ALI follows the majority rules. For example, chapter 4 follows the majority view that spousal earning capacity, spousal skills, occupational licenses, and educational degrees are not divisible property.[66] It also classifies gifts of one spouse to the other spouse as marital property unless intent of the donor provides otherwise.[67] The *Principles*' position that pension interests earned during the marriage are marital property also reflects the majority view.[68] In embracing yet another majority view, the ALI directs that personal injury tort

64. As of 1989, these states reportedly included Connecticut, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, South Dakota, Utah, Vermont, Washington, and Wyoming. *See* McKnight, *supra* note 60, at 196–97 (listing states noted here); *cf.* Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 523–24 (1990) (listing states noted here and adding others). Classification of states into these categories is sometimes difficult and involves some uncertainty. *See supra* note 62.

65. The "all property" states often in fact make a distinction between marital and separate property. *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989) (noting "even kitchen sink states seem increasingly inclined to award 'separate' property to the owning spouse"); Mary Moers Wenig, *Increase in Value of Separate Property During Marriage: Examination and Proposals*, 23 FAM. L.Q. 301, 303 (1989) ("All of the community property states, and more of the common-law states than is evident from the language of their statutes, agree that there is a distinction between community or marital property and separate property.")

66. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.07 & Reporter's Notes, at 158–59; *see* TURNER, *supra* note 10, § 6.20, at 402 (noting "overwhelming majority view is that degrees and licenses cannot be divided"); *but see* O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985) (holding that professional license is marital property); *In re* Marriage of Denton, 951 P.2d 693, 699 (Or. 1998) (holding enhanced earning capacity considered property).

67. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.03(2) (defining marital property); *id.*, *Reporter's Memorandum*, at xxxii (noting that courts and ALI members are divided on this question); *but see id.* § 4.03 (position on gifts from one spouse to another probably reflects majority view).

68. *See* Willard H. DaSilva & Maris Warfman, *Property Subject to Equitable Distribution*, *in* 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 18.03[2][b][i], at 18-18 (2000) (stating that "[m]ost equitable distribution and all community property states now hold that any pension interest earned during marriage and before a marital separation is marital (or community) property"); *see also, e.g.*, MD. CODE ANN. § 8-205(a) (Supp. 1999) (allowing division of interest in "pension, retirement, profit sharing, or deferred compensation plan"); NEB. REV. STAT. § 42-366(8) (Supp. 2000) (including "pension plans, retirement plans, annuities, and other deferred compensation benefits" in marital estate).

recoveries are marital property to the extent they compensate for loss of a marital asset, but are separate property to the extent they do not arise from loss of a marital asset.[69]

B. Rejection of Equitable Distribution

The ALI approach in the *Principles* differs from the majority approach in three important ways. First, it rejects equitable distribution and imposes a strong presumption of equal division. Second, it discards the statutorily or judicially imposed list of discretionary factors courts currently use to distribute property.[70] Third, it recharacterizes separate property as marital property over the duration of the marriage.

1. Equal division presumed and discretionary factors rejected

The strong majority of states follow an "equitable distribution" rule. This permits equitable division of marital property based upon a list of factors usually set forth by statute.[71] Virginia's statute is illustrative:

> The amount of any division . . . shall be determined by the court after consideration of the following factors:
>
> 1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> 2. The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;
>
> 3. The duration of the marriage;
>
> 4. The ages and physical and mental condition of the parties;

69. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.08(2)(a) & cmt. c; *see also* Parde v. Parde, 602 N.W.2d 657, 662–63 (Neb. 1999) (adopting majority "analytical approach"; compensation for diminution of marital estate included in marital estate, but pain and suffering award is separate property).

70. Admittedly, this is an extension of the rejection of equitable distribution.

71. *See* GREGORY, *supra* note 11, ¶ 8.02[1], at 8-3 to 8-7 (listing various statutory and judicially created factors); Fineman, *supra* note 27, at 284–85 (listing factors); UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 288 (1998) (listing factors in UMDA).

> 5. The circumstances and factors which contributed to the dissolution of the marriage . . . .;
>
> 6. How and when specific items of such marital property were acquired;
>
> 7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;
>
> 8. The liquid or nonliquid character of all marital property;
>
> 9. The tax consequences to each party; and
>
> 10. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.[72]

Equitable distribution does not mean equal distribution,[73] though equal distribution may be the result in some cases.[74]

The ALI rejects the equitable division approach and the list of discretionary factors and imposes a strong presumption that marital property is divided equally.[75] Even here, however, the departure from current law is not as great as it might at first seem. Some states already follow an equal division rule, and many equitable division states already impose a presumption of equal division.[76] In many ju-

72. VA. CODE ANN. § 20-107.3(E) (Michie Supp. 2000).

73. *See, e.g.*, Nelson v. Nelson, 25 S.W.3d 511, 517 (Mo. Ct. App. 2000) (stating division need not be equal, only fair); Carlson-Subik v. Subik, 684 N.Y.S.2d 65, 68 (N.Y. App. Div. 1999) ("Equitable distribution does not require equal distribution; rather, it should be a fair distribution . . . ."); Cherry v. Cherry, 421 N.E.2d 1293, 1298 (Ohio 1981) (stating "[e]quitable need not mean equal").

74. Courts are divided on how to determine the appropriate equitable division. Professor John DeWitt Gregory explains: "In a small minority of jurisdictions, the statutes contain a presumption of equal division of marital property. In a few others, the courts have created a fifty-fifty starting point for division, even while rejecting a presumption of equal division. Some states reject altogether both presumptions and starting points." GREGORY, *supra* note 11, ¶ 8.01, at 8-2; *accord* Howard I. Lipsey et al., *Determining Factors in Equitable Distribution of Marital Property*, *in* 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 19.04, at 19-27 to 19-33 (2000) (discussing presumptions and whether division must be equal or equitable).

75. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15.

76. *See* CAL. FAM. CODE § 2550 (West 2001) (requiring equal division of community property); LA. REV. STAT. ANN. § 9:2801(1)(b)(4) (West 2001) (requiring equal division of community property); Ellsworth v. Ellsworth, 637 P.2d 564, 566 (N.M. 1981) (requiring

risdictions, results in fact often reflect a roughly equal division of marital property.[77] One court noted that "[i]n most cases . . . an equal distribution of joint property will be the most equitable."[78]

Moreover, section 4.15 itself affords only a presumption of equal division. The presumption may be overcome if a court finds it "equi-

equal division of community property). Many states presume equal division is appropriate or use equal division as a starting point. *See, e.g.*, ARK. CODE ANN. § 9-12-315(a)(1)(A) (Michie Supp. 1999) (mandating equal division of marital property unless inequitable); FLA. STAT. ANN. § 61.075(1) (West Supp. 2001) (requiring equal distribution unless justification on relevant factors); IDAHO CODE § 32-712(1)(a) (1996) (equal division required unless compelling reasons); IND. CODE ANN. § 31-15-7-5 (Michie Supp. 2000) (presume equal division is just); NEV. REV. STAT. ANN. § 125.150(1)(b) (Michie Supp. 1999) (requiring "equal disposition" of community property unless compelling reasons set forth in writing); N.H. REV. STAT. ANN. § 458:16-a (Supp. 2000) (directing court to "presume that an equal division is an equitable distribution of property" unless it finds otherwise based on factors); N.C. GEN. STAT. § 50-20(c) (1999) ("There shall be an equal division . . . unless the court determines that an equal division is not equitable."); Lundquist v. Lundquist, 923 P.2d 42, 53 (Alaska 1996) (stating that "[t]he law presumes that a 50-50 split of marital property is equitable"); Kelly v. Kelly (*In re* Kelly), 9 P.3d 1046, 1048 (Ariz. 2000) (holding that law requires substantially equal division of community assets unless compelling reason); Carroll v. Carroll, 565 So. 2d 894, 894–95 (Fla. Dist. Ct. App. 1990) (applying rule of equal division and requiring court to set forth justification for any disparity of treatment); *In re* Marriage of Minear, 679 N.E.2d 856, 864 (Ill. App. Ct. 1997) (noting "[e]qual distribution of marital property is generally favored") *aff'd*, 693 N.E.2d 379 (Ill. 1998); Nelson v. Nelson, 25 S.W.3d 511, 518 (Mo. Ct. App. 2000) (division "should be substantially equal unless one or more statutory or non-statutory facts causes such a division to be unjust"); Putterman v. Putterman, 939 P.2d 1047, 1047 (Nev. 1997) (citing statute requiring equal division unless compelling reasons); White v. White, 324 S.E.2d 829, 833 (N.C. 1985) (holding that equal division is mandatory unless evidence proves equal would not be equitable); Cherry v. Cherry, 421 N.E.2d 1293, 1294 (Ohio 1981) (no presumption but equal division is starting point); Bradford v. Bradford, 993 P.2d 887, 893 (Utah Ct. App. 1999) (generally each is entitled to fifty percent of marital property); Hokin v. Hokin, 605 N.W.2d 219, 227 (Wis. Ct. App. 1999) (applying statutory presumption of fifty-fifty division to reverse property award).

According to the *Principles*, Arizona, California, Idaho, Louisiana, New Mexico, and Texas (all of these are community property states) already follow the equal division rule or apply a presumption of equal division. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15 cmt. b; *see also* TURNER, *supra* note 10, § 8.02, at 556 (stating that, based on practice, "all community property states should be regarded as if they had at least an equal division starting point"); *but see* Kimsey v. Kimsey, 965 S.W.2d 690, 704 (Tex. Ct. App. 1998) (emphasizing court's discretion and holding that division need not be equal).

77. *See, e.g.*, *Minear*, 679 N.E.2d at 864 (affirming fifty-fifty split); Behm v. Behm, 427 N.W.2d 332, 335–37 (N.D. 1988) (affirming near-equal division); Olivieri v. Olivieri, 760 A.2d 1246 (R.I. 2000) (affirming fifty-fifty split of marital property); PETER T. HOFFMAN, NEBRASKA DIVORCE PRACTICE MANUAL 322 (2d ed. 1998) (noting that, in Nebraska, "the trial courts seem to be applying a fifty/fifty rule in practice"); SUSAN JACOBS & KAREN B. FLOWERS, NEBRASKA FAMILY LAW 16 (1992) (stating under Nebraska law, "[i]t is the authors' belief that in most cases property is divided equally between the parties and it is rare that those divisions are appealed").

78. Toth v. Toth, 946 P.2d 900, 903 (Ariz. 1997).

table" to compensate a spouse under provisions of chapter 5, or if marital debts exceed marital assets.[79] The presumption may also be overcome if the court finds that a spouse is guilty of financial misconduct by, for example, making gifts of marital property to third parties without consent or by intentionally destroying marital property.[80]

Under the equitable distribution approach, many statutes specifically authorize courts to consider the parties' ages, health, and economic circumstances when dividing property at divorce,[81] and, in practice, courts do consider such factors.[82] By imposing equal division of property, these considerations theoretically are irrelevant. Practically, however, economic need may still impact property division through a back door. The equal division presumption is subject to an exception when "the court concludes, under § 5.11, § 5.12, or § 5.17, that it is equitable to compensate a spouse for loss recognized in chapter 5 . . . with an enhanced share of the marital prop-

79. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15(2).

80. *See id.* §§ 4.15(2)(b), 4.16.

81. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-113(c) (2000) (court should consider relevant factors including "[t]he economic circumstances of each spouse at the time the division of property is to become effective"); CONN. GEN. STAT. § 46b-81(c) (West Supp. 2000) (court shall consider age, health, income, employability, needs of parties); IDAHO CODE § 32-712 (Michie, 1996) (same); MASS. GEN. LAWS ANN. ch. 208 § 34 (West Supp. 2000) (in alimony and property division court shall consider age, health, income, skills, employability); MD. CODE ANN., FAM. LAW § 8-205(b)(3), (6), (7) (Supp. 1999) (court to consider "the economic circumstances of each party," age of the parties, physical and mental conditions of parties); MO. ANN. STAT. § 452.330.1(1) (West Supp. 2001) (court to consider "[t]he economic circumstances of each spouse at the time the division of property is to become effective"); N.H. REV. STAT. ANN. § 458:16-a(b) (Supp. 2000) (court may consider "age, health, social or economic status , . . . [and] needs and liabilities of each party"); S.C. CODE ANN. § 20-7-472(4), (5) (Law. Co-op. Supp. 2000) (court must weigh "the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; the health . . . of each spouse"); TENN. CODE ANN. § 36-4-121(c) (Supp. 2000) (court should consider age, physical and mental health, earning capacity, economic circumstances of the parties).

82. According to one authority,

> The fact that spouses have different economic circumstances is often a key factor in making property division, for example being used to justify disproportionate divisions in favor of the less economically advantaged spouse or to justify reversal of an order which in the judgment of the appellate court did not adequately consider those factors.

Lipsey et al., *supra* note 74, § 19.08[1], at 19–73 (footnotes omitted) (citing cases); *but see id.* at 19–71 (noting that "[a] few jurisdictions apparently reject any connection between property division and the support needs of a party").

erty."[83] Under chapter 5, a spouse may be entitled to compensation for "loss of marital living standard," where the other spouse has a greater wealth or earning capacity,[84] and for loss of earning capacity arising from care of children.[85]

2. Recharacterization of separate property

Chapter 4 departs from the majority view by recharacterizing separate property as marital property over the course of a long-term marriage.[86] The theory behind this device is that recharacterization of certain separate property better comports with the parties' own expectations and conduct because, over time, spouses come to rely upon the availability of separate property for future support of both spouses. "After many years of marriage, spouses typically do not think of their separate-property assets as separate."[87] The longer the duration of the marriage, the greater the equitable claim for compensation for the lost expectation of income sharing.[88]

The formula suggested is a new approach. In practice, some jurisdictions already may be achieving the same objective in different ways. The all-property states already divide separate property.[89] New Hampshire, an all-property state, by statute directs the court to consider the duration of the marriage, sources of income, and needs of each party in dividing property.[90] The "hybrid system" states also divide separate property in some circumstances.[91] In other states, unequal division of the marital property may accomplish the same ultimate result.[92] Many states consider the duration of the marriage

83. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15(2)(b); *see also id.* § 4.15 cmt. d (discussing exception).

84. *See id.* § 5.05.

85. *See id.* § 5.06.

86. *See id.* § 4.18.

87. *Id.* § 4.18 cmt. a; *but see* Oldham, *supra* note 53, at 163 (seriously questioning "whether spouses truly feel this way").

88. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.18 cmt. a.

89. *See, e.g.*, Behm v. Behm, 427 N.W.2d 332, 336 (N.D. 1988) (affirming division of property inherited by husband during a twenty-year marriage).

90. N.H. REV. STAT. ANN. § 458:16-a(II)(a, b) (Supp. 2000).

91. *See, e.g.*, ALASKA STAT. § 25.24.160(a)(4) (Michie 2000) (court may "invade" the property of the spouses acquired before marriage if equities require); *see also* McKnight, *supra* note 60, at 195 (discussing hybrid system).

92. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.18 cmt. a.

when awarding marital property,[93] and some states specifically instruct courts to consider "[t]he value of nonmarital property set apart to each spouse" when dividing marital property.[94]

C. Areas of Concern Under Chapter 4

There are areas of chapter 4 that some jurisdictions are likely to reject. Those areas include chapter 4's chief departures from current law discussed above: the move away from equitable division to equal division and the rejection of the discretionary equitable factors. Other specific issues of concern for some jurisdictions will be the elimination of fault from property division and the exclusion of spousal earning capacity, spousal skills, professional degrees, and occupational licenses as divisible property.

1. Move to equal division

Courts and legislatures may be reluctant to adopt the equal division rule.[95] For all the discussion about the evils of broad judicial discretion, many courts and lawmakers find comfort in that discretion.[96] They want the courts to consider all "relevant" factors. Chapter 4 attempts to limit the relevant factors in favor of more consistent and predictable results, but less discretion in difficult cases may lead to harsh results. Even most community property states, notwithstanding their long traditions of equal division of community property, have adopted equitable distribution rules and decline to impose a

93. *See, e.g.*, S.C. CODE ANN. § 20-7-472(1) (Law. Co-op. Supp. 2000); VA. CODE ANN. § 20-107.3(E)(3) (Supp. 2000).

94. MO. ANN. STAT. § 452.330.1(3) (West Supp. 2001); *see also* Fineman, *supra* note 27, at 284 (listing factors including "whether one of the parties has substantial assets not subject to division by the court").

95. Courts may be influenced by the *Principles*, but adoption of the equal division rule set forth in chapter 4 would require legislative enactment in most jurisdictions. *See* Wendt v. Wendt, No. FA96-0149562-S, 1998 WL 161165, at *87, *115 (Conn. Super. Ct. Mar. 31, 1998) (rejecting § 4.15 and the equal division presumption as violating state statute, and holding § 4.15 cannot become law "until the legislature sees fit to change the statutes"), *aff'd*, 757 A.2d 1225 (Conn. Ct. App. 2000).

96. *See, e.g.*, Parde v. Parde, 602 N.W.2d 657, 662 (Neb. 1999) (noting that Nebraska is an equitable property distribution jurisdiction and, "[i]n equity, there is rarely one tidy answer that fits every size and type of problem"); Cherry v. Cherry, 421 N.E.2d 1293, 1298 (Ohio 1981) (rejecting equal division, holding that "[e]ach divorce case is different, and the trial court must be free to consider all the relevant factors"); *id.* at 1299 (stating "flat rules have no place in determining a property division").

strict equal division presumption at divorce.[97] Common law equitable distribution states have generally emphasized the need for flexibility in property division determinations.[98] In the case of *In re Marriage of Kittleson*,[99] the Washington Court of Appeals stated its view of the Washington equitable distribution statute:

> We read the statute as a wise legislative recognition of the fact that the establishment of hard and fast rules in this area would only lead to inequities and untenable results as the myriad of possible situations came before the courts. The legislative policy as we perceive it was to provide flexible guidelines within which the courts could adjust and reconcile such considerations, *inter alia*, as the health and age of the parties, their prospects for future earnings, their foreseeable future acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or efforts of one or the other, or both.[100]

The factors identified for consideration in property division have considerable appeal. For legislators, it might be difficult to champion a cause denying judges the ability to consider the age, health, and income potential of a spouse when making property division.[101] As demonstrated by the broad acceptance of these factors under current law, many people think it makes sense to consider those factors.[102]

97. *See* WASH. REV. CODE ANN. § 26.09.080 (West Supp. 2001) (division must be just and equitable after considering factors); Toth v. Toth, 946 P.2d 900, 903 (Ariz. 1997) (noting that legislature intended equitable division, not equal division); Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981) (law requires "just and right" division, not equal division); PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 2 (noting that California, Louisiana, and New Mexico have an equal division rule; the other community property states divide community property equitably).

98. *See, e.g.*, Meints v. Meints, 608 N.W.2d 564, 568 (Neb. 2000) (stating, "division of property is not subject to a precise mathematical formula"); Bennett v. Bennett, 516 N.W.2d 672, 675 (S.D. 1994) (stating, "We will not bind a trial court to a strict mathematical formula when reviewing marital property division").

99. 585 P.2d 167 (Wash. Ct. App. 1978).

100. *Id.* at 172; *see also* Fabich v. Fabich, 744 A.2d 615, 618 (N.H. 1999) (quoting *In re Marriage of Kittleson*, 585 P.2d at 172.

101. Professor Robert J. Levy has suggested "that there is a strong streak of conservatism about divorce, divorcers, and even about legal change—among members of the bar, legislators, and citizens generally." Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 556 (1999).

102. The Arizona statute, as originally proposed, directed equal division of common assets, but the word "equally" was replaced with "equitably." *See Toth*, 946 P.2d at 903 (noting that the legislature in specifically rejecting a per se rule of equality intended courts to have dis-

Moreover, accepting the premise that many decisions deviate from the equal division for which the ALI calls, those judges making the unequal divisions believe that there is something unfair about imposing an equal division. Imposing a more rigid formula may lead to greater consistency and predictability but at the risk of diminished fairness.

Consider, for example, the following facts. An eighty-seven-year-old man and sixty-six-year-old woman meet, and a year later they marry. Exactly one day after the marriage, the husband uses his separate funds to buy a house for the couple for $160,000 and puts the title in a joint tenancy between the spouses. Three weeks later, the husband moves out of the house and files for a divorce. There are no other assets or debts at issue for division. The house, under the *Principles*, is marital property as an interspousal gift bought with separate property.[103] Under the equal division rule, the wife of three weeks is entitled to $80,000. Some might consider such equal division a windfall for the wife. Under an equitable distribution rule, in view of the source of the purchase funds, the situation of the parties, and the length of the marriage, a court could give the wife a smaller award or nothing at all.[104]

In some cases, one spouse has the higher earning capacity and income *and* does the majority of the household work.[105] Why should

cretion). New York rejected a statutory equal distribution presumption and adopted an equitable distribution statute after lengthy debate. *See* Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 445 (1988/89) (noting "fierce battle" surrounding equal distribution/equitable distribution debate); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 637–38 (1991) (noting lengthy debate and negotiation over passage of the law).

103. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.03 cmt. b (stating that "the better rule is probably to classify all interspousal gifts as marital property regardless of their source, unless the established intentions of the donor require a different result"). One might argue that under section 4.03 (3), the property should be considered separate notwithstanding the comment.

104. The facts are based on *Toth*, 946 P.2d at 900 (Ariz. 1997). In *Toth*, the district court awarded the wife $15,000 as her share, and the Arizona Supreme Court affirmed. *Id.* at 901. Two justices dissented, arguing that the wife received a one-half interest in the house as an irrevocable gift. *Id.* at 908. *See also In re* Marriage of Stumpf, 932 P.2d 845 (Colo. Ct. App. 1996) (finding home brought to marriage by husband was marital property, but, after three year marriage and under equitable distribution rule, court not required to award half the value of the home to wife).

105. *See, e.g.*, Matwijczuk v. Matwijczuk, 690 N.Y.S.2d 343, 344–45 (N.Y. App. Div. 1999) (affirming unequal property division favoring wife where wife earned $45,000 per year, supported the family, and provided all homemaking and child care, and husband earned

the court order an equal division of the marital property in such cases? Equal division makes sense when both parties contribute basically full-time to the marriage regardless of whether their contributions are financial. When one spouse specializes in earning income for the family, while the other spouse specializes in household work and raising the children, an equal division of marital property may make sense. But there is no reason to assume that both spouses contributed equally to the economic or psychological success of the marriage where the evidence shows otherwise.

Consider, for example, the facts of *Mosley v. Mosley*.[106] The husband and wife were married for over forty years and had eight children. Both spouses worked during the marriage: the husband as a carpenter and the wife as a teacher and federal government employee.[107] Over the course of the marriage, the wife made more money than did the husband. The wife also did most of the house work and provided care for the children.[108] The husband left home on two occasions, frequently spent nights out drinking, had an alcoholism problem, and committed incidents of violence toward his family.[109] In such a case, the ALI would require an equal division of marital assets, but why? To avoid difficult factual questions and avoid litigation? To encourage predictability? Surely not because it is equitable or approximates the actual contributions of the individual spouses. Under the equitable distribution rule, an unequal division is permitted.[110]

Applying the *Principles* to *In re Marriage of Stetler* also exempli-

$10,000 per year); Jochum v. Jochum, No. 96-1249-FT, 1996 WL 588053, at *1 (Wis. Ct. App. Oct. 15, 1996) (affirming sixty-five to thirty-five percent property division favoring wife where she earned most of the income and provided all homemaking and child care); Mosley v. Mosley, 601 A.2d 599 (D.C. Ct. App. 1992) (agreeing that unequal distribution favoring wife proper where wife earned more money and did most of the housework).

106. 601 A.2d 599 (D.C. Ct. App. 1992).

107. *See id.* at 600.

108. *See id.*

109. *See id.* To determine the contributions of the parties to the household, a spouse's absence and physical abuse due to excessive drinking should be relevant aside from any fault consideration.

110. The court in *Mosley* agreed that an unequal division was appropriate, though it reversed and remanded for valuation of reimbursements ordered. *See id.* at 602. For another example, see *Jochum*, 1996 WL 588053, at *1. In *Jochum,* the court affirmed a sixty-five to thirty-five percent property division in favor of the wife where she earned most of the income and provided all homemaking and child care. *Jochum*, 1996 WL 588053, at *1–2.

fies the unfairness of this approach.[111] A man and woman lived together for three years and then married. Thirty-four days after their marriage, they filed for divorce, but continued to cohabit until their first child was born later that same year.[112] The husband had substantial premarital assets and income. Throughout the relationship, the husband provided for nearly all the wife's needs while she furthered her education and accumulated her own earnings.[113] The parties did not commingle their assets. The court specifically found that the wife "had been a beneficiary of Husband's established means and lifestyle, rather than a contributor to his estate."[114] The ALI would require equal division of the marital assets.[115] Again, one should question whether on these facts an equal division is justified or is the best result.[116]

Chapter 4 recognizes this concern but maintains that an irrebuttable presumption that both parties contributed equally to the marriage is justified to avoid "retrospective examination of the parties' marital life that would be impractical if not impossible."[117] The ALI acknowledges that this presumption will not always be correct[118] but prefers the predictability and efficiency of the rule it imposes over what it perceives to be a messy and impossible evidentiary inquiry. Without question, revisiting the histories of troubled marriages is arduous work, and valuing intangible contributions to a marital relationship does not lend itself to mathematical precision. Nonetheless, courts in equitable distribution states can and do make these determinations regularly, with results that most people would consider fair.

Another possible criticism of the move toward equal division is that the rule fails to adequately provide for the economic realities faced by many women in divorce.[119] Some have suggested that equi-

111. 657 N.E.2d 395 (Ind. Ct. App. 1995).

112. *See id.* at 397.

113. *See id.*

114. *See id.*

115. The marital assets would include those acquired during their period of cohabitation prior to the marriage under § 4.03(6). PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.03(6).

116. The court affirmed an award of ninety percent of the marital assets to the husband. *Stetler*, 657 N.E.2d at 399.

117. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15 cmt. c.

118. *See id.*

119. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED

table distribution—and its potential for unequal division—favors the economically disadvantaged spouse.[120] It follows that a move to equal division has the potential to hurt the economically disadvantaged spouse. This concern may be mitigated in part by the provisions for compensatory spousal payments in chapter 5, and the provision for an order deferring sale of a family residence under section 3.16A.[121]

One may question to what extent these discretionary factors genuinely disappear under the *Principles*. Many of the factors still have a place under the exceptions to section 4.15. Unequal property distribution is allowed if it is equitable to compensate a spouse for a loss recognized in chapter 5 through property allocation.[122] Chapter 5, in turn, allows compensation where "[a] person married to someone of significantly greater wealth or earning capacity" suffers a reduced standard of living, "if the marriage was of sufficient duration that equity requires."[123] To make this determination, the court would have to consider most of the discretionary factors included under current law: the duration of the marriage and the age, health, occupation, estate, amount and source of income, vocational skills,

SOCIAL CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 74 (1985) (concluding that "[u]nder the old [California] law, women were typically awarded most of the marital property," but under "the equal division rule, they receive much less"); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 828 (concluding "that a system which facilities unequal divisions is likely to favor women"); Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 718 n.24 (2000) (disagreeing with the *Principles*' equal distribution rule as "insensitive to women's concerns"); *but see* Sugarman, *supra* note 26, at 130–35 (disagreeing with Weitzman's conclusions). Although some of Weitzman's data and conclusions have been discredited, authorities concede that generally women suffer a decreased standard of living after divorce. *See* Kay, *supra* note 52, at 2067–68 (criticizing and discussing Weitzman's findings, but acknowledging gender gap); Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539, 539 (1996) (agreeing "that there is a significant gender gap in the economic consequences of divorce" resulting in hardship for many divorced women).

120. *See* Lipsey, *supra* note 74, § 19.08[1], at 19–73.

121. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15 (2)(a) (exceptions); PRINCIPLES (Tentative Draft No. 4), *supra* note 3, § 3.16A (deferred sale of family residence order).

122. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.15(2)(a).

123. *Id.* § 5.05(1). Section 5.05 limits the court's discretion by calling for rules of statewide application with presumptions specifying the duration of the marriage and income disparity. *Id.* § 5.05(2), (3), (4). But again, these presumptions may be overcome by findings that application of the presumptions "would yield a substantial injustice." *Id.* § 5.05(4).

employability, liabilities, and needs of the parties.[124] These factors all speak to either wealth, earning capacity, standard of living, or the duration of the marriage. Additionally, section 5.05 contains exceptions for cases where application of the rules in section 5.05 (1), (2), and (3), "would yield substantial injustice."[125] Section 5.06's allowance of compensation for a primary caretaker's loss in earning capacity also implicitly calls for consideration of some of the discretionary factors listed above, as well as other factors like contributions to the family unit.[126]

2. No-fault property division

No-fault as a basis for the right to divorce is prevailing law, but in a minority of states, fault continues to be relevant as a discretionary factor in property division.[127] The influential Uniform Marriage

124. These are all factors included in the Uniform Marriage and Divorce Act. UNIF. MARRIAGE AND DIVORCE ACT § 307 [Alternative A], 9A U.L.A. 288 (1998).

125. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 5.05 (4).

126. *See id.* § 5.06.

127. *See, e.g.*, MO. ANN. STAT. § 452.330.1(4) (West Supp. 2001) (court to consider conduct of parties); R.I. GEN. LAWS § 15-5-16.1(a)(2) (Supp. 1999) (court to consider "conduct of the parties during the marriage"); Covington v. Covington, 675 So. 2d 436, 438 (Ala. Civ. App. 1996) (holding that court may consider conduct of parties); Dews v. Dews, 632 A.2d 1160, 1163–64 & n.5 (D.C. Cir. 1993) (approving consideration of illicit drug use and adulterous affair in property division); McDougal v. McDougal, 545 N.W.2d 357, 361 (Mich. 1996) (holding that fault is a factor in property division); Nelson v. Nelson, 25 S.W.2d 511, 518 (Mo. Ct. App. 2000) (court could consider affair in property division); Behm v. Behm, 427 N.W.2d 332, 337 (N.D. 1988) (marital misconduct is a factor in property distribution); Twyman v. Twyman, 855 S.W.2d 619, 625 (Tex. 1993) (in dividing marital property fault of parties may be considered); Young v. Young, 609 S.W.2d 758, 761–62 (Tex. 1980) (affirming consideration of fault in property division); Grosskopf v. Grosskopf, 677 P.2d 814, 819–20 (Wyo. 1984) (holding that fault is a valid factor to consider when determining property division); *see also* Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2535 (1994) (noting that approximately one quarter of states "regard economic and marital fault as relevant to property distribution"). Some courts that generally disapprove of allowing consideration of fault will permit it if the fault is egregious or shocks the conscience of the court. *See* O'Brien v. O'Brien, 489 N.E.2d 712, 719 (N.Y. 1985) (holding that fault may only be considered in equitable distribution in "egregious cases which shock the conscience of the court"); Havell v. Islam, 718 N.Y.S.2d 807, 811 (N.Y. Sup. Ct. 2000) (refusing to exclude evidence of pattern of domestic violence and holding that such evidence could be considered in equitable distribution of marital property). For a comprehensive listing of states and their approach to fault in property division and alimony, see Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 810–30 (1996); *but cf.* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 301–02 n.113 (1997) (questioning classification of some states).

and Divorce Act ("UMDA"), promulgated in 1970, takes a no-fault position to property division,[128] and many jurisdictions have agreed.[129] Nonetheless, a substantial minority of states have resisted the modern trend removing fault from consideration in property division.[130] Missouri, for example, adopted the UMDA's property distribution provisions, but amended them to include fault as a consideration.[131]

The fault debate is not new, and the ALI itself is divided on the wholesale rejection of marital fault in the *Principles*.[132] Some scholars have suggested that completely removing fault from property and alimony considerations is wrong.[133] At a minimum, those states that continue to permit consideration of fault in property allocation can be expected to hold to their positions and reject that aspect of the *Principles.* They have rejected the fault aspect of the UMDA for over thirty years and have found themselves in a minority position. Adding another voice to the chorus is unlikely to change anything. Just as the ALI is divided, so are the states, and they will likely continue to be so.[134]

128. *See* UNIF. MARRIAGE AND DIVORCE ACT § 307, 9A U.L.A. 288 (1998) (requiring equitable apportionment of property "without regard to marital misconduct").

129. Even in no-fault property division states and under the *Principles*' no-fault position, the courts may consider marital misconduct that directly diminishes marital property available for distribution. *See* Ellman, *supra* note 127, at 776–77; PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.16.

130. *See* Woodhouse & Bartlett, *supra* note 127, at 2531 (maintaining that "[m]any of the fault-based laws on alimony and property . . . are recent reforms or amendments").

131. Levy, *supra* note 101, at 555; *see also* MO. ANN. STAT. § 452.330.1(4) (Supp. 2001) (considering conduct of parties during marriage).

132. *See* Ellman, *supra* note 127, at 776 (noting approval of no-fault property allocation by a divided vote of the ALI Council, and defeat of amendments by membership to reintroduce fault); PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 14 (noting sharp division among states on the issue of consideration of marital misconduct in allocating marital property).

133. *See* Harry D. Krause, *On the Danger of Allowing Marital Fault to Re-emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1362–67 (1998) (noting that "reformers carelessly transferred their aversion to fault to the very different question of what the financial consequences of the termination of marriage should be," and rejecting the *Principles*' rejection of any notion of fault); Swisher, *supra* note 127, at 303–20 (criticizing the *Principles* and arguing that fault should have a place in spousal support awards and property division); *cf.* Woodhouse & Bartlett, *supra* note 127, at 2525 (suggesting that perhaps fault should play a role); Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 79 (1998) (arguing generally for moral discourse and fault considerations in divorce law).

134. For discussion of suggestions by scholars and efforts in several states to reconsider

The ALI posits that fault serves no legitimate purpose in property division (or alimony).[135] It considers and rejects two possible bases for considering fault: (1) agent of morality—punishing the wrongdoer, and (2) compensating the injured party.[136] The ALI argues that punishment is the function of criminal law, and, to a lesser extent, tort law, and there are, therefore, no appropriate standards that could be imposed without either inequitable results or limitless discretion.[137]

Under the agent of morality/punishment notion, the ALI also rejects the argument that considering fault acts to compensate the innocent spouse for the inherent financial loss resulting from splitting one household into two. The ALI rejects this view because "no losses are identified beyond the financial consequences present in nearly every dissolution," and because it is impossible to determine who "caused" the divorce.[138] Cause in this context is a moral question, not a scientific one, and is not capable of accurate determination. This again raises the specter of unlimited discretion in the face of no clear standards. Finally, some argue that the causation justification is actually punishment in disguise.[139] The ALI also rejects the claim that consideration of fault is justified to compensate an injured party for injury from battery, emotional distress, and pain and suffering. A party may recover for these claims under tort law.[140]

In contrast to the ALI's position, divorce law, historically, did consider wrongful marital conduct as both grounds for divorce[141]

no-fault divorce, see J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 175–77 (1997). The *Principles* include an excellent discussion of the fault issue in their introduction. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 14–74. This can be expected to generate significant scholarly discussion of the issue. *See* Ellman, *supra* note 127, at 773 (ALI reporter discussing ALI position); Krause, *supra* note 133, at 1366 (disagreeing with Professor Ellman and the *Principles'* approach to fault); Swisher, *supra* note 127, at 303–20 (disagreeing with Professor Ellman and the *Principles'* approach to fault).

135. This discussion excludes what some call "economic fault" or "financial misconduct" addressed in § 4.16. As noted above, all courts will consider this type of fault. *See supra* note 63 and accompanying text.

136. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, at 22–29.

137. *See id.* at 23–24.

138. *See id.* at 24–25.

139. *See id.* at 25–26.

140. *See id.* at 27–43.

141. *See* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000) (discussing fault ground for divorce and history of divorce prior to no-fault).

and as leverage in the financial settlement.[142] These considerations were separate from criminal and tort law,[143] and neither criminal law nor tort law has replaced the fault consideration once standard in divorce law. Criminal law today is rarely invoked for, or applicable to, traditional marital misconduct of adultery, desertion, or emotional abuse.[144] Criminal law applies to battery and physical abuse, but these wrongs are not inherently linked to the marital relationship. Tort law historically did allow claims for "criminal conversation" and "alienation of affections" based on adulterous conduct, but these claims were brought against third parties, rather than the offending spouse.[145] These torts are now abolished in most states.[146] Generally, tort law does not—and probably should not—cover adultery, desertion, or alleged purely emotional abuse in marriage.[147] Both criminal

142. *See* WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS §§ 99–103, at 174–90 (1896) (discussing fault grounds for divorce); 2 WILLIAM T. NELSON ET AL., NELSON ON DIVORCE AND ANNULMENT § 14.40, at 63 (2d ed. 1961 rev., 1945) (stating that fault was an element in setting alimony).

143. *See* Swisher, *supra* note 127, at 306 (noting that the "concept of fault based upon serious marital misconduct has long been recognized as an important principle in American family law, separate and apart from any tort law or criminal law remedy").

144. Although adultery was prohibited under criminal law, many states have now decriminalized adultery, and the remaining laws are rarely enforced. *See* Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49–54 (1991–92) (discussing efforts to decriminalize adultery); Melissa Ash Haggard, Note, *Adultery: A Comparison of Military Law and State Law and the Controversy this Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469–70, 481 (1998–99) (noting that adultery is a crime in twenty-four states, and citing statutes, but asserting that laws are rarely enforced).

145. A claim for criminal conversation is brought against a defendant who committed adultery with the plaintiff's spouse. *See* DAN B. DOBBS, THE LAW OF TORTS § 442 (2000). Alienation of affections was brought against a third party to the marriage who "acted for the purpose of affecting it adversely"; sexual relations were not required. *Id.*

146. *See id.* § 442, at 1247.

147. *See* Whittington v. Whittington, 766 S.W.2d 73, 74–75 (Ky. Ct. App. 1989) (affirming dismissal of IIED claim based on fraudulent dissipation of marital assets and adultery, and noting that suitable relief was available under domestic relations law); Quinn v. Walsh, 732 N.E.2d 330, 338–39 (Mass. App. Ct. 2000) (dismissing IIED claims against former wife's paramour, holding that openly conducted affair does not constitute required extreme and outrageous conduct); Ruprecht v. Ruprecht, 599 A.2d 604, 608 (N.J. Super. Ct. Ch. Div. 1991) (dismissing IIED claim based on 11-year adulterous affair); Pickering v. Pickering, 434 N.W.2d 758, 761 (S.D. 1989) (holding IIED "unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage" and affair could not support claim); *see also* Wiener v. Wiener, 444 N.Y.S.2d 130, 131 (N.Y. App. Div. 1981) (dismissing IIED counterclaim for loud abusive language and noting "strong policy considerations militat[ing] against its introduction to disputes arising out of marital differences"); Hakkila v. Hakkila, 812 P.2d 1320, 1327 (N.M. Ct. App. 1991) (reversing IIED award; insults

law and tort law overlap each other in some cases and serve a deterrent function by assigning responsibility coupled with consequences. Considering fault in the property division at divorce could deter socially undesirable conduct and compensate for consequences of such conduct without unnecessarily duplicating criminal or tort law.[148]

The pivotal question is whether considering fault in connection with property division (or alimony) in fact deters undesirable conduct or achieves fairer results. In order for fault to play a role, the law must be willing to identify specific unacceptable, wrongful conduct. The law informed by long-standing societal norms has recognized adultery, cruelty, and abandonment as marital misconduct,[149] and courts have not had trouble finding such misconduct to substantially contribute to the marital breakdown.

If we accept that upon divorce at least one party—and often both parties—will be financially worse off, the compensation function is relevant. The spouse who, through marital misconduct, precipitates the marital breakdown causes financial loss to the other spouse. What is wrong with charging some portion of this financial loss against the wrongdoer to help make the innocent spouse whole? Tort law routinely assigns fault and requires compensation. It does so in the face of competing theories of causation, multiple parties, and sometimes complex facts. The same can be done in divorce proceedings. Not all

and outbursts fail to meet legal standard of outrage); Krause, *supra* note 133, at 1366 (arguing that "relying on existing tort law to deal with marital misconduct is the worst-case alternative"); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse As a Tort?*, 55 MD. L. REV. 1268, 1343 (1996) (concluding "that it is probably a mistake for the courts to make tort law available for claims between divorcing spouses, apart from cases in which the abusive conduct is criminal").

148. These are the same goals fault-based tort law serves. Professor Dan Dobbs explains that the purpose of tort law "is primarily to vindicate the individual victim and the victim's rights and secondarily to confirm and reinforce public standards of behavior." DOBBS, *supra* note 145, § 2 (2000); *see also id.* § 8 (noting that "most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior").

149. *See, e.g.*, Young v. Young, 609 S.W.2d 758, 761 (Tex. 1980) (identifying cruelty, adultery, and abandonment as traditional fault divorce grounds); DIFONZO, *supra* note 134, at 53–55 (discussing the "unholy trinity" of divorce grounds); TIFFANY, *supra* note 142, §§ 99–103, at 174–90 (discussing adultery, cruelty, and desertion). Determining what constituted cruelty did pose some challenges. Historically, cruelty as a ground for divorce required physical injury or fear of it, but, over time, courts adopted a much broader view allowing mental suffering to qualify. *See* DIFONZO, *supra* note 134, at 54 (noting "utter malleability" of this ground, and its broad meaning); FRANK H. KEEZER, A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE §§ 275–96 (2d ed. 1923) (discussing cruelty). Other recognized fault grounds for divorce were habitual drunkenness, conviction of crime and imprisonment, and nonsupport. *See id.* §§ 300–21, at 234–41; TIFFANY, *supra* note 142, § 103, at 189–90.

conduct should qualify as marital misconduct or fault, but some should. A determination of responsibility for the divorce in allocating property or alimony in many cases will be impossible and often unnecessary, but that is no reason to suggest that it may not, if proven, be considered.

The more difficult issues are, first, determining whether permitting consideration of fault would exacerbate destructive acrimony in divorce, and, second, determining the effect fault would have on the property division. Surely the law should not promote public and painful review of every misdeed, real or imagined, of both spouses. Moreover, if fault were relevant, how should it change the property division? The ALI appropriately raises the concern of open-ended discretion that results when there are no guidelines.[150] These are valid concerns, but stigmatizing marital misconduct might deter such conduct and offset losses to an innocent party.

3. Definition of property

The ALI declines to define "property" generally, but it does take the position that spousal earning capacity, spousal skills, occupational licenses, and educational degrees "are not property divisible on divorce."[151] Although this is the widely accepted majority view,[152] some jurisdictions and scholars disagree and argue that these "intangible assets" or "human capital" should be recognized as property.[153] Chapter 4 does not change the law on this issue, but the debate will

150. *But see* Swisher, *supra* note 127, at 310–14 (disagreeing with Professor Ellman's characterization of discretion as inherently limitless).

151. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.07(1), (2).

152. TURNER, *supra* note 10, § 6.20 (noting that "overwhelming majority view is that degrees and licenses cannot be divided").

153. *See* O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985) (holding that marital degree acquired during marriage was marital property subject to equitable distribution); *In re* Marriage of Denton, 951 P.2d 693 (Or. 1998) (holding that enhanced earning capacity was considered property); Kelly, *supra* note 27, at 80–124 (arguing that career assets should be considered property and included in the marital estate); Bryan, *supra* note 119, at 718 (2000) (denouncing failure of property distribution laws "to capture as property the husband's post-divorce income stream"); Parkman, *supra* note 19, at 64–66 (noting "limited range of assets recognized" and urging recognition of intangible assets); Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 94–96 (1997) (discussing earning capacities, degrees and property); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 110–42 (1985) (discussing need for recognition of "career assets" as marital property).

continue over whether a fair adjustment of the spouses' finances can be made with the exclusion of spousal earning capacity, spousal skills, occupational licenses, and educational degrees.[154]

IV. CONCLUSION

The ALI effort to set forth coherent and consistent rules for property division upon dissolution of marriage is thoughtful and elucidating. The proposals contained in chapter 4 are generally consistent with much of current American property division law, although a complete embrace of chapter 4 would require rejection of the equitable distribution rule in favor of an equal division rule and rejection of the discretionary factors used under current law. It is unclear whether, at the end of the day, adoption of chapter 4 would substantially alter the results of actual property division awards in a majority of cases. Many courts already apply a presumption of equal division unless there are specific justifications for deviating from the presumption. Chapter 4, however, will likely reinforce the movement toward equal division.

Many jurisdictions are likely to prove unwilling to amend their statutes to eliminate the discretionary factors, reject equitable distribution, and overturn their own settled case law.[155] In particular, the jurisdictions that continue to consider fault as part of property division will not likely change their position based on the *Principles*. Before completely embracing chapter 4, lawmakers should consider whether chapter 4 strikes the right balance between firm rules leading to predictable results and fairness.

154. The ALI does recognize that earning capacity may be relevant under chapter 5. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 3, § 4.07 cmt. a.

155. *Cf.* Levy, *supra* note 101, at 557–58 (addressing the *Principles* generally and concluding "that the ALI's project will have even less legislative success than the Uniform Act," and finding it "unlikely that state legislators will move very quickly to consider, much less enact, so thoroughly new and (some would consider) radical a program"); Sheldon, *supra* note 18, at 24 (questioning whether *Principles* arrived too late; noting that it may be impossible to "reverse course and rewrite history" in view of existing critical mass of caselaw).