The Pursuit of Life, Liberty, Happiness… and Fairness? Property Division in American and English Big Money Divorce Cases

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THE PURSUIT OF LIFE, LIBERTY, HAPPINESS... AND FAIRNESS?
PROPERTY DIVISION IN AMERICAN AND ENGLISH BIG MONEY DIVORCE CASES

By Margaret Ryznar *

A lot of people have asked me how short I am. Since my last divorce, I think I’m about $100,000 short.

--Mickey Rooney

I. INTRODUCTION

Although divorce bears the brunt of many jokes, the high stakes involved in big money marriages is no laughing matter. Paul McCartney reportedly settled with Heather Mills for $64 million, nearly $1,800 for every hour of their marriage. Sumner Redstone, at the helm of media giant Viacom, settled with his ex-wife for approximately £1 billion in 2002. Princess Diana’s settlement

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reportedly totaled £17.5 million.\textsuperscript{4} Indeed, newspapers are rich with big money divorce stories because while marriage may be for richer or poorer, divorcing spouses are far less financially indifferent.

Eyebrows have arched not only at the high sums involved in big money cases, but also at the amount of ink spilled on this relatively small subset of divorce cases.\textsuperscript{5} Critics contend that big money cases lack social justice issues\textsuperscript{6} and it is therefore preferable to focus on financially ruined, fragmented families.\textsuperscript{7} Yet, it is precisely in big money cases that the words “justice” and “fairness” acquire significant haziness.\textsuperscript{8} Is it fair for a high-wage earner to pay an ex-spouse half of all future profits? Or, would it be fairer for the lower income earner to receive a smaller portion of the ex-spouse’s net worth, which still totals millions of dollars? Such questions are particularly acute in short marriages or when one spouse is at fault for the marital breakdown.

While American state courts have been encountering these problems with increasing frequency in recent years, English courts have been resolving them rather controversially, emerging as “the Harrods, as it were, for those shopping for divorce jurisdictions.”\textsuperscript{9} This honor of sorts is surprising given that both the American and English legal systems share the goal of fairness in property distribution. Indeed, the commonalities between the two systems peak in the average divorce case, when a divorcing couple’s assets are just sufficient to meet the needs of both spouses.\textsuperscript{10} In this case,

\begin{itemize}
  \item[4] Id.
  \item[6] Id. at 172.
  \item[7] Unfortunately, even the average divorce case can leave parties financially ruined. In 1993, for example, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, \textit{Child Custody and Relocation: A Constitutional Perspective}, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1996). But see Kelly Bedard & Olivier Deschênes, \textit{Sex Preferences, Marital Dissolution, and the Economic Status of Women}, XL \textit{THE JOURNAL OF HUMAN RESOURCES} 411 (2004) (arguing that divorced women live in households with more income per person than never-divorced women).
  \item[8] Another significant grey area in divorce law occurs when the only assets are tied up with future earning capacity.
  \item[9] Conlin, \textit{supra} note 2.
  \item[10] The mean income for an American household is $46,242, usually insufficient to generate sums that would result in a surplus after the spouses’ basic needs were met. United States Census Bureau, Fact Sheet, available at
\end{itemize}
each spouse receives enough to cover reasonable needs, with little surplus over which to litigate. However, it is in big money cases, where one spouse contributes an extraordinary amount of money to the marriage, that English and American divorce law diverge, particularly since the House of Lords 2000 decision in *White v. White*.11

Importantly, the English approach has practical implications even for the American divorcing couple—all that is needed to grant a court jurisdiction over a divorce is the domicile of a party. If one American spouse becomes domiciled in England, it is conceivable that the divorce may occur there. Therefore, many divorce battles begin over which jurisdiction is the appropriate forum, assuming more than one is potentially available. This is particularly true in the European Union, whose member states’ boundaries enclose small geographical areas and do not pose citizenship or mobility barriers.

Furthermore, the English treatment of big money divorce cases offers significant lessons for the American legal system, particularly in the meaning of fairness in property division. The English experience also triggers questions of whether there should be a distinction among divorcing couples based on their financial situation, and if so, what that distinction should be. While American law currently lacks any clear legal distinction between big money divorce cases and the rest,12 England has an entire body of case law involving big money couples. Even the terminology is lacking in the United States, although there has been some reference to the “prodigious spouse”13 or the “wealthy wage earner”14 to describe the spouse who contributed more to a marriage financially.

To aid the analysis, this Article will combine American and British semantics: the term “big money” will refer to those divorce cases wherein the resources exceed the financial needs of the parties and the term “higher income spouse” will describe the spouse that contributes to the marriage through exceptional efforts. Although in many big money cases it is difficult to isolate one spouse as the

http://factfinder.census.gov/servlet/ACSSAFFacts?_submenuId=factsheet_1&_ss
e=on.

11 [2001] 2 All ER 659.
12 The treatment of professional degrees may be an exception. *See infra* Part II.C.
14 *Id.*
higher income spouse because of the extraordinary nature of both parties’ contributions to the marriage, this Article mostly restricts its analysis to those big money cases that result from the exceptional efforts of a higher income spouse.

Part I therefore begins by briefly surveying American divorce law on property division, focusing on the equitable distribution principle used by the majority of states. Part II examines the English legal approach to big money divorces, which rests on the yardstick of equality approach. Finally, Part III extracts the lessons from a comparison of these legal systems, underscoring the consequences of each country’s interpretation of fairness in post-divorce property division.

II. THE AMERICAN PRINCIPLE OF EQUITABLE DISTRIBUTION

Divorces in the United States are governed by state law and any generalization is difficult. However, post-divorce property division traditionally proceeds in two stages. The first is determining the assets. This is generally governed by statutory law in all states, as well as contract law if the parties entered into a prenuptial agreement. The second stage is the division of assets, which is also typically defined by statute. The principle that usually governs this second stage is equitable distribution, although a minority of community property states favors more equal property division.

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15 Compare Lehr v. Robertson, 463 U.S. 248, 256 (1983) (“Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships.”).
16 In most states, all marital property owned by the parties is divisible following divorce. In England as well, all of the spouses’ property at the date of hearing is divisible regardless of its source of acquisition. Parkinson, supra note 5, at 165.
17 The details of these statutes vary among the states. For example, the relevant Illinois statute subjects only marital property to division. Furthermore, there is a rebuttable presumption that property acquired during the marriage is marital property that is divisible upon divorce. Finally, property gained before marriage or by gift does not qualify as marital property in Illinois. 750 ILCS 5/503(a)-(b).
18 The relevant Illinois statute is typical in providing a list of factors that courts should consider when dividing marital property, which is to be equitably divided regardless of who holds title to it. Id.
19 The community property system more commonly results in an equal division. Jeffrey G. Sherman, Prenuptial Agreements: A New Reason to Revive an Old Rule,
Although equitable distribution is well-established in most jurisdictions, the debate has hardly slowed regarding the most appropriate post-divorce property division. Instead, the disagreement has resulted in several model statutes, challenged the proper division of professional degrees, and fueled litigation.

A. The Debate Regarding Equitable Distribution

The principle of equitable distribution requires the courts to divide the property between the parties equitably. However, such a division does not necessarily mean an equal split between the parties; even a 95-5 division can be equitable. In making these divisions, courts consider several legislated factors, such as the length of marriage, the causes for the dissolution of the marriage, the age and health of the parties, and the amount and sources of income, as well as the vocational skills, liabilities, and needs of each party. The courts thus have much discretion in property division and decisions are highly fact-specific.

However, the fact that most states use equitable division has hardly slowed the debate regarding its appropriateness. On the contrary, equitable distribution has simply triggered more litigation on the proper division of assets following a divorce. The debate surrounding equity is particularly acute in the subset of divorce cases involving wealthier couples. In these cases, property divisions are often very disproportionate, an outcome that has been vigorously challenged in the courts.


\[20\] Alston v. Alston, 331 Md. 496, 514 (Md. 1993) (“Where one party, wholly through his or her own efforts, and without any direct or indirect contribution by the other, acquires a specific item of marital property after the parties have separated and after the marital family has, as a practical matter, ceased to exist, a monetary award representing an equal division of that particular property would not ordinarily be consonant with the history and purpose of the statute.”).


\[22\] See, e.g., 750 ILCS 5/504; CONN. GEN. STAT. § 46b-81, § 46b-82.
Specifically, many lower income spouses\textsuperscript{23} have argued that nothing short of an \textit{equal} division can be equitable—an argument encompassed by the ALI Principles.\textsuperscript{24} However, the generally accepted theory of equitable division likens the division of property upon divorce to that of partnership dissolution.\textsuperscript{25} While each partner has a stake in the partnership, all shares are not equal. Thus, upon dissolution of the partnership, each partner only receives the share that corresponds to his contribution. In the marital context, however, contributions are not limited to the assets that each spouse brings, but also extend to those contributions made to the marriage generally, such as child care. Nonetheless, lower income spouses contend that only an equal division can be equitable.

\textbf{B. Model Statutes and Equitable Distribution: The ALI Principles and UMDA}

The ALI Principles\textsuperscript{26} adopt the minority view of property division, rejecting equitable distribution in favor of a strong

\textsuperscript{23} One category of big money plaintiffs in the United States fueling litigation on the meaning of “equitable” consists of the wives of corporate executives, occasionally referred to by the case law as “corporate wives.” \textit{See, e.g.}, In re Marriage of Nesbitt, 879 N.E.2d 445, 447 (Ill. App. 2007); Wendt v. Wendt, 757 A.2d 1225 (Conn. App. 2000); McMackin v. McMackin, 1993 Del. Fam. Ct. LEXIS 119 (Del. Fam. Ct. 1993); see also infra note 41. Another category is the homemakers. However, the stereotypical household of a patriarchal order is no longer necessarily true, with many women outperforming their husbands in the workplace. DiMaggio, \textit{supra} note 13, at 470. \textit{See also} Whispell v. Whispell, 534 NYS2d 557 (1988) (justifying the ex-husband’s low share of the marital property based on his “negative contribution to the marriage”). Thus, it is important to underscore that the equitable distribution principle is gender-neutral: all people who contribute an unusual amount of property to their marriage are allowed a share that reflects their extraordinary efforts.

\textsuperscript{24} \textit{See infra} Part II.B.


\textsuperscript{26} For an excellent background and commentary on the drafting of the ALI Principles in Family Law, and on property division in particular, see Marsha Garrison, \textit{The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?}, 8 \textit{Duke J. Gender L. & Pol’y} 119, 123 (2001). “Although the American Law Institute is best-known for its Restatements of the Law, ‘the current disarray in family law’ led the Institute to opt, in this Project, for principles that would ‘give greater weight to emerging legal concepts’ than would a Restatement.” \textit{Id.}
presumption of equal division.\textsuperscript{27} There are limited exceptions, such as if one spouse commits financial misconduct.\textsuperscript{28}

Although not entirely controversial, the Principles generally inspire some debate from the legal community.\textsuperscript{29} However, these Principles do not become the law in any jurisdiction until legislative or judicial action implements them.

Despite the strong preference of the ALI Principles for equal division, however, most states have enacted equitable distribution statutes.\textsuperscript{30} These parallel another model statute, the Uniform

\begin{footnotesize}
\begin{enumerate}
\item Section 4.15(1) in the American Law Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations (Tentative Draft No. 2) states, “In every dissolution of marriage, the presumption arises that marital property shall be divided so that the spouses receive marital property equal in value, although not necessarily identical in kind.” The presumption can be rebutted in only two circumstances: (1) it is equitable to compensate a spouse for a “loss recognized” in whole or in part, with an enhanced share of the marital property or (2) one spouse is entitled to an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it. \textit{Id.} at § 4.15(2)(a) and 2(b). \textit{See also} Craig W. Dallon, \textit{The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division}, 2001 B.Y.U. L. Rev. 891, 892 (2001). Professor Dallon also notes that the ALI Principles distinguish themselves from the majority of jurisdictions by rejecting the discretionary factors used in equitable distribution cases and by proposing a recharacterization of separate assets to marital assets over the course of a long marriage. \textit{Id.}
\item See \textit{id}. Specifically, unequal division is permitted when “(a) the court concludes . . . that it is equitable to compensate a spouse for a loss [that would otherwise result in an alimony award under] Chapter 5 . . . with an enhanced share of the marital property; or (b) the court concludes under 4.16 that one spouse is entitled to an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it; or (c) 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, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.” ALI Principles of Family Dissolution 1997 § 4.15(2).
\end{enumerate}
\end{footnotesize}
Marriage and Divorce Act of 1970 and 1973 ("UMDA"). Promulgated by the National Conference of Commissioners on Uniform State Laws, the UMDA advocates equitable distribution of marital property at divorce, which often results in disproportionate property divisions that trigger litigation by lower income spouses. Thus, the position of the ALI Principles on property division remains the minority approach.

C. Professional Degrees as Property Subject to Equitable Distribution

Although American courts do not uniquely categorize big money divorces as their English counterparts do, their treatment of professional degrees typically implicates only big money families. Often times, graduate degrees in business, law, and medicine are subject to intense, big money court battles in the United States. American cases involving professional degrees are therefore somewhat akin to English big money cases, deserving a brief mention.

Section 4.07 of the ALI Principles does not consider occupational licenses and educational degrees as subject to division upon divorce. This reflects the majority of jurisdictions, which refuse to treat such assets as marital property instead of as personal attainment. This view is buttressed by a degree’s characteristic lack of value, nonassignability, and personal nature.

ANN. § 36-4-121 (2001); VT. STAT. ANN. TIT. 15, § 751 (2001); and VA. CODE ANN. § 20-107.3 (2001).
32 See supra Part II.A. and infra Part II.D.
33 Margaret F. Brinig, Property Distribution Physics: The Talisman of Time and Middle Class Law, 31 FAMILY LAW QUARTERLY 93 (1997).
34 Such a battle seems of increasing import for women with professional degrees. Professor Robin Fretwell Wilson recently released a study showing that women with business, law, or medical school degrees are twice as likely to get divorced or separated than their male counterparts. Sara Schaefer Munoz, Study Finds Women’s MBAs Hazardous to Marital Health, WALL STREET JOURNAL, Apr. 2, 2008, available at http://blogs.wsj.com/juggle/2008/04/02/study-finds-womens-mbas-hazardous-to-marital-health/?mod=WSJBlog#comment-40588.
35 ALI Principles of Family Dissolution § 4.07.
36 See, e.g., Simmons v. Simmons, 708 A.2d 949 (Conn. 1998).
New York uniquely approaches professional licenses as marital assets, dividing their value between spouses as appropriate.\textsuperscript{37} Other jurisdictions may grant the nonprofessional spouse certain relief in limited circumstance. If, for example, the husband single-handedly supported the household during his wife’s law school years, he may receive reimbursement alimony.\textsuperscript{38}

Nonetheless, the courts’ general refusal to divide the value of a professional degree underscores their reluctance to apportion marital assets between the spouses equally. The view that the spouse who earned the degree solely receives its benefit is therefore consistent with the American philosophy that the contributing spouse keeps his contribution, particularly if it is a remarkable one.

\textbf{D. The Interpretation of Equitable Distribution in Case Law: Wendt v. Wendt}

Although American law does not distinguish among divorce cases based on their financial stakes, the division of property in high net divorce cases has the most potential to result in a disproportionate division. Specifically, the higher income earner typically receives a larger amount to reflect a higher marital contribution. However, this outcome has often been vigorously challenged in American state courts.

One of the most famous cases challenging equitable distribution is \textit{Wendt v. Wendt}.\textsuperscript{39} The case was driven by a corporate wife,\textsuperscript{40} who demanded exactly half of the marital estate that valued from $52 million to approximately $100 million.\textsuperscript{41} After Mrs. Wendt rejected her ex-husband’s $8 million settlement and $250,000 in annual alimony, a Connecticut court awarded her $22 million in one

\textsuperscript{38} Mahoney v. Mahoney, 453 A.2d 527 (1982) (holding that where one spouse receives financial contributions from the other, which were used in obtaining a professional degree or license with the expectation of deriving material benefits for both spouses, the supporting spouse may be reimbursed for the amount of such contributions).
\textsuperscript{40} See supra note 23.
\textsuperscript{41} Wendt generated much commentary on the role of a corporate wife. See, e.g., Paul Barett, \textit{Wendt Divorce Dissects Job of “Corporate Wife”}, WALL ST. J., Dec. 6, 1996, at B1, B17.
of the largest divorce rulings in American history. Unsatisfied, she appealed the decision, seeking half of his future earnings based on the argument that only an equal distribution is an equitable one.

Mr. and Mrs. Wendt were high school sweethearts and married on July 31, 1965 in Wisconsin. The plaintiff wife, Mrs. Lorna Wendt, was a public school music teacher early in their marriage, earning modest wages. After quitting her employment, she had been a mother, homemaker, and corporate wife. The defendant husband, Mr. Gary C. Wendt, was the Chairman, President, and Chief Executive Officer of GE Capital Services, Inc. The couple had two daughters who were grown and self-sufficient at the time of the divorce in 1995.

Mrs. Wendt’s claim was that her contributions to Mr. Wendt’s career entitled her to half of all his worth because she was his equal partner. Specifically, she talked to him about his work throughout his career. She entertained guests at their multi-million dollar home in Stamford, Connecticut and received invitations “to parties in New York City, out of town dinners or a golf engagement.” She would occasionally accompany defendant on expensive and exotic corporate trips. At trial, she described herself as the “ultimate hostess” and a “corporate wife.” Additionally, Mrs. Wendt argued that her homemaking duties entitled her to an equal share of the marital estate. She thus introduced evidence of her

42 Id.
44 Wendt, 1998 WL 161165 at *1.
45 Id.
46 Id. (However, at trial, “[t]he plaintiff offered an expert witness to support her claim that she is entitled to a substantial distribution in the tens of millions of dollars by reason of giving up her career as a public school music teacher.”) Id. at *11.
47 Id.
48 Id.
49 Id.
50 Id. at *5.
51 Id.
52 Id. at *13-14.
53 Id. at *14, *16.
54 Id. at *5.
care for the children, duties of cooking, and general maintenance of the household, albeit with hired help. 55

Mrs. Wendt’s homemaking contributions were undisputed, as was the quality of those services. 56 However, the court found her view of the contributions she made to Mr. Wendt’s career to be exaggerated. 57 Mr. Wendt’s contributions to GE and the family finances, however, were extraordinary. During his time at GE Capital, the company’s earnings surged from $271 million to $2.8 billion. 58 After hearing testimony on Mr. Wendt’s extraordinary vision for GE and his exceptional leadership skills, the court found that Mr. Wendt made the most substantial contributions to GE of all its employees. 59

Ultimately, the court found that, “It is widely recognized that the primary aim of property distribution [under the equitable distribution principle] is to recognize that marriage is, among other things, ‘a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute-directly and indirectly, financially and nonfinancially-the fruits of which are distributable at divorce.’” 60 Accordingly, the court accepted the value of Mrs. Wendt’s non-monetary contributions to a marriage.

However, there are many factors to property division, only one of which is contributions. Other potential factors include the dissipation of assets, the duration of the marriage, and any prenuptial agreement between the parties regarding the distribution of the property. 61 In Illinois, for example, the courts may consider the quality of the homemaker’s contributions and whether the homemaker had been frugal or extravagant. The courts may also

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55 Id. at *5, *12.
56 Id. at *7.
57 Id. at *16. (For example, during a business trip to Poland, “[w]hile the defendant had meetings and lunches with the Polish Ministry of Finance, a representative of the Polish Center Bank, the President of the Gdansk Solidarity Bank and other executives, the plaintiff had a 15 minute tour of the city, watched a 20 minute movie in the historical museum and spent from 9:30 a.m. to 1:00 p.m. shopping.”). Id.
58 Id. at *11.
59 Id.
60 Id. at *27 (citing JOHN DEWITT GREGORY ET AL., THE LAW OF EQUITABLE DISTRIBUTION 1-6 (1989) § 1.03).
61 DiMaggio, supra note 13, at 462.
quantify the homemaker’s contributions. The Connecticut court endorsed this approach in *Wendt*, “The court must consider all of the statutory criteria in determining how to divide the parties’ property in a dissolution action. A trial court, however, need not give each factor equal weight; or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor.” The court therefore rejected § 4.15 of the ALI Principles on Family Dissolution and the equal division presumption as a violation of state statute, noting that it cannot become law “until the legislature sees fit to change the statutes.”

On appeal, the lower court’s judgment was affirmed. In so doing, the Connecticut Court of Appeal confirmed that the principle of equitable distribution does not mean equal division. On the contrary, an equitable distribution often requires an unequal division of marital property, particularly in those cases where the marital estate grew significantly because of the extraordinary contributions of the higher income spouse. Such a result, typical in the United States, makes English divorce law the envy of American lower income spouses seeking divorces.

### III. The English Yardstick of Equality

The English statutory framework on post-divorce property division, rooted in the Matrimonial Causes Act 1973, gives courts significant discretion on the issue. Although judges initially used this discretion to award spouses their reasonable needs and requirements, they recently began to favor an equal property division. In 2001, this preference culminated in *White v. White*, which articulated the yardstick of equality against which judges must now measure their awards.

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62 *Id.* at 463.
64 *See supra* Part II.B.
68 Matrimonial Clauses Act 1973, c. 18.
69 [2001] 2 All ER 659.
A. The Statutory Basis for English Divorce Law

The English courts’ power to divide marital property upon divorce has always been statutorily prescribed. Originally, a judge’s ability to order varying settlements between spouses was found in the Matrimonial Causes Act 1859, which replaced the old ecclesiastical courts and established the Court for Divorce and Matrimonial Causes. Owing to its patriarchal Victorian roots, however, the Act in fact limited the court’s ability to award fair settlements to women. Under the Act, women also lacked men’s ability to exercise claims against a spouse for adultery, cruelty, or desertion that led to their divorce. These limitations on the English judiciary led the Law Commission to seek reform, resulting in the current legal regime under the Matrimonial Clauses Act 1973, which provides judges with much discretion in post-divorce property divisions.

1. The Matrimonial Causes Act 1973

The Matrimonial Causes Act 1973 constitutes the primary legislation underpinning the divorce law in the United Kingdom. The most clearly articulated principle in the Act is the due regard courts must have for the children of the marriage. Specifically, §25(2) provides that children must be placed in the financial position that they would have enjoyed had the marriage not ended. In big

70 For a brief but useful history of English statutory divorce law on property division, see White v. White, [2001] 2 All ER 659.
71 Id.
72 Id.
73 Id.
74 Matrimonial Clauses Act 1973, c. 18.
75 Id.
76 The relevant provisions consider:
(a) the financial needs of the child;
(b) the income, earning capacity (if any), property and other financial resources of the child;
(c) any physical or mental disability of the child;
(d) the standard of living enjoyed by the family before the breakdown of the marriage;
(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained[.]
Id. at c. 18, §25(2).
money cases, this provision is less relevant because of the abundance of money involved.

Unfortunately, the Matrimonial Causes Act 1973 is not equally lucid on the financial arrangement of the spouses following divorce.\textsuperscript{77} Sections 23 and 24 allow the courts to make financial provision orders and property adjustment orders. The Act also contains a checklist guiding the court’s power in dividing the property between the divorcing spouses.\textsuperscript{78}

However, the Act does not provide any guidance on the objectives of post-divorce property division. The section of the Act that originally provided such guidance was deleted. It had mandated that judges exercise their discretion so:

\begin{quote}
[A]s to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.\textsuperscript{79}
\end{quote}

\textsuperscript{77} As Judge Lord Nicholls declared, “The Matrimonial Clause Act 1973 confers wide discretionary powers on the courts over all the property of the husband and wife.” \textit{White}, [2001] 2 All ER 659.

\textsuperscript{78} The exact checklist in the Matrimonial Causes Act 1973 guiding property division is:

\begin{enumerate}
\item the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
\item the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
\item the standard of living enjoyed by the family before the breakdown of the marriage;
\item the age of each party to the marriage and the duration of the marriage;
\item any physical or mental disability of either of the parties to the marriage;
\item the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
\item in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring[.]
\end{enumerate}

Matrimonial Clauses Act 1973, c. 18, §25(1).

With the deletion of this provision, no explicit objective of post-divorce property division exists within the Act. Its closest indication is another section of the Act, § 10, which requires that “the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances.”\textsuperscript{80} Courts have also read § 25A as requiring them to facilitate a clean break between the parties.

Despite its ambiguities, the Matrimonial Causes Act 1973 is the primary statutory element to English divorce law. As one English judge declared, “Matrimonial Causes 1973 s 25 rules the day. And despite the endless judicial gloss which is applied to it year in and year out at every level it is always best to start and end in that familiar section.”\textsuperscript{81}

Given the significant judicial discretion allowed by the Act, however, much divorce law has evolved judicially. Not wholly in favor of the resulting direction of English divorce law, the Law Commission has proposed legislative changes through the Family Act 1996.

### 2. The Family Act 1996

Drafted by the Law Commission, the Family Act 1996\textsuperscript{82} has not entirely come into effect yet, nor is there a definitive date for its complete passage.\textsuperscript{83} Through the introduction of this Act, the Commission, a catalyst and guiding force for legal change in England, will influence divorce law to some extent. Thus, it is prudent to bear in mind its recommendations in considering English divorce law today.

Part II of the Act introduces new divorce law, which has not yet been enacted by Parliament.\textsuperscript{84} Part III focuses on publicly-funded mediation, a topic less relevant to ancillary relief.\textsuperscript{85} Importantly, however, Part I of the Act establishes several principles, the current lack of which has plagued the Law Commission since 1973, when the Commission formulated the Matrimonial Clauses

\textsuperscript{80} Matrimonial Clauses Act 1973, c. 18, § 10(3)(b).
\textsuperscript{81} Charman v. Charman, [2007] 1 FCR 33, [58].
\textsuperscript{82} Family Law Act 1996, c. 27.
\textsuperscript{83} GILLIAN DOUGLAS, AN INTRODUCTION TO FAMILY LAW 184 (2nd ed. 2004).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
Act. These principles are embedded in § 1 of the Act and direct the courts to execute all divorce law in light of these principles.  

Most notably, the overarching principle is that the institution of marriage must be supported. Stated differently, “divorce law must not undermine the institution of marriage.” The courts therefore gain the obligation to apply divorce law so as to respect and support marriage. Accordingly, the Act provides instruments designed to hinder divorces, such as cooling off periods before a divorce is granted.

Many commentators have noted that this newfound principle of respect for marriage contrasts starkly with the incentives of a divorce law that favors equal division, like the English law currently does. First, an equal property division in big money cases creates a disincentive for marriage not only because of its unfavorability to a higher income spouse, but also because of its volatility, as evidenced by the dramatic and recent changes in English divorce law. Prenuptial agreements are not entirely a perfect solution. Second,

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86 The exact principles are as follows:
(a) that the institution of marriage is to be supported;
(b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
(c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end—
   (i) with minimum distress to the parties and to the children affected;
   (ii) with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
   (iii) without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end; and
(d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

Family Law Act c. 27, §1.

87 DOUGLAS, supra note 83, at 185.

88 As one embattled higher income spouse commented, “There is a genuine sense of grievance among rich husbands that they married, in this case in 1976, with the law as it then was, and are now facing a sea-change wrought in 2000.” Frances Gibb, “I Didn’t Want to Take Him for Every Penny—I’m Not Greedy.” THE TIMES (London), May 25, 2007, at News 5.

89 See infra Part IV.C.
once married, people’s incentive for professional productivity may be reduced by the prospect of equal property divisions upon divorce. Finally, a promise of equal division incentivizes spouses’ litigiousness because the lower income spouse will not settle for less than an equal division, while higher income spouses view such a division as unfair.

Despite the changes proposed by the Family Act 1996, however, the English statutory framework provides judges with much discretion in property divisions, allowing them to formulate divorce law unfettered. Therefore, the courts’ interpretation of the statutory framework is by far the most determinative factor of English divorce law today.

B. Judicial Development of English Divorce Law

Taking advantage of statutorily prescribed judicial discretion, English judges have been able to formulate the objectives of divorce law, select the appropriate model of property division, and develop the legal standards by which to divide property following divorce. This wide discretion has recently culminated in the development of the English courts’ preference for equal property division, not only in average divorce cases where such a split is unavoidable by virtue of limited assets, but also in big money cases, even when one spouse far out-contributed the other and both have enough for reasonable needs.

One of the consequences, and perhaps advantages, of vesting discretion in the judiciary instead of Parliament is that legal change

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91 On the other hand, significant judicial discretion may also fuel litigation if the parties perceive the award as unfair, particularly when the property division is very disproportionate. See supra Parts II.A. and II.D.
93 Compare Matrimonial Property Act 1976 (New Zealand), which legislatively prescribes detailed instructions for the division of property following divorce.
is easier to accomplish.\textsuperscript{94} Judicial discretion has indeed allowed the courts to develop and adjust divorce law easily and at the expense of predictability. In particular, a single court case handed down by the House of Lords can definitively change the entire direction of divorce law, as White’s\textsuperscript{95} introduction of the yardstick of equality has done.

1. Fairness as an Objective of English Divorce Law

Fairness has been particularly valued by the English judiciary as an objective of property division in the absence of explicit statutory guidance.\textsuperscript{96} As Judge Nicholls opined in the landmark White big money case, “Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses. . . . The powers must always be exercised with this objective in view.”\textsuperscript{97}

Although the articulated goal of English property division may be fairness, however, the courts have not yet agreed on how to achieve it. As Lord Nicholls noted, “fairness, like beauty, lies in the eye of the beholder.”\textsuperscript{98} Divorce law has thus been changing as quickly as the concept of fairness. These changes recently culminated in White,\textsuperscript{99} wherein Lord Nicholls announced that fairness required new principles to guide the division of property. In formulating these principles, Lord Nicholls altered the entire landscape of divorce law in England.

\textsuperscript{94} Justice Antonin Scalia worried about the federalization of family law in the United States for this very reason: “I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.” Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting).
\textsuperscript{95} White v. White, [2001] 2 All ER 659.
\textsuperscript{96} Although the Matrimonial Causes Act 1973 mentions fairness in property division, it is not mandated as the lone or even primary goal of property awards. \textit{See supra} note 80 and accompanying text.
\textsuperscript{97} White, [2001] 2 All ER 659.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
2. Possible Models of Property Division

In addition to widely changing perceptions of fairness, a problem arises given the broad spectrum of possible goals in divorce law, all of which result in different models for the division of property. A court’s choice of model therefore influences the results of the property division.

The first potential model for property division is the community property approach adopted by most American states and many civil law systems, which rests on the assumption that marriage is a partnership of equals. As Lord Nicholls of Birkenhead opined, “The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary.”

Another model is equitable distribution, wherein the equality between spouses does not necessarily result in an equal sharing of assets at divorce. Specifically, equal shares may be skewed by the particular needs of one party or the children.

A third potential model of post-divorce property division is the compensation model. This approach aims to compensate spouses for their contributions to the marriage, as well as their opportunity costs of doing so. For homemaking spouses, their child-rearing work usually composes a substantial amount of total compensation.

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100 See DOUGLAS, supra note 83, at 191-92.
102 As one higher income spouse’s attorney argued, “The most important principle which emerges is the identification of the function of the court as being to ascertain the reasonable requirements of the claimant. If the needs of both parties are satisfied and there is a surplus it should lie where it falls.” Id.
103 Id. at [142]. See also H v. H [2007] EWCH 459 (Fam), [2007] All ER (D) 88 (Apr). However, White emphasized that equal division of marital assets is both feasible and fair in certain situations today, such as in Burgess v. Burgess, [1996] 2 FLR 34. In that case, a marriage between a doctor and a lawyer allowed them to equally share the marital assets because both parties had decent incomes to supplement their halves of the assets. White, 2 All ER 659 at 143.
104 DOUGLAS, supra note 83, at 191.
105 Under this approach, spousal support is based “on the advantages and disadvantages flowing from the actual relationship between the parties, rather than from the fact of marriage per se. It attributes financial value to the reasonably held expectations by the spouse who made the preponderance of non-monetary
Finally, a property division may be driven by the reasonable needs of the parties.\textsuperscript{106} This model is rooted in the idea that marriage generates needs for one party that ought to be met by the other party. This is a common approach to property division when there is no financial surplus after the parties’ needs are considered.

English big money divorce cases occasionally exhibit a mixture of these three models, as \textit{McFarlane v. McFarlane}\textsuperscript{107} illustrates. In that case, the House of Lords affirmed the lower courts’ awards, deciding that Mr. McFarlane must meet his ex-wife’s annual needs of £128,000, pay her compensation for the marriage-generated disadvantage she incurred by quitting her job as an attorney to focus on the family, and pay any surplus because she was entitled to share it. Although \textit{McFarlane} postdates \textit{White}, English divorce law, at least in theory, should be more consistent since 2001, when the House of Lords adopted a yardstick of equality in \textit{White v. White}.

3. Legal Standards for Property Divisions

In any divorce case “[o]ne question always arises. It concerns how the property of the husband and wife should be divided and whether one of them should continue to support the other.”\textsuperscript{109} This problem becomes especially complex in big money cases, where the court’s task is to determine the owner of massive amounts of money that exceed either party’s financial needs. Guided by fairness, English courts have used various legal standards by which to make property divisions between divorcing spouses, although their jurisprudence recently developed in favor of equal division.

i. The Transition from Reasonable Needs to Reasonable Requirements and Beyond

\textsuperscript{106} DOUGLAS, \textit{supra} note 83, 191.
\textsuperscript{107} Miller v. Miller, McFarlane v. McFarlane, [2006] UKHL 24.
\textsuperscript{108} \textit{White}, [2001] 2 All ER 659.
\textsuperscript{109} \textit{Id.}
Prior to White\textsuperscript{110} in 2001, English courts used two common approaches to post-divorce property division: reasonable needs and reasonable requirements. Under the reasonable needs approach, each spouse received enough to cover his reasonable needs. Under a reasonable requirements analysis, meanwhile, each spouse received that which he reasonably required.

However, the interpretation of needs and requirements has changed over the years as English judges have searched for the fairest property divisions. The phrase “reasonable requirements” was first employed in \textit{O’Donnell v. O’Donnell},\textsuperscript{111} where the wife received more than she strictly needed. \textit{Page v. Page}\textsuperscript{112} subsequently articulated a specific list of factors considered in both a “requirements” and a “needs” division, “In a case such as this ‘needs’ can be regarded as equivalent to ‘reasonable requirements’, taking into account the other factors such as age, health, length of marriage and standard of living.”\textsuperscript{113} \textit{Dart v. Dart},\textsuperscript{114} however, allowed courts to award spouses more than their strict needs. In that case, Judge Thorpe LJ reiterated that the factors to determine property division include the available assets, the household’s former standard of living, the spouses’ health and age, each party’s contributions to the marriage, and the length of the marriage.\textsuperscript{115}

In big money cases, the English courts’ shift away from strict reasonable needs meant a significant windfall to lower income spouses, who could claim massive awards for exorbitant clothing stipends and other matters extending well beyond necessity.\textsuperscript{116} At the other extreme, however, the reasonable requirements approach in

\begin{itemize}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} [1975] 2 All ER 993.
\item \textsuperscript{112} [1981] 2 FLR 198.
\item \textsuperscript{113} \textit{Id.} at 201. The view that reasonable requirements equaled reasonable needs was confirmed in Preston v. Preston, [1982] 1 All ER 41, 47 (“[T]he word ‘needs’ in para (b) of s 25(1) [of the Matrimonial Clauses Act] in relation to the other provisions in the section is equivalent to ‘reasonable requirements’, having regard to the other factors and the objective set by the concluding words of the section. . . .”).
\item \textsuperscript{114} [1997] 1 FCR 21.
\item \textsuperscript{115} These factors are similar to those requiring consideration under the American equitable distribution principle in states such as Illinois and Connecticut. See \textit{supra} note 22 and accompanying text.
\item \textsuperscript{116} In the highly emotional context of divorce, some spouses may avenge the divorce by claiming exorbitant requirements.
\end{itemize}
effect capped the amount that a spouse could receive, to the
dissatisfaction of the House of Lords. According to Lord Nicholls,
“This seems then to have led to a practice whereby the court’s
appraisal of a claimant wife’s reasonable requirements has been
treated as a determinative, and limiting, factor on the amount of the
award which should be made in her favour.”\textsuperscript{117}

The reasonable requirements standard therefore began to
encounter significant criticism in English law. For example, Lord
Nicholls suggested in \textit{White} that the standard departed from the
statutory language of the Matrimonial Clauses Act.\textsuperscript{118} In another
case, the reasonable requirements standard was practically scorned:
“The husband is genuinely bemused that the wife should regard his
£20m offer as anything other than reasonable, even generous [given
that the wealth was generated entirely by his efforts] . . . In the
narrow, old fashioned sense that perspective is understandable if
somewhat anachronistic. Nowadays it must attract little
sympathy.”\textsuperscript{119}

Without the standard of reasonable requirements, however,
courts were left without a legal standard by which to achieve fairness
in the post-divorce division of property. The House of Lords filled
this void by providing some renewed direction in \textit{White v. White},\textsuperscript{120}
which adopted a yardstick of equality in property division.

\textbf{ii. Adoption of a Yardstick of Equality: White v. White}

\textit{White}\textsuperscript{121} is the landmark English case that introduced a strong
preference for equal division in property division. The facts of the
case were straightforward: Mr. and Mrs. White married in 1961.\textsuperscript{122}
They both had farming backgrounds and throughout their marriage
ran a successful dairy farming business in partnership.\textsuperscript{123} Their farm,
Blagroves Farm, generated marital assets of £3.5 million through its
live and dead stock, machinery, and milk quota. Mr. and Mrs. White
also farmed Rexton Farm, which was 10 miles away from Blagroves

\begin{footnotesize}
\begin{enumerate}
\item[118] \textit{Id}.
\item[119] Charman v. Charman, [2006] EWHC 1879 (Fam), [2007] 1 FCR 33, [19].
\item[120] [2001] 2 All ER 659.
\item[121] \textit{Id}.
\item[122] \textit{Id}.
\item[123] \textit{Id}.
\end{enumerate}
\end{footnotesize}
Farm and worth £1.25 million, as part of their partnership business. Additionally, the couple had three children. The marriage broke down in 1994 and the spouses divorced in 1997. At the time of divorce, the net worth of Mr. and Mrs. White’s assets totaled £4.6 million, £193,300 of which was owned solely by Mrs. White and mostly in the form of pension provisions, and £193,300 of which was owned solely by Mr. White and mostly in Rexton Farm.

The lower court proceeded on a “clean break basis,” as per § 25A of the Matrimonial Clauses Act 1973, as well as due regard for Mrs. White’s reasonable needs. Accordingly, Mrs. White argued that her reasonable needs included sufficient money to start her own farm. However, the judge deemed this request to be unreasonable because it was unjustifiable to fragment the existing, successful farming business so that she could begin her own farm without any guarantees. Thus, calculating the wife’s reasonable needs without her requested capital for a new farm, the judge granted her a fifth of the £4.6 million marital assets.

Mrs. White appealed and the Court of Appeal increased her share to two-fifths because she had been Mr. White’s equal partner in the farming business. In the course of its judgment, the Court of Appeal opined that the starting point should be to divide the assets according to partnership principles—here, they were equal business partners. Additionally, the court noted that there should be an increase in Mrs. White’s share to account for her contributions as a wife and mother. Both spouses appealed: Mrs. White demanded exactly half of the marital property and Mr. White sought the reinstatement of the lower court’s award.
The House of Lords accepted the appeal and handed down its watershed decision, which altered the direction of big money cases. Lord Nicholls first rejected the necessity of detailing the partnership stakes between the spouses, instead underscoring that a broad review of their financial situation was more appropriate.\textsuperscript{136} Second, and more importantly, Lord Nicholls declared a principle of equality between husband and wife that was independent of their exact shares in the business.\textsuperscript{137}

However, the House of Lords stopped short of creating a presumption of equality in property division so as not to offend the intentions of Parliament, whose members did not include such a presumption in the legislation,\textsuperscript{138} unlike their Scottish counterparts.\textsuperscript{139} Instead, Lord Nicholls formulated a yardstick of equality against which judges should check their property division decisions.\textsuperscript{140} This represented a complete break from the previous reasonable requirements standard.

Notably, \textit{White} is an unusual case to change the direction of English big money cases because it is factually atypical in that there is no higher income spouse. On the contrary, both spouses were nearly equal partners in the business. To begin the farm, each contributed approximately an equal amount of capital.\textsuperscript{141} Eventually, Mr. White’s father favorably loaned them some additional business capital, although both spouses worked together to expand and farm the land.\textsuperscript{142} The whole business was treated as the property of the partnership between Mr. and Mrs. White. In addition to her farming duties, Mrs. White also primarily maintained the household.\textsuperscript{143}

Nonetheless, this atypical case, with no higher income spouse, changed the direction of all big money cases, allowing courts

\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} See supra Part III.A.
\textsuperscript{139} \textit{White}, [2001] 2 All ER 659.
\textsuperscript{140} Lord Cooke, in his concurring opinion, doubted whether there was much distinction between “yardstick” and “guidelines” or “starting point.” \textit{Id.} However, the House of Lords was concerned that \textit{White} could create a formal presumption of equality in practice, with the attendant consequences regarding the burden of proof. \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
to divide marital assets equally, even if the award exceeded the most imaginative reasonable needs of the lower income spouse. Therefore, an entrepreneurial high income spouse could no longer provide just for his ex-spouse’s reasonable requirements, no matter how lavish, but now had to give her an equal share of his wealth.

Furthermore, despite its particularities, *White* influenced the future of not only big money cases, but also of average ones. Specifically, Lord Nicholls announced a “principle of universal application” that the Matrimonial Clauses Act 1973 authorized:

In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering . . . the parties’ contributions.

Accordingly, the yardstick of equality applies to all divorce cases, not just big money ones. However, its fairness is questioned most by higher income spouses in big money cases, where there is a significant difference between the lower income spouse’s reasonable requirements and half of the marital property.

Unsurprisingly, *White*’s dramatic shift toward equal division has encountered criticism. For one, the court wrote *White* with a

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144 See, e.g., Elliott v. Elliot [2001] 1 FCR 477; Adams v. Lewis [2001] All ER (D) 274. See also the Annual Review of the All England Law Reports, “In a previous edition of this Review, it was suggested that modern marriages may sometimes be described as an equal partnership, but that the Court of Appeal’s decision in *White* v. *White* demonstrated that some marriages are more equal than others. The decision of the House of Lords [in *White* v. *White*] now establishes a principle of equality for all marriages.” All ER Rev. 2001, 219 (citations omitted).

broad stroke, not providing many instructive details to practitioners.\textsuperscript{146} As a commentator noted, should the yardstick only apply to capital division or to future income as well?\textsuperscript{147} Furthermore, the \textit{White} decision threatened to produce unpredictable and confusing case law. Notwithstanding these criticisms, however, the yardstick of equality is favored by the House of Lords as a justification for equal division, transforming England into one of the friendliest divorce forums for lower income spouses and creating a doctrinal split from American divorce law.

iii. \textit{The \textquotedblleft Special Contributions	extquotedblright} Exception

To avoid particularly harsh results, the yardstick of equality has a special contributions doctrine exception.\textsuperscript{148} This doctrine allows courts to take into account one spouse’s unique contribution to the marriage, resulting in a higher award to that spouse.\textsuperscript{149} However, the doctrine of special contributions is not often used by the English courts.

Furthermore, the doctrine is particularly difficult to apply given the English courts’ discomfort in valuating the parties’ contributions to the marriage. Originally, big money divorce cases were couched in terms such as the exceptional or “stellar” contributions of one party.\textsuperscript{150} This terminology was eventually

\textsuperscript{146} All ER Rev. 2001, 219 (“The decision of the House of Lords [in \textit{White v. White}] now establishes a principle of equality for \textit{all} marriages. In principle, this is a welcome development. However, in the light of the uncertainty about the implications of the case, Dr Stephen Cretney asks: ‘Was it not a trifle rash for the House of Lords to overrule . . . the hitherto tolerably well-settled practice of the court?’” (citation omitted)).

\textsuperscript{147} Rebecca Bailey-Harris, \textit{supra} note 90, at 234-35.

\textsuperscript{148} Short marriages may also justify a disproportionate division in England. “The general approach in this type of case should be to consider whether, and to what extent, there is good reason for departing from equality. As already indicated, in short marriage cases there will often be a good reason for departing substantially from equality with regard to non-matrimonial property.” Miller v. Miller, McFarlane v. McFarlane, [2006] UKHL 24, [55].

\textsuperscript{149} Parkinson explains, “The doctrine of special contributions provides that a court is justified in evaluating the contributions of spouses during the course of the marriage as unequal where the performance of one spouse in his or her role within the marriage has special features about it, placing that contribution outside of the norm.” Parkinson, \textit{supra} note 5, at 164.

\textsuperscript{150} \textit{See, e.g.,} Cowan v. Cowan, [2002] Fam 97.
rejected because of the judges’ uneasiness in valuating each party’s contributions to a marriage, particularly when one spouse is in the corporate world and the other is a homemaker. As one English judge suggested, “But then, the facts having been established, they each call for a value judgment of the worth of each side’s behaviour and translation of that worth into actual money. But by what measure and using what criteria?” The courts’ uneasiness with anything but an equal property division has thus undermined the special contributions doctrine, defeating its purpose.

Even when a judge applies the special contribution doctrine, however, the final property division rarely differs much from an equal split. For example, in one of the most recent big money cases, the special contributions doctrine failed to produce a substantially disproportionate division. In fact, during the course of the lengthy litigation, Mrs. Charman conceded not to pursue a share greater than 45% if a pending case, Miller, upheld the special contribution doctrine. Ultimately, the court awarded her 36% of the marital assets, totaling £48 million award—one of the largest in British history. She received this award even after her ex-husband provided her with the marital home, substantial provision for their sons, and accommodation for her parents.

Furthermore, in Sorrell v. Sorrell, an English court similarly narrowed the special contributions doctrine’s effect, finding that, “A departure from equality was justified by the husband’s special contribution to the marriage in the form of exceptional business talent amounting to genius.” Despite her husband’s genius financial contributions to the marriage, the wife was awarded 40% of the assets.

153 Id. at [13].
155 Id.
156 Id. [2005] EWHC 1717 (Fam), [2006] 1 FLR 497.
157 Id. at [2].
158 Id.
Finally, in _GW v. RW_, the court concluded that “some departure from equality in the instant case was justified on the basis of the duration of the marriage.” Once again, the wife was awarded 40%, illustrating that post-White property division often resembled an approximately equal split despite the special contributions doctrine.

Thus, while the doctrine of special contributions may theoretically exempt a higher income earner from an equal division, the English courts have increasingly restricted its use. Furthermore, even if a special contribution by one spouse is acknowledged by the courts, the final division does not fall far from an equal division in big money cases, even when such a sum exceeds the most imaginative reasonable requirements held by the lower income spouse. Such a result differs significantly from the previous outcomes produced under the standards of reasonable needs and reasonable requirements. The current state of English law, so unfavorable to higher income spouses, provides several important lessons to American courts.

IV. LESSONS FROM THE ENGLISH APPROACH

American federalism is often praised as creating the experimental conditions that advance the most efficient solutions. The commonalities between English and American divorce law, which permit comparisons, also create the experimental conditions that validate certain approaches to family law. First, both systems resolve divorce cases that share similar facts and issues. Second, both systems are bound by divorce legislation that provides for a substantial amount of judicial discretion. Third, each jurisdiction’s statutory divorce law is fundamentally similar to the other’s. Finally, both jurisdictions share the goal of fairness in property division.

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160 _Id._ at [1].
161 _Id._
162 See, e.g., _Gonzales v. Raich_, 545 U. S. 1, 11 (2005) (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’”) (citing _New State Ice Co. v. Liebmann_, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting)).
Despite these similarities, English courts have diverged from the majority of American law by advocating equal division. This difference between American and English divorce law arises most notably in the treatment of big money cases.

The English approach to property division offers many lessons. Importantly, the English courts’ preference for equal division reveals the consequences of this interpretation of fairness. Furthermore, pinpointing the reason for England’s equal distribution scheme, which seems to be the courts’ discomfort in valuating the spouses’ contributions to a marriage, clarifies the alternatives for achieving property divisions that more accurately reflect the parties’ contributions to a marriage. Finally, the rise of prenuptial agreements has coincided with these problems, deserving a brief mention.

A. The Meaning of Fairness

One lesson immediately emerging from a comparison of the American and English approaches is that there is no universal definition of fairness in property division. The mere fact that so many different statutory approaches exist in the United States, and an entirely different system has developed in England, illustrates the elusive nature of fairness and its differing meanings across jurisdictions.

Furthermore, the English courts’ decision to classify big money divorce cases separately implicates the meaning of fairness. While big money divorce cases certainly have presented novel challenges to English courts, it may be inherently unfair to treat them differently than the remainder of divorce cases. However, as one English court noted, “There may be cases of short marriages where the limited financial resources of the parties necessarily mean that attention will still have to be focused on the parties’ needs. That is not so in big money cases. Then the court is concerned to decide what would be a fair division of the whole of the assets, taking into account the parties’ respective financial needs and any need for

\[163\text{ See supra note 30.} \]
\[164\text{ In the case of mobile couples, this of course has many implications in the field of conflicts of law, or the problem of which law to apply when more than one jurisdiction is involved.} \]
In other words, the courts’ perception of fairness plays a lesser role in the average divorce case because there is no use for discretion with limited assets. It is difficult to think of another area of law, however, wherein the definition of fairness depends on the amount of money involved, which would be generally described as unfair.

Finally, the yardstick of equality produces property awards that highly depend on the amount of money at stake, which may produce unfair results. Under the yardstick of equality, for example, a homemaker married to an average-earning spouse will receive a tiny fraction of another homemaker’s award, even though they both performed the same work but one is married to an outstandingly productive spouse. Therefore, what may be a fair settlement for a poorer couple becomes an unfair one if applied to a big money case.

However, certain issues of fairness implicate big money cases in particular. Specifically, in the average divorce case, applying the yardstick of equality to property division would have a result similar to that under a reasonable needs approach—even half of all divisible property does not exceed the spouse’s reasonable needs because the divisible pool of money is modest. Thus, in the average divorce case, no matter what standard for a fair division is used, the lower income spouse will receive about the same amount—half the assets. On the contrary, in a big money case, the lower income spouse receives a settlement that depends on the size of the marital assets, even if she did not significantly contribute to them. In these big money cases, there is a significant difference between the lower income spouse’s reasonable needs and half of all divisible property.

The same observation applies to the American system, which remains split between the community property and equitable distribution approaches. In the average divorce case, there may not be much difference between the results under a community property approach and those under an equitable distribution approach. This is because the principle of community property requires equal division, while such is the practical result of equitable distribution: the divorcing couple’s assets are just sufficient to meet the needs of both spouses. However, where the assets are sizable, the results differ

165 Miller v. Miller, McFarlane v. McFarlane, [2006] UKHL 24, [55].
166 This assumes that both homemakers contributed equally to their households.
greatly depending on which approach the court uses in dividing the property.

In sum, fairness acquires very different meanings depending on the amount of money at stake and the particular court’s approach. The English courts have been laboring in recent years to more precisely develop these nuances of fairness, but the emerging question for the American judicial system is whether the English results are desirable.

B. Valuating the Spousal Contribution

One reason for England’s yardstick of equality is a reluctance to valuate spouses’ contributions to a marriage in monetary terms. In particular, English courts often have trouble valuating the homemaker’s contribution to the household. According to one such judge, “It has also meant that the court has been asked to examine closely aspects of the psychological dynamic of the marriage partnership in a way nowadays almost unheard of.” The natural result of such a view is that property division upon divorce must resemble an equal division, even if the spouses contributed varying efforts to the marriage.

The opposite of such an approach would be to use an economic analysis in divorce judgments. American courts have been exploring this method, utilizing traditional human capital theory, market replacement theory, and opportunity cost theory to reach equitable distribution judgments that reflect spouses’ varying efforts. Any one of these approaches provides a way to distribute assets between divorcing spouses according to their contributions. Furthermore, such an approach could prevent higher income spouses from being forced into particular jobs solely to meet high alimony payments, which typically cannot be reduced upon self-imposed changes in salary.

Finally, property awards would be more consistent. Thus, there are many advantages to an economic analysis approach.

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168 Charman v. Charman, [2006] EWHC 1879 (Fam), [2007] 1 FCR 33, [20].
169 American courts in particular base alimony on a formula that combines need and ability to pay, although self-imposed salary changes do not lower the payor’s alimony award.
and American courts should continue exploring this approach in order to discover which economic tools produce the fairest post-divorce property divisions.

C. Prenuptial Agreements

The rise of prenuptial agreements unsurprisingly coincided with all of the concerns raised by property distribution at divorce. Such agreements allow parties to minimize or entirely eliminate potential divorce disputes in the future by contracting around court defaults. However, prenuptial agreements are hardly the perfect remedy.

In England, prenuptial agreements are simply rare. Although more popular in the United States, such agreements are not always reliable, occasionally raising enforceability issues. States have adopted differing positions on the enforceability of prenuptial agreements, with some invalidating prenuptial agreements that are materially unfair to one party and others exhibiting complete deference to the agreements. Prior to 1970, however, prenuptial agreements were often considered completely invalid in the United States on public policy ground because they were deemed to endanger marital stability. Florida became the first state in the United States to accept such agreements in Posner v. Posner.

Interestingly enough, the theory underpinning prenuptial agreements may undermine the partnership model of marriage, toward which both England and the United State strive. On the one hand, a court’s ability to invalidate a contract entered into by equal

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171 One survey found that only 2% of married and divorced people in the United Kingdom had prenuptial agreements. Divorce Lawyers Braced for Busiest Week Ever, TIMES ONLINE, January 5, 2009, available at http://business.timesonline.co.uk/tol/business/law/article5450552.ece.


174 233 So.2d 381, 383 (Fla. 1970).
partners is problematic because as equals, they should be able to contract. On the other hand, if prenuptial agreements substantially deprive parties of equal shares, they hinder the spouses’ equality. Therefore, some commentators have suggested that prenuptial agreements move in the direction of dividing property equally, or else they are at odds with the view of marriage as a partnership. Accepting this proposition, however, would defeat the entire purpose of a prenuptial agreement, which is to provide parties a method of contracting around court defaults.

Therefore, the favorable approach to prenuptial agreements in the United States recognizes spousal equality by recognizing each spouse’s ability to contract. Furthermore, the philosophy pervading American family law acknowledges that different people make differing contributions to marital life, thereby permitting people to enter into premarital agreements that reflect their varying contributions. On the contrary, England’s default equal division scheme precludes the acknowledgment of the differing contributions of spouses.

V. CONCLUSION

Judges in England and the United States have each been encountering big money cases with increasing frequency in recent years. While both legal systems have pursued fairness in their division of post-divorce property, each has taken drastically different routes—especially in big money cases.

Most American courts have employed the principle of equitable distribution, which frequently results in a disproportionate property division, particularly when the marital estate grew due to the efforts of one talented spouse. England, on the other hand, recently implemented a yardstick of equality in White that produces near equal property division in many cases. While this shift does not significantly change the property awards in average divorce cases,

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176 Id. at 2096 (“This section expands on the argument that deference to freedom of contract in antenuptial agreement law is undesirable. It argues that acknowledgment of the partnership conception of marriage demands that parties desiring to execute antenuptial agreements approximate the fifty-fifty division implicit in the partnership approach or stand prepared to prove the agreements’ substantive fairness at the time of divorce.”).
lower income spouses in big money marriages receive far more than they would reasonably need or require, creating a significant doctrinal split from American law.

The recent developments in English law would be equivalent to a move by American courts from equitable division to equal division of property. Although such a change of law has not occurred in the United States, many lower income spouses have challenged their disproportionate shares of marital property in state courts. The English divorce regime would be ideal to such spouses, but the resounding calls for divorce reform in England provide support for the American equitable distribution principle.

In big money cases, however, the lower income spouse is often already so well situated under any approach that an absolutely equal division becomes only a matter of principle. The question therefore becomes: which principle does a legal system aim to support? That fairness requires equal treatment of all marriages and spouses and contributions? Or that fairness permits an exceptional contributor to retain the rewards of her labor after taking care of the needs of a former spouse?

177 See supra Part III.A.2.