Retained Jurisdiction in Damage Actions Based on Anticipatory Breach: A Missing Link in Landlord-Tenant Law

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RETIRED JURISDICTION IN DAMAGE ACTIONS BASED ON ANTICIPATORY BREACH: A MISSING LINK IN LANDLORD-TENANT LAW

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Courts have updated many areas of landlord-tenant law by recognizing the applicability of contract principles to leases of realty. However, a lessor’s difficulty in collecting damages caused by a lessee’s unwarranted default has been generally ignored. Professor Kwall proposes that courts retain jurisdiction so as to more accurately and equitably assess damages in cases involving long-term leases.

This Article explores the settled application of the doctrine of retained jurisdiction to domestic relations and probate matters, specific performance of long term contracts, and workers’ compensation. Professor Kwall concludes that a lessor’s collection of damages in landlord-tenant matters is an equally appropriate and fertile field for the application of retained jurisdiction.

INTRODUCTION

PROPERTY LAW traditionally regarded a leasehold as a transfer of an estate in land, shunning the application of contract principles to resolve disputes between landlords and their tenants. At common law, property law equated a lease of land with a sale of the premises for a term, thus converting the lessee into both the owner and occupier of the land for the lease term subject to the ancient doctrine of caveat emptor. The rules of property law solidified prior to the development of mutually dependent covenants in contract

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law, so once an estate was leased, the landlord was not obligated to perform any further acts. Recently, however, the judiciary's growing recognition of a lease as a contractual relationship has facilitated significant tenant-oriented reforms, resulting both in an increasing number of duties on the part of lessors toward their respective lessees and in a concomitant strengthening of tenant's rights. Although this trend generally has had a marked impact upon modernizing landlord-tenant law, courts frequently have overlooked the relevance of the contractual aspects of a lease in at least one respect which is of crucial importance to lessors generally—the collection of compensation upon a lessee's unwarranted default.

Theoretically, after a lessee abandons the leased premises, he is still liable to the lessor for any loss resulting from the default. The remaining sum due the lessor may be characterized either as rent or as damages. As a practical matter, however, a lessor's recovery of this sum may prove exceedingly difficult, regardless of which characterization is invoked. In those jurisdictions where the lessor is not required to relet the premises, the leasehold estate continues in existence and the lessee is liable for the rent due. Nevertheless,
because the lessee’s obligation to pay rent generally cannot be accelerated, the lessor is forced to sue for the rent on a periodic basis, as each installment falls due.\textsuperscript{5}

The lessor’s situation is just as disadvantageous where he is required or permitted to relet the abandoned premises without terminating the lessee’s future liability.\textsuperscript{6} In these circumstances, the nature of the lessee’s liability can be considered either as rent,\textsuperscript{7}


\textsuperscript{6} See, e.g., tenBraak v. Waffle Shops, Inc., 542 F.2d 919, 923-24 (4th Cir. 1976) (after tenant abandonment, landlord is permitted to either refuse or accept the surrender—sue for accrued rents or re-enter the premises); Grayson v. Mixon, 176 Ark. 1123, 1127-28, 5 S.W.2d 312, 314 (1928) (premature suit for rent); Roberts v. Watson, 172 Ind. App. 108, 117-18, 359 N.E.2d 615, 621 (1977) (right of action for whole amount of rent matures when all installments have matured); Lowenberg v. Ford & Assocs., Inc., 165 Ga. App. 753, 754, 302 S.E.2d 433, 435 (1983) (cannot sue for future rent). \textit{But see} Coast Fed. Sav. and Loan Ass'n v. DeLoach, 376 So. 2d 1190, 1191 (Fla. App. 1979) (lessor permitted to accelerate unpaid rentals); Thieneman v. Kahn, 433 So. 2d 761, 765-66 (La. 1983) (lessor entitled to future rental payments, even absent a rent acceleration clause).


presenting the aforementioned difficulty of periodic recovery for the lessor, or as damages.\textsuperscript{8} If the lessee's liability is viewed as damages, the relationship between the lessor and the original lessee is considered terminated, but the contract remains in existence for the sole purpose of determining the lessor's damages.\textsuperscript{9} Under this scenario, the lessor will be precluded from suing the defaulting tenant for damages until the end of the original lease term since the damages are not considered as ascertainable until that time.\textsuperscript{10} Such a delay is undesirable from the lessor's perspective because it forces him to take the risk that his defaulting lessee will become insolvent or unavailable.\textsuperscript{11}

Some courts have applied the contract doctrine of anticipatory breach to enable a lessor to recover losses attributable to a lessee's default in an expeditious fashion.\textsuperscript{12} This theory recognizes the lessee's abandonment as an unequivocal repudiation and breach of the executory lease contract, supporting an immediate action by the lessor for present and future damages.\textsuperscript{13} The measure of these damages is the present value of the difference between the rent reserved in the lease and the fair rental value of the premises for the remainder of the term.\textsuperscript{14}

Acceptance of a lessee's wrongful abandonment of a leasehold as a breach by anticipatory repudiation is consistent with the modern

\hspace{1em} \textit{SCHOSHINSKI, supra} note 4, \S 10:14 (deficiency occurring after abandonment may be considered rent).


\textsuperscript{9} See R. SCHOSHINSKI, supra note 4, \S 10:14.

\textsuperscript{10} See, e.g., Sommers v. Timely Toys, Inc., 209 F.2d 342, 343 (2d Cir. 1954) (lesser's claim for damages was "pre-mature," since term of lease had not expired); Hermitage Co. v. Levine, 248 N.Y. 333, 338, 162 N.E. 97, 98 (1928) (damages ascertainable when rental term ends).

\textsuperscript{11} Hicks, supra note 1, at 520.

\textsuperscript{12} See infra notes 34-39 and accompanying text.

\textsuperscript{13} Under the doctrine of anticipatory breach, when a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance arrives, the promisee has the option to treat the contract as ended so far as further performance is concerned and maintain an action at once for damages occasioned by the breach.

Hicks, supra note 1, at 515-16. \textit{See also} RESTATEMENT (SECOND) OF CONTRACTS §§ 250, 253(1) (1981); R. SCHOSHINSKI, supra note 4, \S 10:15 (wrongful abandonment by tenant constitutes repudiation giving rise to action for damages); infra notes 22-29 and accompanying text.

trend of applying contract principles to resolve landlord-tenant disputes. In applying the doctrine to assess a lessor's recoverable damages, courts usually determine the damages only for the period of time during which the rental value of the property can be predicted with reasonable certainty at the time of the trial. Unfortunately, when this period is less than the unexpired lease term, lessors typically are denied any recovery for the balance of the term since they are not afforded the opportunity to litigate their remaining damages at the end of the period of time for which the initial damages were awarded. This practice is particularly detrimental to commercial lessors who frequently enter into long-term leases.

Suppose a lessor enters into a twenty-year lease for office space with a tenant at the rate of $3000 per month. In the third year of the lease, the tenant abandons the premises. If the rental value has declined slightly during that period, say to $2500 per month, the lessor suing under the theory of anticipatory breach may be awarded the $500 monthly difference for a period of time with which the court is comfortable. For purposes of illustration, assume this is a seven-year period. If, subsequent to the court's determination of damages, the lessor is able to relet the premises for the balance of the lease term at $2500 per month, he will lose $6000 per year for the last ten years of the lease if the rental value remains at $2500. More likely is the possibility that the rental value for the premises will fluctuate significantly over the course of the remaining years of the original lease. If the rental value falls below $3000 at any time during the final ten years of the original lease period, the landlord will suffer a loss. This loss may be exacerbated if the lessor is unable to relet the premises for the same number of years as the original lease term. Thus, if our hypothetical lessor relets the premises for $2500 per month for a ten-year period following the original tenant's abandonment, the lessor is again vulnerable to declining rental values in year thirteen of the original lease. If the rental value for the premises has dropped below $2500 by this point, the lessor will lose more than $6000 per year for the remaining seven years of the term.

15. See Hicks, supra note 1, at 521-22; R. Schoshinski, supra note 4, § 10:15. Despite the theoretical and practical appeal of applying the doctrine of anticipatory breach to facilitate a lessor's immediate recovery upon his lessee's default, the doctrine has not gained universal acceptance in this context. See infra notes 30-33 and accompanying text.

As the hypothetical demonstrates, if the rental value of the abandoned premises declines subsequent to the period of time for which the court computes the damages, a lessor will be needlessly penalized by an assessment of damages for less than the unexpired lease term.\textsuperscript{17} This Article argues that such an arbitrary determination of a lessor's damages can be avoided if courts retain jurisdiction in this type of landlord-tenant dispute so that the lessor's damages can be reassessed at a later point in time when circumstances permit more certainty in calculation.

The argument for the use of retained jurisdiction in this landlord-tenant context is not merely academic. The United States currently is experiencing the most widespread glut of office space since World War II, resulting in tremendous rental savings for tenants.\textsuperscript{18} In this type of environment, landlords are especially vulnerable to tenant defaults and demands to renegotiate the rental rates. Notwithstanding the severity of the current glut, an overabundance of office space is not novel; the office space market traditionally is markedly cyclical.\textsuperscript{19} Landlords seeking compensation from abandoning tenants are handicapped by the lack of predictability in the onset, severity, and cessation of periodic gluts.\textsuperscript{20} The current glut, for example, was triggered in part in some cities when numerous tenants were devastated by unpredictable economic conditions such

\textsuperscript{17} On the other hand, if the value of the property rises dramatically subsequent to the original damage hearing, a defaulting lessee may be held responsible for an excessive amount of damages. As a policy matter, however, retained jurisdiction should not be used to benefit the original wrongdoer. Moreover, it is extremely impractical to expect the lessor to pay back to the defaulting lessee a portion of his damage award at a later point even if the initial award proves excessive.

\textsuperscript{18} Ross, \textit{Bargains Galore in Office Space}, \textit{Fortune}, Feb. 17, 1986, at 58. This glut is especially severe in Sunbelt localities. In downtown Houston, for example, the best buildings commanded rent of $25-$28 per square foot in 1981, as compared to $10-$15 in 1986. \textit{Id.} at 61. \textit{See also} Bayless, \textit{Office Glut Happen Here? Houston’s Tale Sheds Light}, \textit{Crain’s Chi. Bus.}, June 16, 1986, at 11 (discussing possibility that Chicago may experience the same degree of overexpansion as Houston).

\textsuperscript{19} Ross, \textit{supra} note 18, at 62-64 ("Typically the oversupply leads to a near cessation of activity, which eventually creates another shortage and a repetition of what went before."). The current glut has been exacerbated by financial and tax incentives which have pulled funds into the office market despite a decline in demand. \textit{Id.} at 64.

\textsuperscript{20} The story behind 1010 Lamar Street in Houston illustrates this uncertainty. When the building opened in 1979, it rented for $15 per square foot and the owners anticipated that the rent would jump to $20 by the middle of the next decade. Instead, they were forced to drop the rent to $11 "in an effort to compete with new buildings." \textit{Id.} The industry has been criticized for amateurish forecasting methods which use "current market conditions as a barometer for the future, rather than forecasting both demand and the likely response of the industry." \textit{Id.} (quoting John Dowling, executive vice president of Cushman & Wakefield).
as the decline of oil prices and the Latin American debt crisis.\textsuperscript{21} Many landlords currently face the reality of declining rental values, and many future lessors undoubtedly will confront this problem.

Part I of this Article examines the case precedent applying the doctrine of anticipatory breach to award to a lessor present and future damages attributable to a lessee's default. Scant authority exists for retained jurisdiction in this context. Part II illustrates the concept of retained jurisdiction in four other legal contexts—divorce settlements, probate matters, specific performance of long-term contracts, and worker's compensation. Part III demonstrates that the concept of retained jurisdiction, which functions admirably in these other contexts, would operate equally well in the landlord-tenant area, thus enabling lessors or their representatives to obtain their rightful compensation from defaulting lessees.

\section*{I. Judicial Acceptance of Anticipatory Breach as a Remedy for a Tenant's Default}

The doctrine of anticipatory breach has its roots in contract law.\textsuperscript{22} Section 250 of the Second Restatement of Contracts, which essentially adopts the general common law regarding anticipatory breach as crystallized in the First Restatement of Contracts,\textsuperscript{23} defines a repudiation as involving either: a) a statement by the promisor that he will commit a breach that would give the promisee a claim for damages for total breach; or b) a voluntary affirmative act which makes the promisor unable to perform without a breach.\textsuperscript{24} Section 253(1) of the Second Restatement provides that such a re-

\begin{footnotesize}
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\item Id. at 61.
\item Section 250 of the Second Restatement of Contracts provides, in pertinent part: When a Statement or an Act Is a Repudiation. A repudiation is (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach. . . . or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach. Restatement (Second) of Contracts § 250 (1981). Comment b to § 250 further provides that "to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." Id. But see 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies, 507 Pa. 166, 172-74, 489 A.2d 733, 736-37 (1985) (Second Restatement represents an "unacceptable dilution" of Penn-
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\end{footnotesize}
pudiation may give rise to a claim for damages for total breach even before the promisor actually has breached by non-performance.25 The doctrine of anticipatory breach thus assumes that the promisor has not yet defaulted in his performance under the contract at the time of his repudiation of the agreement.26

The First Restatement of Contracts specifically excepted two types of contracts from the operation of these general principles governing anticipatory breach: contracts "originally unilateral and not conditional on some future performance by the promisee," and contracts originally bilateral which have "become unilateral and similarly unconditional by full performance by one party."27 According to the First Restatement, therefore, a promisee cannot utilize the doctrine of anticipatory breach unless the contract in question is one which imposes future interdependent obligations on all parties to the agreement. Although the Second Restatement does not expressly prohibit the application of anticipatory breach to such unilateral contracts,28 ample authority supports this limitation on the doctrine's scope.29

sylvanian law; anticipatory breach requires "an absolute and unequivocal refusal to perform or a definite and positive statement of an inability" to perform).

25. Section 253(1) of the Second Restatement of Contracts states:
   Effect of a Repudiation as a Breach and on Other Party's Duties
   (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.

**Restatement (Second) of Contracts** § 253(1) (1981).


27. **Restatement of Contracts** § 318 (1932).

28. The Second Restatement of Contracts appears to limit its denial of anticipatory breach in unilateral contracts to situations involving the payment of money in unrelated installments. Section 243(3) provides:

   Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.


29. The application of anticipatory breach has been denied consistently in situations involving the breach of a unilateral contract, especially contracts for the payment of money in the future. *See* Smyth v. United States, 302 U.S. 329, 356 (1937); John Hancock Mutual Life Ins. Co. v. Cohen, 254 F.2d 417, 425 (9th Cir. 1958); Local 1574, Int'l Ass'n v. Gulf & W. Mfg. Co., 417 F. Supp. 191, 201 (D. Me. 1976); Wallace Clark & Co., Inc. v. Acheson Indus., Inc., 422 F. Supp. 20, 23 (S.D.N.Y.), aff'd, 532 F.2d 846 (2d Cir.), cert. denied, 425 U.S. 976 (1976); Bertolo v. Burke, 295 F. Supp. 1176, 1178 (Dist. V.I. 1969). *See also* 11 William on Contracts, § 1326, at 146 (3rd ed. 1968) (as a general rule, no unilateral obligation for the payment of money at a future time can be enforced until that date arrives). In a similar context, anticipatory breach has not been applied to bilateral contracts which have become unilateral by complete performance on one side. *See, e.g., Brown Paper Mills Co. v. Irvin,
Relying on the notion that a lease is properly classified either as a unilateral contract or as a bilateral contract which has become unilateral through the lessor's complete performance, some courts have refused to apply the doctrine of anticipatory breach in actions by lessors against defaulting lessees. These courts view a lease primarily as a transfer of an estate in land rather than as a contractual relationship and thus reason that the lessor has fully performed his part of the bargain upon the mere execution of the lease by conveying the premises to the tenant. Once this transfer has occurred, the agreement between the lessor and lessee is completely unilateral since the lessor no longer is obligated to perform any covenants which are interdependent with the tenant's duty to pay rent. According to this rationale, the lease contract is executory only on the part of the tenant, whose obligation to pay rent at specified times in the future cannot be accelerated by invoking the anticipatory breach doctrine.

146 F.2d 232, 236 (8th Cir. 1944); Phelps v. Herro, 215 Md. 223, 229, 137 A.2d 159, 163 (1957).

30. For example, in In re Edgewood Park Junior College Inc., 123 Conn. 74, 192 A. 561 (1937), the tenant's receiver had repudiated a lease six years prior to the end of its term. The landlord brought an action seeking the entire amount due under the lease. The receiver argued that the covenant to pay rent created no debt until the time for that payment arrived and, therefore, a right to recover under anticipatory breach should be denied. The court agreed with the receiver's position, approving the general rule that the doctrine of anticipatory breach should not be applied to unilateral contracts, and stating that the independent covenants in a lease are nothing more than unilateral obligations. Thus, the court reasoned that the repudiation of a lease by the tenant would not give rise to an immediate cause of action for future installments of rent. See also General Am. Tank Car Corp. v. Goree, 296 F. 32, 36 (4th Cir. 1924); Jordan v. Nickell, 253 S.W.2d 237, 239 (Ky. 1952); Cerruti v. Burdick, 130 Conn. 284, 33 A.2d 333 (1943); Cooper v. Casco Mercantile Trust Co., 134 Me. 372, 382-83, 186 A. 885, 890 (1936). See generally A. CORBIN, supra note 26, at 986; R. SCHOSHINSKI, supra note 4, § 10:15.

31. See In re Edgewood Park at 77-78, 192 A. at 562-63.

32. See Sagamore Corp. v. Willett, 120 Conn. 315, 319, 180 A. 464, 465 (1935). In Sagamore the defendant lessee entered into a lease for a one year period beginning October 1, 1934. The rent was due in advance on the first of each month. On February 1, 1935, the defendant moved out and subsequently notified the plaintiff that he would no longer comply with the lease terms or pay further rent. The court refused to apply the doctrine of anticipatory breach in this situation, relying on the unilateral nature of the lease agreement. Nevertheless, the court allowed the plaintiff to recover his damages in full on the ground that "when such a partial breach is accompanied or followed by a repudiation of the entire contract, the promisee may treat it as a total breach." Id. at 320, 180 A. at 465. Under this theory, the "[d]efendant's failure to pay the rent due on February 1st, considered alone, constituted a breach only of his agreement to pay that particular installment of rent" and "[h]is subsequent statement to the plaintiff that he would no longer comply with the terms of the lease and would pay no further rent was a repudiation of his entire contract." Id. at 320, 180 A. at 466. See also Hicks, supra note 1, at 523 (discussion of the distinction between anticipatory breach and partial breach coupled with renunciation).

33. See, e.g., tenBraak v. Waffle Shops, Inc., 542 F.2d 919, 923 n.2 (4th Cir. 1976) ("Vir-
More enlightened courts recognize that a lease should be regarded the same as any other contract for the purpose of applying the doctrine of anticipatory breach. In *Hawkinson v. Johnston*, a seminal case in which the Eighth Circuit applied the doctrine to compensate the lessor of a ninety-nine year lease for his lessees' default, the court articulated the underlying rationale for invoking the doctrine. The court observed that the "real sanctity of any contract rests only in the mutual willingness of the parties to perform" and that "any attempt to prolong or preserve the status quo between unwilling parties will usually be unsatisfactory and mechanical." Thus, the doctrine of anticipatory breach benefits society by providing parties to an agreement with an option for settling their rights and obligations expeditiously in the event one of the parties wrongfully repudiates the contract. Focusing on this rationale for ap-

ginia law clearly provides that the maximum recovery by a landlord upon abandonment by his tenant is limited to the amount of rent accrued either at the time he initiates his action or at the time of lessor's re-entry, if such has occurred."); *In re Edgewood Park Junior College Inc.*, 123 Conn. 74, 77, 192 A. 561, 563 (1937) (anticipatory breach not allowed for breach of lease); Jordon v. Nickell, 253 S.W.2d 237, 239 (Ky. 1952) (lessor entitled to recover rental payments only as they became due); Cooper v. Casco Mercantile Trust Co., 134 Me. 372, 382-83, 186 A. 885, 890 (1936) (no acceleration of rental payments permitted in leasehold situation); see also *Leon v. Barndall Zinc Co.*, 309 Mo. 276, 290, 274 S.W. 699, 703 (1925) (anticipatory repudiation "cannot be invoked with respect to contracts to pay money at specified times, where one of the parties has completely executed the contract, and it is executory only on the part of the other party."). Significantly, the parties to a lease may provide specifically in the lease for a lessor's recovery of future damages for losses attributable to a lessee's default even in those jurisdictions which refuse to apply the doctrine of anticipatory breach in this regard. See, e.g., *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919, 924-25 (4th Cir. 1976); Jordon v. Nickell, 253 S.W.2d 237, 239 (Ky. 1952).

34. 122 F.2d 724 (8th Cir.), cert. denied, 314 U.S. 694 (1941). *Hawkinson* was a diversity case and the court purported to apply Missouri law.

35. *Hawkinson*, 122 F.2d at 729.

36. *Id.*

37. *Id.* The court also observed that "[t]he commercial world has long since learned the desirability of fixing its liabilities and losses as quickly as possible, and the law similarly needs to remind itself, that, to be useful, it too must seek to be practical." *Id.* at 729-30. *See also* 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies, 489 A.2d 733, 737 (Pa. 1985) ("[T]he rationale behind the rule of anticipatory repudiation is the prevention of economic waste."); STC, Inc. v. City of Billings, 543 P.2d 374, 377-78 (Mont. 1975). *City of Billings* noted several rationales supporting anticipatory breach, including the uselessness and inequity of requiring the promisee to hold himself in readiness to perform his contractual obligation on the date performance is due where the promisor has already repudiated his reciprocal obligations under the contract; the present injury to the implied right of each of the contracting parties to refrain from impairing the ability or willingness of the other to perform when performance is due; [and] the duty of the promisee to mitigate damages by withholding expenditures in preparation for carrying out his contractual obligations where the promisor will not perform in any event.

*Id.*

It should be emphasized that the doctrine of anticipatory breach provides the lessor with
plying the doctrine to contracts generally, the Hawkins court saw no reason to distinguish lease contracts from other types of executory agreements. In holding that the doctrine of anticipatory breach would sustain an immediate suit by the lessor for both present and future damages, the court reasoned that the lease contract "was in part still executory on the part of plaintiff, since he was obligated by specific and continuing covenants to assure the quiet enjoyment of the premises during the term of the lease, and also, at all times to defend the title." Further, the court viewed these covenants on the part of the lessor as sufficiently "interdependent with the lessees' obligation to pay rent, since the payment of rent at any particular time necessarily . . . [is] conditional on their continued performance."

Modern courts frequently display a willingness to apply the doctrine of anticipatory breach to lease contracts upon a lessee's default, thus explicitly recognizing the contractual basis for liability inherent in a lease. Nevertheless, even in those jurisdictions

an optional means of relief. The lessor is not required to bring an immediate action for damages against the lessee should he desire instead to bring suit at the termination of the original lease term. In Hochster v. De Latour, 22 L.J.Q.B. 455, the decision by which the doctrine of anticipatory breach became a settled part of the English common law with respect to contracts generally, the court observed:

The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

Id. at 458 (emphasis added). See also Hurwitz v. Kohm, 594 S.W.2d 643, 645 (Mo. Ct. App. 1980) (anticipatory breach an optional remedy); R. Schoshinski, supra note 4, § 10:15.


Sometimes the circumstances surrounding the lessee's default determine whether a court will apply the doctrine of anticipatory breach to facilitate a lessor's recovery of future losses.
which have applied the doctrine to enable lessors to recover immediately present and future damages from their defaulting lessees, lessors typically still face major difficulties in proving their future damages. The measure of damages for anticipatory breach of a lease is the difference between the rent reserved in the lease and the fair rental value of the premises for the remainder of the term, reduced to present value.41 Lessors frequently are denied recovery because of their inability to prove, to a court’s satisfaction, the fair rental value of the leased premises for the balance of the term.42

A lessor who sues the defaulting lessee for anticipatory breach is entitled to possession of the abandoned premises, although he is under no obligation to relet the property.43 Thus, the course of action the lessor takes with respect to the abandoned property does not affect the recoverable damage award.44 Given the applicable damage formula, however, the lessor who refuses to relet the premises will be able to recover only the difference between the rent reserved in the original lease and the amount he could have received from a replacement tenant. The best means of determining the fair rental value of the abandoned property is to place it back on the

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For example, some jurisdictions draw a distinction between cases in which the lessee actually takes possession of the premises but subsequently abandons them, and those in which the lessee signs a lease whose term begins in the future and breaches prior to entry. Typically, even those courts which would deny recovery to a landlord in the former situation will sanction an immediate contracts cause of action for future damages in the latter situation on the theory that when a prospective tenant breaches a contract to lease, the landlord-tenant relationship never has been created, and contract law therefore governs. See, e.g., tenBraak v. Waffle Shops, Inc., 542 F.2d 919, 923 n.3 (4th Cir. 1876); Hicks, supra note 1, at 523-24.

Another default scenario which has received some attention is that presented when a lessee becomes bankrupt and the trustee in bankruptcy refuses to adopt the lease. See Hicks, supra note 1, at 524-27; Bennett, The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Interdependency of Convenants), 16 Tex. L. Rev. 47, 55-63 (1937). The current Bankruptcy Act provides that the lessor facing this situation can prove his future damages in an amount not exceeding the greater of one year’s rent, or 15% of the remaining lease term, not to exceed three years. 11 U.S.C. § 502(b)(7) (1982). This limitation was “designed to compensate the landlord for his loss while not permitting a claim so large (based on a long-term lease) as to prevent other general unsecured creditors from recovering a dividend from the estate.” 11 U.S.C. § 502 Historical and Revision Notes.


42. See infra notes 46-65 and accompanying text.

43. R. SCHOSHINSKI, supra note 4, § 10:15. Professor Schoshinski notes that the lease is considered terminated when a lessor sues his lessee for anticipatory breach. Therefore, such a lessor may either relet the premises for his own account or possess the premises himself.

44. Id.
rental market, and lessors who fail to take such action risk a denial of recovery on the ground that they have not presented sufficient evidence of the fair rental value of the property.\(^{45}\) On the other hand, where a lessor makes every reasonable effort to relet the premises but is unsuccessful in this endeavor, a court may find that the abandoned premises has no market value for purposes of determining the lessor's damages in the suit for anticipatory breach.\(^{46}\)

Even if a lessor attempts to relet the abandoned premises, he still faces a significant possibility that he will not be awarded all future damages attributable to his lessee's default, particularly if the original lease was for a lengthy period of time. In *Hawkinson v. Johnston*,\(^{47}\) the lessees breached a ninety-nine year lease for a vacant lot with a remaining term of sixty-seven years.\(^{48}\) The lessor sued for damages in the amount of the difference between the rental share under the lease, for a thirty-year period, and the reasonable rental value of his interest in the property for that period.\(^{49}\) Thus, the

\(^{45}\) See, e.g., Adkins v. Hobson & Son, Inc., 666 S.W.2d 951, 955 (Mo. App. 1984); Harden v. Drost, 156 Ga. App. 363, 364-65, 274 S.E.2d 748, 751 (1980) (no efforts by lessor to relet premises; future rents not recoverable due to lack of evidence regarding the property's fair rental value). The party suing for damages always has "the burden of proof of showing the amount of loss in a manner in which the jury can calculate the amount of the loss with a reasonable degree of certainty." *Harden* at 364-65, 274 S.E.2d at 751.

\(^{46}\) See Look v. Werlin, 590 S.W.2d 526, 528 (Tex. Civ. App. 1979). In *Werlin*, the leased premises had been specially prepared for use as a veterinary clinic by the lessee. Following the lessee's abandonment, the lessor was unable to relet the premises, despite all reasonable efforts to do so. The trial court found that "the premises were vacant at the time of trial, and that the property would likely remain unrented for the remainder of the lease term due to the nature of its renovation as a veterinary clinic." *Id.* at 527. On appeal, the lessee argued that the lessor had failed to prove the reasonable rental value of the property for the period following the lessee's abandonment. The appellate court disagreed and held that the evidence was sufficient to support the trial court's implied finding that the premises had no market value. *Id.* at 527. The court thus determined that the lessor was entitled to recover the full value of the future rental installments, discounted to present value as of the time of the trial. *Id.* at 528.

\(^{47}\) 122 F.2d 724 (8th Cir.), cert. denied, 314 U.S. 694 (1941).

\(^{48}\) The parties to the original lease were the plaintiff's devisee (the owner of the property) and the defendant and his brother, the lessees. When the owner died, the lessees purchased a one-third interest in the title from one of the devisees. The plaintiff in *Hawkinson* was the devisee of the other two-thirds interest. 122 F.2d at 726. According to the terms of the lease, the annual rent was payable quarterly and the lessees were also responsible for paying all taxes on the property for the duration of the lease. The plaintiff's two-thirds share of the rent for the unexpired term was $1,600 per year. *Id.*

\(^{49}\) The plaintiff alleged that

it was certain and determinable that "performance of the terms of said lease could and would have been possible for a period of not less than thirty years from and after June 30, 1940" [the date of the lessees' abandonment], and that during that period, except for the repudiation, plaintiff would have received his $1,600 share of the annual lease rental and the benefit of the payment of the taxes upon the property.
leessor elected to limit his future damages to a thirty-year period following the lessees' default, despite the fact that sixty-seven years actually remained on the lease at the time of the breach. The trial court, however, fixed the lessor's future damages for a period of only ten years and was affirmed by the Eighth Circuit.\textsuperscript{50}

The Eighth Circuit observed that there can never be "a fixed, uniform period for which damages should be allowed in every case of total breach of a long term lease . . . [instead,] the period for which damages can be reasonably forecast or soundly predicted in such a situation must depend upon the circumstances and evidence of the particular case."\textsuperscript{51} In \textit{Hawkinson}, the Eighth Circuit determined that the amount of damages fixed by the trial court was supported by competent evidence suggesting with "reasonable certainty or probability that the rental value of the property . . . [ten years following the breach] could be expected to remain fairly stable."\textsuperscript{52}

The approach taken by the \textit{Hawkinson} court in determining the lessor's damages can be criticized for its arbitrariness.\textsuperscript{53} Nevertheless, the case illustrates the traditional method of calculating a lessor's future damages upon a lessee's default. In an earlier decision, \textit{Leo v. Pearce Stores Co.},\textsuperscript{54} a federal district court in Michigan was faced with determining, in an equity receivership suit, a lessor's damages resulting from the lessee's breach of a twenty-year lease which occurred about two years after the commencement of the term.\textsuperscript{55} The lessor claimed he was entitled to recover from the receivership estate the present value of the difference between the stip-

\textit{Id.} at 727.

\textsuperscript{50} \textit{Id.} at 730-31. The plaintiff contended in his cross-appeal before the Eighth Circuit that the trial court "should have fixed the predictable damage period at not less than fifteen years" in light of the testimony of his expert witnesses. The Eighth Circuit rejected this argument, observing that "the trial court was not required to accept at face value the opinion of the expert witnesses as to future rental returns and tax valuations." \textit{Id.} at 731 ("It will . . . be argued . . . that any period of definite forecast or certain predictability attempted to be fixed . . . is arbitrary and excessive.").

\textsuperscript{51} \textit{Id.} at 731.

\textsuperscript{52} \textit{Id.} at 730.

\textsuperscript{53} \textit{Id.} at 731.

\textsuperscript{54} 57 F.2d 340 (E.D. Mich. 1932).

\textsuperscript{55} In a prior decision, the court had determined that the repudiation and abandonment of the lease by the lessee's receiver constituted an anticipatory breach of the lease. \textit{Leo v. Pearce Stores Co.}, 54 F.2d 92, 93 (E.D. Mich. 1931).

The twenty-year lease was entered into on May 21, 1929. In January, 1931, a receiver was appointed who continued the rental payments until April 1, 1931, at which time both the receiver and the lessee abandoned the leased premises. Thereafter, the rent was paid through April 1, 1932 by certain individuals who had previously guaranteed payment for a period of one year after default. \textit{Pearce Stores Co.}, 57 F.2d at 340.
ulated rent for the entire unexpired term and the fair rental value of the leased premises at the time of the breach.\textsuperscript{56} The only evidence in the record relating to the fair rental value of the property at the time of the breach was the estimate of a real estate dealer. The dealer claimed that, in his opinion, a twenty-five to thirty percent reduction in rental value from the rent stipulated in the original lease could be expected if a new lease for the remainder of the original term were to be negotiated at the time of the breach.\textsuperscript{57} The court, viewing this evidence as falling short of establishing the lessor's future damages "with the certainty required by law," observed:

Evidence of the fair rental value of a lease on premises for a period extending eighteen years into the future does not . . . indicate the fair rental value of such premises during such future period of eighteen years, if leased for periods of less than that duration, as it would manifestly be the duty of the lessor to do if reasonably possible, and as this record wholly fails to show is impossible or improbable.\textsuperscript{58}

Although the court ultimately concluded that, based on the equities of the parties, the lessor should be allowed $7500 "as representing an amount which will fairly compensate him for all of his damages reasonably to be anticipated as a result" of the lessee's breach,\textsuperscript{59} it apparently never considered the option of retaining jurisdiction over the matter so that it could compute the lessor's damages with greater precision at some point in the future.

A state court in Indiana relied upon the rationale used in Hawkins and Pearce Stores to deny the lessor of an eighty-nine year lease for a theatre building any recovery for future damages in

\textsuperscript{56} Id. at 340-41. Given the performance of the guaranty, the lessor conceded that it incurred no damages from the lessee's default prior to April 1, 1932. Id. at 340. Therefore, the future damages requested by the lessor were for the period from April 1, 1932 through August 31, 1949. Id.

\textsuperscript{57} Id. at 341. According to the court, the dealer's testimony, "considered in the light most favorable to the lessor," showed that:

[In the year 1931 rental values of property in the business district of Saginaw declined about 25 or 30 per cent as compared with such 'rental values' in 1929 . . . , that the witness would not say that during the first half of the year 1931 the premises here involved could be rented for the amount of the said agreed rental, and that in May, 1931 such witness 'estimated,' as his opinion, that 'the reduction in the rental value for a lease to be negotiated for the remainder of this term, which would be a lease for eighteen years, would be 'from about 25 to 30 per cent less,' presumably than such agreed rental.

Id.

\textsuperscript{58} Id. The court evaluated the proffered evidence in light of the then current abnormally low property values, of which it took judicial notice. Id.

\textsuperscript{59} Id. at 342.
Rauch v. Circle Theatre. In that case, the lessee assigned its interest in the lease, entered into voluntary dissolution proceedings, and liquidated its assets a little over forty years after the commencement of the lease term. Alleging that the lease had been breached, the lessors filed a complaint seeking damages for the breach, the appointment of a receiver to collect the lessee’s assets to the extent of the present value of all monies due under the lease, and an order that the receiver hold that sum in escrow for the entire term of the lease. Although the court held that the lessee had repudiated the lease by liquidating its corporate assets and distributing them to the shareholders, it refused to sanction the appointment of a receiver on the ground that “as a practical matter such a remedy would be grossly inequitable for all parties concerned, particularly when considering the extended period of time for which the lease is to continue.” In so holding, the court emphasized that the lessors had not yet suffered any damages attributable to the lessee’s breach because the assignee currently was performing all of the lease covenants, including the payment of rent. Therefore, having failed to prove any injury resulting from the breach, the lessors were denied recovery for any damages.

The Rauch decision is unsound in failing to afford the lessors any means of protection in the event the lessee’s assignee becomes bankrupt or otherwise unable to make the rental payments. At the time of the decision, the original lease was not due to expire for another thirty-seven years, during which time the assignee’s financial circumstances easily could change. Similarly, if the value of the

61. Id. at 133, 138, 374 N.E.2d at 549, 552. The lessor also demanded attorney’s fees and an injunction restraining the Secretary of State from issuing a Certificate of Dissolution for the lessee.
62. Id. at 137, 374 N.E.2d at 552.
63. Id. at 138, 374 N.E.2d at 552.
64. In this regard, the court observed:
   There seems to be no evidence of a bad faith assignment in this case. The trial court found Assignee to be a solvent corporation with assets of equal or greater value than that of Lessee and with a superior ability to manage and operate the leased premises. Further, we have found no evidence to show that the assignment and dissolution were merely an attempt to hide or shield Lessee’s assets from an anticipated default in the covenants of the lease.
65. Id. at 139, 374 N.E.2d at 553.
66. Id. at 140, 374 N.E.2d at 553. See also Henson v. B & W Fin. Co., 401 S.W.2d 261, 264-65 (Tex. 1966) (damages too speculative to allow a present determination of liability).
67. The lease was executed in 1926 and was to be in effect until the year 2015. Rauch, 176 Ind. App. at 132, 374 N.E.2d at 549. It should be noted that the lessor of a bankrupt lessee can recover some of his future damages under the current Bankruptcy Act. See supra note 39.
abandoned premises at issue in *Hawkinson* and *Pearce Stores* fell subsequent to the time when those decisions were rendered, the respective lessors certainly would have incurred future damages. Although courts grappling with determining damages in cases involving leases scheduled to run for many years cannot necessarily calculate future damages in accordance with the entire lease term due to the inherent speculation involved, some means of preserving the lessor's rights against the defaulting lessee is desirable and ought to be available.

A more equitable solution to determining a lessor's future damages upon his lessee's default was suggested by the Supreme Court of South Carolina in *United States Rubber Co. v. White Tire Co.* In that case, a lessor and lessee entered into a ten-year lease for a lot, with buildings to be constructed thereon by the lessor, at a rental of $7000 a year. The lease provided that upon execution, the lessee was to deposit $7000 "to be held by the Lessor as security for the faithful performance" of all the terms and conditions of the lease. In the event the lessee fully complied with the terms of the lease, the money was to be applied by the lessor as the rent for the tenth year. The lessee was placed in receivership about two years after it had entered into possession of the premises, and its sub-lessee thereupon occupied the premises for the remainder of the original lease term in accordance with a written agreement executed by the sub-lessee and the lessor. Under the terms of that agreement, the sub-lessee was not required to make an additional $7000 deposit but was entitled to have the $7000 deposited by the original lessee applied toward the rent for the tenth year if the sub-lessee performed according to the lease and if neither the lessee nor its receiver claimed any interest in the money.

In response to the receiver's petition for instructions as to his rights with respect to the $7000, the lower court held that since the lessor's damages resulting from the lessee's breach could not be determined currently, the receiver was not entitled to a return of the

67. See *supra* notes 47-52 and accompanying text.
68. See *supra* notes 54-59 and accompanying text.
70. 231 S.C. 84, 97 S.E.2d 403 (1956).
71. *Id.* at 87, 97 S.E.2d at 405.
72. *Id.* at 89, 97 S.E.2d at 405.
73. *Id.* at 91, 97 S.E.2d at 407. The agreement between the lessor and sub-lessee provided that the arrangement regarding the $7000 was for the purpose of protecting "the Lessor against any loss of rental during the term of this lease," and that if the lessor did not sustain any loss the sub-lessee "may be benefited by the said $7000 . . . ." *Id.* at 92, 97 S.E.2d at 407.
deposit at the present time. If, however, the lessor did not sustain any losses prior to the expiration date of the original lease, the receiver would have a valid claim for the money against the lessor and her property.\textsuperscript{74} Moreover, the court ordered that the cause remain open so that the parties could clarify any additional issues that might arise with regard to the money.\textsuperscript{75} In affirming this decision, the state supreme court supported the lower court’s order that the cause remain open since the lessor’s future damages which would be chargeable against the deposit could not be determined until the expiration date of the original lease term.\textsuperscript{76}

At the time the South Carolina Supreme Court rendered the \textit{White Tire} decision, the original lease still had about six more years to run.\textsuperscript{77} Although the lessor could not prove any future damages at the time of the trial,\textsuperscript{78} the court considered the possibility that she might, in fact, ultimately sustain a loss resulting from the lessee’s breach. Rather than deny her any recovery or allow the receiver to set aside an “equitable” but possibly insufficient amount, the court authorized a mechanism by which the lessor would be protected as fully as possible in the event she suffered a loss attributable to her lessee’s default.

Allowing the cause to remain open until the expiration date of the original lease is the most equitable solution from the standpoint of the lessor. This approach should be followed by other courts confronted with the problem of calculating a lessor’s future damages upon a lessee’s default in the context of a long-term lease.\textsuperscript{79} Unfortunately, the \textit{White Tire} solution does not appear to have been adopted by any other courts dealing with this situation.\textsuperscript{80} It is somewhat surprising that the concept of retained jurisdiction has not found a larger following among courts adjudicating claims by

\textsuperscript{74} Id. at 94-95, 97 S.E.2d at 409. The lower court also found that the lessor’s payment of $500 to her attorney was chargeable against the $7000 deposit, but this finding was reversed by the state supreme court. \textit{Id.} at 94-96, 97 S.E.2d at 408-09.

\textsuperscript{75} Id. at 96, 97 S.E.2d at 409.

\textsuperscript{76} Id.

\textsuperscript{77} The lease was due to expire on April 6, 1962, and the court’s opinion was dated December 31, 1956. \textit{Id.} at 90, 97 S.E.2d at 405-06.

\textsuperscript{78} Id. at 95, 97 S.E.2d at 409.

\textsuperscript{79} Another alternative would be to award the lessor damages for the entire period based on the rental value of the property at the time of the trial. Of course, a present value discount should be employed to avoid a windfall for the landlord. Although this approach is advantageous in that it expeditiously resolves the damage issue, it does not afford as accurate a measure of damages as would be obtained if the court were to retain jurisdiction and reassess the remaining damages when circumstances permit more certainty in calculation.

\textsuperscript{80} No other reported decisions have been located which utilize the retained jurisdiction approach authorized by the court in \textit{White Tire}. 
lessors for future damages, as many other areas of the law employ this mechanism to settle disputes in an equitable manner. The following section examines four areas in which retained jurisdiction plays a critical role.

II. THE RETAINED JURISDICTION CONCEPT IN OPERATION

A. Divorce Settlements

Divorce settlements frequently require modification due to the changing economic circumstances of individual family members. Courts faced with the responsibility of implementing viable divorce settlements are especially interested in the continuing efficacy of child support provisions. The adequacy of spousal maintenance typically is a strong secondary concern. Therefore, courts issuing divorce decrees which incorporate awards for child support or spousal maintenance frequently retain jurisdiction over either a portion of the decree or the entire cause of action.\(^81\) Although courts adjudicating divorce cases generally rely on state statutes as their source of authority for retaining jurisdiction,\(^82\) some courts invoke judicial precedent to achieve the same result.\(^83\) Retained jurisdiction is an important concept in divorce proceedings because it is the

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82. See infra notes 87, 99 and accompanying text.


In McGhee v. McGhee, 82 Idaho 367, 353 P.2d 760 (1960), the state supreme court affirmed the lower court’s decree annulling the parties’ marriage and awarding the wife damages payable on a monthly basis. In rejecting the husband’s contention that the periodic payment schedule rendered the judgment for damages a nullity, the court observed:

Equity jurisdiction of the district court is not confined to statutory provision for its delineation, and is not subject to diminution by legislative cuts. . . . Where a court of equity has obtained jurisdiction of subject matter of dispute it will retain jurisdiction for settlement of the entire controversy between the parties with respect thereto and will grant all proper relief consistent with the case and embraced within the issues.

Id. at 374, 353 P.2d at 764. See also Zechiel v. Zechiel, 198 Cal. App. 2d 621, 626, 18 Cal.
mechanism by which courts can correct any problems resulting from a poor property settlement, custody determination, or spousal maintenance payment schedule. In addition, by reserving jurisdiction courts can prevent future inequities in economic distributions due to unanticipated social situations such as death, illness, or remarriage. The following discussion provides a closer look at the function and implementation of retained jurisdiction in the context of the three areas in which the concept is utilized most frequently in divorce proceedings—child custody and support, spousal maintenance, and property settlements.84


The welfare of minor children involved in a divorce proceeding is the judiciary’s most important concern regarding divorce settlements.85 The duty of parents to support their children is not terminated by a divorce decree, and courts generally make every effort to ensure that the rights of children of divorced parents are protected from possible abuse.86 Retained jurisdiction is the vehicle through which courts effectuate this goal. Courts typically derive their authority for retaining jurisdiction over child custody and support matters from state statutes.87 In addition, however, the parties to a

Rptr. 111, 115 (1961) ("Since divorce proceedings are equitable, equity retains jurisdiction to secure full compliance with its decrees.").

84. Courts issuing divorce decrees can also retain jurisdiction with respect to other matters pertinent to the litigation. See, e.g., Hubbard v. Hubbard, 233 So. 2d 150 (Fla. Dist. Ct. App. 1970) (retained jurisdiction to award attorney’s fees; award reversed on appeal); Hunter v. Hunter, 221 So. 2d 189 (Fla. Dist. Ct. App. 1969) (retained jurisdiction with respect to attorney’s fees, costs, and a property settlement in addition to alimony and child support).

85. See, e.g., Anderson v. Anderson, 124 Colo. 74, 77, 234 P.2d 903, 905 (1951) ("[I]n cases of this nature the principal issue before the court is the welfare of the child, and to that welfare the rights and personal desires of the parents are subservient.").

86. See, e.g., Hutschenreuter v. Hutschenreuter, 23 Wis. 2d 318, 322, 127 N.W.2d 47, 49 (1964) ("It is fundamental that a divorce terminates only the relationship of husband and wife, and does not affect in any manner the parental relations or duties of the parties."). The obligation of parents to support their children typically is mandated by statute. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.2 (1968). See, e.g., MD. FAM. LAW CODE ANN. § 5-203 (b) (1984) ("The parents of a minor child . . . are jointly and severally responsible for the child’s support, care, nurture, welfare, and education."); ILL. ANN. STAT. ch. 68, para. 24 (Smith-Hurd 1959) (parent who fails, without lawful excuse, to support child in need of support is guilty of a misdemeanor; punishable by fine, imprisonment, or both).

87. See, e.g., CAL. CIV. CODE § 4811(a) (West 1983) (grants court discretion to modify provisions of order regarding child support); CAL. CIV. CODE § 5152 (West 1983) (allowing modification of custody decree in the child’s interest); FLA. STAT. ANN. § 61.14 (West 1985) (jurisdiction to modify a support order); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd 1980) (child support may be modified “upon a showing of a substantial change in circumstances”); ILL. ANN. STAT. ch. 40, para. 610 (Smith-Hurd 1980) (allowing modification of
divorce may provide expressly for the court's continuing jurisdiction in the divorce decree. In light of the premium courts place on safeguarding the best interests of children involved in divorce proceedings, the power of courts to retain jurisdiction over child custody and support matters appears unequivocal. As one court has observed, "[a] divorce decree dealing with the custody and support of minor children never forecloses the right of the court to inquire into changed circumstances that would warrant a revision of such decree or the jurisdiction and power of a chancery court to enforce the provisions of its decree." This approach is in contrast to the more restrictive attitude regarding retained jurisdiction taken by some courts confronted with other types of modifications of a divorce decree such as those involving spousal maintenance or property settlements.


Courts and legislatures manifest differing attitudes with respect to the concept of spousal maintenance. Although spousal maintenance, or alimony, traditionally was regarded as a fixed obligation of the financially independent ex-spouse, a more recent trend seeks to foster financial independence for both spouses by utilizing

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89. Kosch v. Kosch, 106 So. 2d 600, 603 (Fla. Dist. Ct. App. 1958), rev'd on other grounds, 113 So. 2d 547 (Fla. 1959). See also Roberson v. Roberson, 370 So. 2d 1008, 1010 (Ala. Civ. App. 1979) ("The question of custody is never res judicata . . . because the prevailing consideration in child custody matters is the best interest of the child."). (citation omitted). The judiciary's power to retain jurisdiction over child custody and support matters has been invoked by some courts pursuant to statutory authority allowing amendment of custody provisions even where the original divorce decree did not contain a custody order. See, e.g., Cox v. Cox, 457 F.2d 1190, 1195-96 (3d Cir. 1972) (allowing retained jurisdiction; noting split of authority). In addition, courts have modified divorce decrees so as to provide for support of children of the divorcing parties born after the entry of the decree. See, e.g., Perez v. Perez, 75 N.M. 656, 659, 409 P.2d 804, 807 (1966); Hutschenreuter v. Hutschenreuter, 23 Wis. 2d 318, 322, 127 N.W.2d 47, 49 (1964); Thompson v. Thompson, 347 P.2d 799 (Okla. 1959).

90. See infra notes 98-115, 123-26 and accompanying text. See also H. CLARK, supra note 86, § 15.3 (noting that where wife agrees to release husband from further child support, husband would nevertheless have to provide it if child should later need it).

91. See H. CLARK, supra note 86, § 14.1 (noting that traditionally, the support obligation was imposed only upon the husband). In 1979, the Supreme Court ruled that state statutes permitting only wives to receive alimony were constitutionally invalid. Orr v. Orr,
rehabilitative maintenance. A frequently articulated argument justifying the award of permanent spousal maintenance is that the financially independent ex-spouse has both a moral and a social obligation to support his former partner so that the state will not have to assume this responsibility through welfare. This rationale for spousal maintenance tends to equate financially dependent ex-spouses with minor children in that both groups require outside intervention to safeguard their well-being. On the other hand, it can be argued that even a financially dependent ex-spouse does not require as much protection from the courts and legislatures as a minor child and that an equal degree of protection for both children and adults is, in fact, inappropriate. Competent adults, regardless of their background or prior training, are generally capable of looking after their best interests and should be encouraged to become financially self-sufficient. Moreover, although parents have an indubitable legal duty to support their children, no such duty arguably should exist toward ex-spouses. The approach which a court or legislature takes with respect to reserving jurisdiction where awards of spousal maintenance are involved may very well be influenced by its view of the degree of protection appropriate for financially dependent ex-spouses.

440 U.S. 268 (1979). It should be noted, however, that only a minority of divorce cases involve alimony awards. See L. Weitzman, The Marriage Contract 44-45 (1981).

92. See infra notes 116-23 and accompanying text.

93. See Killian v. Lawson, 387 So. 2d 960, 962 (Fla. 1980) ("[T]he purpose of alimony is to prevent a dependent party from becoming a public charge or an object of charity."); Note, Specific Performance of Separation Agreements: Is the Remedy Enforceable?, 58 N.C.L. Rev. 867, 874-75 (1980) (In discussing the exclusion of alimony payments from the Constitutional provision prohibiting imprisonment for nonpayment of debts, author notes that alimony is a duty owed to the public as well as to the wife and that courts "are well aware that effectively enforcing this duty of husbands lessens the support burden on society.").

94. See H. Clark, supra note 86, § 15.1 (noting that the child support obligation is of greater social importance than alimony; "[t]he duty to support the children of the marriage is not subject to the limitations (such as the wife's fault) which apply to alimony.").

95. See supra note 86 and accompanying text.

96. Traditionally, the English ecclesiastical courts granted only divorces a mensa et thoro (from bed and board), which authorized the husband and wife to live separately but prohibited the parties from remarrying. L. Weitzman, supra note 91, at 43-44. The notion of alimony was born in this context to insure the husband's support obligations toward his wife, but subsequently was utilized as a means of support when full divorce with the right to remarry became available. See H. Clark, supra note 86, § 14.1. The logic of this extended application of the alimony concept has been questioned. See id.

97. The extent to which courts and legislatures deem financially dependent ex-spouses to be in need of protection impacts on areas other than retained jurisdiction where spousal maintenance awards are at issue. For example, the Supreme Court of Florida has held that a divorced man who pays alimony is entitled to a statutory exemption from garnishment of his wages because he should be considered "the head of a household." Killian v. Lawson, 387
In general, if a divorce decree incorporates an award for spousal maintenance, the court retains jurisdiction to modify the award at any time upon a finding of changed circumstances.\(^{98}\) In most jurisdictions, statutes provide courts with this authority.\(^{99}\) Some courts in jurisdictions lacking such express statutory authorization also

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So. 2d 960, 962 (Fla. 1980). The court based its decision on the ground that the exemption statute serves the same purpose as alimony and “should be liberally construed in favor of a debtor so that he and his family will not become public charges.” *Id.*

In addition, conflicting authority exists as to whether spendthrift and support trusts should be subject to the claims of an ex-spouse for alimony. *Compare* Pemberton v. Pemberton, 9 Mass. App. Ct. 9, 411 N.E.2d 1305, 1311-13 (1980) (discussing Massachusetts case law which rejects ex-wife’s claim to invade spendthrift trust for support) *and* Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161 (1936) (spendthrift trust not subject to alimony and child support claims of beneficiary’s ex-wife); *with* Bacardi v. White, 463 So. 2d 218 (Fla. 1985) (disbursements from spendthrift trusts subject to alimony claims where no other remedies to enforce alimony exist) *and* Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 359 (1969) (income from spendthrift trust subject to execution for alimony and child support claims) *and* England v. England, 223 Ill. App. 549, 555 (1922) (alimony is social obligation; ex-wife of beneficiary of spendthrift trust could reach trust income to satisfy alimony claim). To a lesser extent, case law is split as to whether such trusts should be subject to child support claims. *Compare* Erickson, 197 Minn. 71, 266 N.W. 161 *with* Keller v. Keller, 284 Ill. App. 198, 11 N.E.2d 773 (1936) (income from spendthrift trust subject to support claims of beneficiary’s minor children). *See generally* G. BOGERT, *LAW OF TRUSTS* § 40 (5th ed. 1973) (noting that the argument for subjecting spendthrift and support trusts to alimony claims is weaker than the case for subjecting them to child support claims). The legislatures of some states have resolved this matter. *See, e.g.,* MO. ANN. STAT. § 456.080(1) (Vernon 1956 & Supp. 1986) (income of spendthrift trusts subject to claims of wife and children); PA. STAT. ANN. tit. 20 § 6112 (Purdon 1975) (income of spendthrift trusts “liable for the support of anyone whom the income beneficiary shall be under a legal duty to support”); WIS. STAT. ANN. § 701.06(4) (West 1981) (spendthrift trusts subject to claims of child support). In addition, the Restatement of Trusts has taken the position that spendthrift and support trusts may be reached “by the wife or child of the beneficiary for support, or by the wife for alimony.” *Restatement (Second)* of Trusts § 157(a) (1959).


99. *See, e.g.,* ALASKA STAT. § 25.24.160 (1983) (detailing powers of courts to rule “in an action for divorce or action declaring a marriage void or at any time after judgment” regarding property divisions and support orders); CAL. CIV. CODE § 4811(b) (“[P]rovisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order . . . except to the extent that any written agreement, or . . . any oral agreement entered into in open court between the parties, specifically provides to the contrary.”); DEL. CODE ANN. tit. 13, § 1519(a)(4) (1981) (modification of alimony award permissible “only upon a showing of real and substantial change of circumstances”); FLA. STAT. ANN. § 61.14 (West 1985) (allows modification of maintenance or alimony “with due regard to the changed circumstances or the financial ability of the parties”); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd 1980 & Supp. 1986) (provisions of any judgment respecting maintenance may be modified “upon a showing of a substantial change in circumstances.”).

Where such a statute authorizing modification of alimony exists, it is unnecessary for the court to expressly reserve jurisdiction in its decree. Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413, 426 (1976) (reserved jurisdiction to modify sustenance award implied in the decree); Kosch v. Kosch, 113 So. 2d 547, 550 (Fla. 1959) (reservation on the part of the court “is not essential to the exercise of subsequent jurisdiction to modify.”).
have concluded that they have the authority to modify maintenance awards. In *Hager v. Hager*,\(^{100}\) for example, the court discussed at length the case law establishing the proposition that "an award of periodic alimony based on the husband's future earning capacity is modifiable whether or not the court reserves control in its decree."\(^{101}\) Other courts take a more restrictive position regarding modification by holding that no judicial authority exists to modify the alimony provisions of a divorce decree in the absence of a governing statute or an express reservation of such power.\(^{102}\) Where

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100. 293 Ala. 47, 299 So. 2d 743 (1974).

101. *Id.* at 54, 299 So. 2d at 749. The judiciary's authority to modify periodic alimony awards in Alabama, though no power of modification was reserved in the original decree, was established by the supreme court of that state in *Epps v. Epps*, 218 Ala. 667, 120 So. 150 (1929). *See also* Rayfield v. Rayfield, 242 N.C. 691, 694, 89 S.E.2d 399, 401 (1955) ("alimony provisions are subject to such modification by the court from time to time as changed circumstances of the parties may reasonably require"); Winkel v. Winkel, 178 Md. 489, 500-01, 15 A.2d 914, 919 (1940) (jurisdiction is continuing whether or not reserved).

The *Hager* court also emphasized the distinction between periodic alimony and alimony in gross, the latter being "based on the value of the wife's inchoate rights in her husband's estate" at the time of the divorce. *Hager*, 293 Ala. at 54, 299 So. 2d at 749. An award of alimony in gross is intended to be a final judgment for the payment of money, and therefore, is not modifiable if the court fails to reserve control in its decree. *See also* McEntire v. McEntire, 345 So. 2d 316, 319-20 (Ala. Civ. App. 1977) (alimony in gross or property settlement not modifiable given either characterization).

102. *See, e.g.*, Northrup v. Northrup, 43 N.Y.2d 566, 570, 373 N.E.2d 1221, 1223, 402 N.Y.S.2d 997, 999 (1978) ("The power to modify a provision for alimony is only such as is conferred by statute."); Ethridge v. Ethridge, 212 Ga. 597, 94 S.E.2d 377 (1956) (prior to enactment of statute authorizing modification of alimony judgments, lower court lacked jurisdiction to modify alimony award in original decree not reserving such jurisdiction); Eaton v. Davis, 176 Va. 330, 335, 10 S.E.2d 893, 896 (1940) (prior to enactment of statute permitting modification, final decree for alimony could not be reopened unless decree expressly reserved jurisdiction); Mayer v. Mayer, 154 Mich. 386, 390, 117 N.W. 890, 892 (1908) ("In most of the states the power to amend the decree as to alimony is reserved to the court by statute, but in the absence of such reservation or authority, or of a reservation in the decree itself, we think the determination should be treated as final."). The general basis of decisions denying courts the power to modify is the concept that an absolute divorce decree is in legal contemplation a final adjudication, not only as to the dissolution of the marriage, but also as to the extent of the right to alimony. Livingston v. Livingston, 173 N.Y. 377, 66 N.E. 123 (1903) (divorce decree is final judgment that creates and vests substantial property rights).

Another issue regarding modification of alimony which sometimes arises is whether a court can modify an alimony award which stems from an agreement between the divorcing parties rather than the court's own determination. In *Popovic v. Popovic*, 45 Ohio App. 2d 57, 341 N.E.2d 341 (1975), the court held that the lower court did not have the authority to modify the alimony provisions of a divorce decree where the ex-spouses had entered into an agreement providing for alimony for an indefinite period of time and such agreement was incorporated by the trial court into the journal entry but the court did not retain jurisdiction with respect to modification. The court observed that this prohibition of modification of alimony was warranted by the "finality of judgments" principle, which exists to provide stability and encourage reliance on the judiciary's rulings. In the context of divorce judgments, where the parties entered into an agreement which is "submitted to the court, approved, and incorporated into a divorce decree, justice requires that the agreement be binding upon both
the original divorce decree fails to provide for any maintenance, jurisdictions are divided as to whether they have authority to retain jurisdiction for purposes of issuing a maintenance award subsequent to the decree.\textsuperscript{103} In some states statutes exist which authorize courts to award maintenance in these circumstances.\textsuperscript{104} The effect of such statutes is to incorporate automatically into every final judgment for divorce a provision for retained jurisdiction with respect to maintenance.\textsuperscript{105} Moreover, courts in some states which have adopted the Uniform Marriage and Divorce Act have held it proper to reserve jurisdiction over future maintenance when a spouse may not be able to support herself on a permanent basis due to an existing injury, even though no maintenance was needed at the time of the dissolution proceeding.\textsuperscript{106}

In contrast, many courts hold that the right to future maintenance is waived unless the divorce decree itself contains a maintenance award or a provision reserving jurisdiction, or both. In \textit{DuVernoy v. DuVernoy},\textsuperscript{107} for example, a Florida appellate court affirmed the trial court’s dismissal of the wife’s petition to modify the divorce decree so as to award her periodic alimony retroactive to the date of the divorce decree.\textsuperscript{108} The original divorce decree did

\begin{footnotes}
\item[103] See generally H. CLARK, supra note 86, § 14.4.
\item[104] See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1986) (“Upon divorce or upon a complaint in an action brought at any time after a divorce, . . . [a court] may make a judgment for either of the parties to pay alimony to the other.”); N.Y. DOM. REL. Part A § 236 (McKinney 1977 & Supp. 1986) (“the court may direct either spouse to provide suitably for the support of the other as, in the court’s discretion, justice requires . . . . Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment . . . .”) (emphasis supplied).
\item[105] See Boyce v. Boyce, 58 A.D.2d 776, 396 N.Y.S.2d 390, 391 (1977) (“The Court, once having personal jurisdiction over the parties in the original divorce action culminating in a judgment, retained jurisdiction even after the final judgment for purposes of modification of that judgment.”) (citing N.Y. DOM. REL. § 236).
\item[106] See, e.g., James v. James, 618 S.W.2d 187 (Ky. Ct. App. 1981) (reserving the question of future maintenance and medical expenses); Davis v. Davis, 35 Colo. App. 447, 452, 534 P.2d 809, 812-13 (1975) (where a court “determines that a spouse may not be able to support herself on a permanent basis due to the effects of an existing injury, reservation of the issue of maintenance for subsequent determination or award of nominal maintenance subject to subsequent review is permissible . . . .”) (emphasis supplied).
\item[107] 202 So. 2d 620 (Fla. Dist. Ct. App. 1967).
\item[108] Id. at 621. The wife also sought medical expenses, attorney’s fees, and court costs.
\end{footnotes}
not incorporate either a provision for alimony or for retained jurisdiction over the cause under which the court could award alimony to the wife in the future. The wife sought a modification of the final divorce decree on the ground that her poor health necessitated the expenditure of all of the funds she received under the property settlement, and that she therefore was "in dire need of financial assistance" from her ex-spouse, whom, she alleged, could afford to pay her the requested sums. In denying the wife's petition, the court asserted that the relevant statute and case law would permit such a modification "only in those cases in which the final decree of divorce either awards the wife periodic alimony, or in which jurisdiction is reserved by the court to consider a petition by the wife for the award of alimony at some future time upon proof of changed circumstances and financial ability of the husband to meet such needs." In another case, Ford v. Ford, an Arkansas Chancery Court denied the wife alimony but retained jurisdiction with respect to her possible future needs. The Arkansas Supreme Court held that the Chancellor erred in failing to award her alimony in light of its determination that the relevant state statute should be interpreted "as requiring that the Decree of Divorce allow or disallow alimony and not retain jurisdiction for the purpose of allowing it or disallowing it in the future based on changed conditions." In reversing the lower court, the state supreme court awarded the wife fifty dollars a month in alimony subject to "modification based on changed circumstances." Thus, the wife's interests were protected without a departure from the perceived statutory require-

109. Id.
110. Fla. Stat. § 65.15 (1963) (modified by § 61.14) authorized modification of any agreement or decree of separate maintenance or alimony on the grounds of changed circumstances of the husband.
111. DuVernoy, at 621. Other jurisdictions also hold that alimony cannot be allowed in a subsequent proceeding where the original divorce decree does not provide for it and the court did not reserve jurisdiction. See Taylor v. Taylor, 241 S.C. 462, 128 S.E.2d 910 (1962); Perry v. Perry, 202 Va. 849, 120 S.E.2d 385 (1961); Spain v. Spain, 177 Iowa 249, 254-61, 158 N.W. 529, 531-33 (1916). See also Winkel v. Winkel, 178 Md. 489, 502-03, 15 A.2d 914, 923 (1940) (rule that court retains jurisdiction to make a subsequent alimony award where none was provided for in decree does not apply where the marriage relation is terminated by an absolute divorce).
113. Id. at 509, 616 S.W.2d at 4.
114. Id. at 517, 616 S.W.2d at 9. The statute pertaining to alimony involved in the Ford decision provides: "When a decree shall be entered, the court shall make such order touching the alimony of the wife or the husband and care of the children, if there be any, as from the nature of the case shall be reasonable." Ark. Stat. Ann. § 34-1211 (Supp. 1985).
115. Ford, 272 Ark. at 517, 616 S.W.2d at 9.
ment that the divorce decree contain a maintenance award if the court wishes to exercise retained jurisdiction.

The awarding of rehabilitative maintenance lends itself to one of the most creative uses of the judiciary's authority to retain jurisdiction in divorce proceedings. The policy underlying the concept of rehabilitative, or time limited, maintenance is "that such awards may provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self sufficiency." Illinois recently adopted rehabilitative maintenance and the decisions of courts in that state illustrate how the judiciary can use retained jurisdiction in this context to provide both spouses with the most equitable settlement possible. For example, in *In re Marriage of Asch*, one of the seminal cases in this area, the appellate court affirmed the trial court's decision to award the divorced wife maintenance for three years and to retain jurisdiction to review the award at the expiration of this period so that it could determine whether she "had made appropriate and reasonable efforts to procure suitable employment and maintain herself financially." The appellate court commended the trial court for adding "an element of flexibility to its order" by choosing "a practical alternative designed to avoid the speculation often inherent in future maintenance awards."

Under *Asch*, the spouse seeking maintenance essentially bears the burden of demonstrating that she attempted to find employ-

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116. *In re Marriage of Hellwig*, 100 Ill. App. 3d 452, 464, 426 N.E.2d 1087, 1096 (1981). The court in *Hellwig* noted, however, the following caveat with respect to the use of rehabilitative maintenance:

This policy, however, must be balanced against a realistic appraisal of the likelihood that the spouse will be able to support herself in some reasonable approximation of the standard of living established during the marriage, especially where the marriage is of long duration and the spouse has had a long absence from the labor market. Although each case must be decided on its own facts, some general guidelines for determining whether to grant time limited or permanent maintenance have been approved by this court. Maintenance for a limited period is appropriate where the spouse is employable at an income not overly disproportionate from the standard of living established during the marriage. Conversely, where the spouse is not employable or is employable only at a low income as compared to her previous standard of living, then permanent maintenance would be appropriate.

*Id.* at 464-65, 426 N.E.2d at 1096 (citations omitted).

117. ILL. ANN. STAT. ch. 40, para. 504(b)(2) (Smith-Hurd 1980). The Historical and Practice Notes to this section state that this provision "creates an affirmative obligation on the part of the spouse seeking maintenance to seek employment, where plausible, and this reflects one of the most important changes brought about by this Act." *Id.*, Historical and Practice Notes, at 529.


119. *Id.* at 296, 426 N.E.2d at 1069.

120. *Id.* at 298, 426 N.E.2d at 1069.
ment. Absent such an attempt at rehabilitation, the court could be justified in denying further maintenance. Alternatively, the court could continue or even increase the maintenance award should it find that, as of the date of its review, the spouse reasonably sought but failed to find employment and therefore “still meets the prerequisites to an award of maintenance”: an absence of property to provide for her needs and an inability to support herself through appropriate employment.\textsuperscript{121} The retained jurisdiction approach thus affords the spouse granted maintenance every opportunity to benefit from such funds provided she makes a good faith effort to live without the help of this support. Several Illinois decisions subsequent to \textit{Asch} have been persuaded by the viability of retained jurisdiction in the context of rehabilitative maintenance awards.\textsuperscript{122}

\textsuperscript{121} \textit{Id.} Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) permits a maintenance award only where the spouse seeking maintenance “(1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and (2) is unable to support himself through appropriate employment . . . , or (3) is otherwise without sufficient income.” \textit{ILL. ANN. STAT.} ch. 40, para. 504(a) (Smith-Hurd 1980). Section 504(b) of IMDMA provides:

\begin{quote}
The maintenance order shall be in such amounts and for such periods of time as the court deems just . . . after consideration of all relevant factors, including: 1) the financial resources of the party seeking maintenance . . . ; 2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; 3) the standard of living established during the marriage; 4) the duration of the marriage; 5) the age and the physical and emotional condition of both parties; 6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and 7) the tax consequences of the property division upon the respective economic circumstances of the parties.
\end{quote}

\textit{Id.}, para. 504(b).

The appellate court in \textit{Asch} elaborated upon the alternatives open to the trial court when reviewing its original maintenance award at the expiration of the three year period:

\begin{quote}
If at the end of the three years the court determines that respondent has reasonably sought employment and failed to find anything suitable, the court will undoubtedly decide that the maintenance should continue, possibly at a higher amount. If, however, respondent has chosen not to seek employment and begin supporting herself the court could then deny her further maintenance. Having already determined that respondent is able to support herself, the court could justifiably end the maintenance, finding it improper under section 504(a). Alternatively, it is possible that respondent will have found employment that would not provide adequate support. Acting on a motion for modification, the court could then provide for maintenance in a suitable amount.
\end{quote}


\textsuperscript{122} For example, \textit{In re} Marriage of Carney, 122 Ill. App. 3d 705, 462 N.E.2d 596 (1984) involved a situation in which the couple divorced, remarried, and ultimately re-divorced. The wife was awarded permanent maintenance in the first divorce settlement. Upon the second dissolution of the marriage, however, her maintenance award was restricted to $30,000 over a period of five years. The Appellate Court held that the trial court had abused its discretion with respect to this second, time limited maintenance award, and remanded the case with direction to consider retaining jurisdiction “over the maintenance award in order to review the parties’ respective circumstances at a later date and reevaluate the need for further
This use of retained jurisdiction is not limited to the Illinois courts, however, as courts in other jurisdictions which have adopted rehabilitative maintenance also have invoked this approach.123

3. Property Settlements

The foregoing discussion illustrates that child custody and support orders are virtually always modifiable when a change is in the child's best interests. Similarly, spousal maintenance awards frequently are subject to modification upon a showing of changed circumstances. In contrast, that part of the divorce decree which determines the property rights of the respective parties to a divorce proceeding generally is regarded as final and unmodifiable.124 The policy supporting this general principle is that a complete break is most desirable because it facilitates the parties' psychological adjustment to the divorce125 and also conserves the judiciary's resources by discouraging repeated litigation.126 Nevertheless, the

123. See, e.g., Lindsay v. Lindsay, 115 Ariz. 322, 328-29, 565 P.2d 199, 205-06 (1977) (lower court erred in failing to retain jurisdiction to modify its fixed term rehabilitative maintenance award); Pujals v. Pujals, 414 So. 2d 228, 229 (Fla. Dist. Ct. App. 1982) ("[B]y virtue of its inherent as well as statutory authority and even without an express reservation, the trial court retains jurisdiction to consider a petition for modification or extension of rehabilitative alimony as long as it is filed within the period of rehabilitation provided by the final judgment.").

124. See, e.g., Haynes v. Haynes, 41 Colo. App. 469, 471, 586 P.2d 1010, 1011 (1978) ("Property settlement agreements incorporated into the decree are not ordinarily subject to future modification."); McIntire v. McIntire, 345 So. 2d 316, 319 (Ala. 1977) ("After a lapse of thirty days from the date of rendition of the decree, a court of equity cannot modify a property settlement provision except to correct clerical errors."); COLO. REV. STAT. § 14-10-122(1) (1973) ("The provisions as to property disposition may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment."); DEL. CODE ANN. tit. 13, § 1519(a)(3) (1981) (allowing modification of property disposition "only upon a showing of circumstances that would justify the opening or vacation of a judgment under the Rules of the Superior Court of this State").

125. See In re Marriage of Lee, 78 Ill. App. 3d 1123, 1132, 398 N.E.2d 126, 132 (1979) ("The friction resulting from an unsuccessful marriage almost inevitably makes continuing dealings between the parties difficult.").

126. See, e.g., In re Marriage of Hellwig, 100 Ill. App. 3d 452, 459, 426 N.E.2d 1087,
parties to a divorce may choose to alter the unmodifiable aspect of a property division by requesting the court to incorporate in the divorce decree a property settlement agreement which specifies the terms of modification for the agreement and the decree based upon it. In such instances, the incorporation of such a property settlement agreement into the divorce decree allows the court to retain jurisdiction to act in accordance with the specified terms regarding modification. 127

Sometimes a divorce settlement will involve property the value of which cannot be ascertained at the time of the divorce. Examples of such property include deferred compensation plans and stock options. In these cases, courts may retain jurisdiction until a final determination can be made of the value of the property in question. In *In re Marriage of Moody*, 128 the trial court awarded the divorced husband all interest in certain stock options which would allow him to purchase his employer's stock at below-market value. 129 On ap-

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1092 (1981) ("In distributing property, courts should seek a high degree of finality so that parties can plan their future with certainty and are not encouraged to return repeatedly to the courts."). The desirability for a sense of finality is manifested in some statutes by a preference for property division over a maintenance award. See, e.g., Illinois Uniform Marriage and Divorce Act § 308, Commissioners' Note, at 161 (1979) (statute encourages courts to provide for the parties' financial needs through a lump sum property division rather than maintenance); Kujawinski v. Kujawinski, 71 Ill. 2d 563, 576, 376 N.E.2d 1382, 1388 (1978) (observing that the Illinois statute "sought to replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of marital property and assets"); Brueggemann v. Brueggemann, 551 S.W.2d 853, 857 (Mo. Ct. App. 1977) (in discussing state Dissolution of Marriage Act, the court observed that a property division is "emphasized as the primary means of providing for the future financial needs of the spouses.") (quoting Uniform Laws Annotated, Vol. 9 at 457 (1973)). See also Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings*, 29 De Paul L. Rev. 1, 31 (1979) (emphasizing the feasibility of minimizing "the need for the former spouses' continued intrusion into each other's economic activities, and thus reducing the potential for friction and continued litigation" where estimation of the present value of pension assets is possible, allowing immediate allocation of those assets).

127. See, e.g., Carlson v. Carlson, 221 Cal. App. 2d 47, 51, 34 Cal. Rptr. 195, 197-98 (1963) (no jurisdiction to modify property settlement provisions where court's authority to modify was not reserved expressly but instead was conferred by agreement of parties after the issuance of the divorce decree); Hogarty v. Hogarty, 188 Cal. 625, 628, 206 P. 79, 81 (1922) (reserved jurisdiction over permanent monthly allowance, which was considered to be part of the property settlement rather than alimony). See also Michael v. Michael, 454 So. 2d 1035, 1036 (Ala. Ct. App. 1984) (retained jurisdiction over all property of the parties for one year to guarantee divorced wife's receipt of child support payments).


129. Two stock option agreements involving stock in Bally Manufacturing Corporation were at issue in *Moody*. The court described the terms of the agreements as follows:

One agreement, dated August 16, 1978, provides that respondent shall have the right to acquire 2,000 shares of Bally common stock at a price of $21.47 per share. The second agreement, dated March 27, 1980, grants respondent the right to purchase an additional 1,000 shares at $20.25 per share. The agreements, by their
peal, the husband contended that a distribution to him of these unexercised stock options is inequitable as they have no value until he actually exercises them.\textsuperscript{130} He thus argued that the trial court should have retained jurisdiction over the case until such time as he exercised the options or until they expired. The appellate court was persuaded by this position, holding that the husband should retain his interest in the stock option agreements as his separate property until he exercised the options. At such time, the court could allocate an appropriate share of any realized profit to each spouse.\textsuperscript{131}

\textit{Moody} illustrates the viability of the retained jurisdiction approach in cases involving potential future benefits stemming from the employment of one of the parties to the divorce. When such property is at issue, retained jurisdiction may be the most equitable alternative since a present award based on the discounted value of such future benefits to the employed spouse may be excessive if the employed spouse receives less in the way of benefits than the

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\textsuperscript{130} The trial court arrived at a value for the stock options by subtracting the cost of the 3000 shares, at the reduced option prices, from the price it would have cost the divorced husband to acquire the same number of shares on the New York Stock Exchange one day before the hearing. \textit{Id.}

\textsuperscript{131} The appellate court noted that "it was improper for the trial court to take judicial notice of the price at which Bally stock was traded on June 6, 1982," the day before the hearing. \textit{Id.} at 1047, 457 N.E.2d at 1026. Further, the court discussed several factors which, in its view, precluded a valuation of the options until the divorced husband actually exercised them:

First, under the terms of the option agreements, the stock options are non-transferable and thus respondent is unable to realize any profit from a sale or an assignment of his interest under the agreements. Respondent, therefore, would have to exercise the options in order to realize any profit. If they expire without ever being exercised, they have no value whatsoever. Second, on the date of the hearing, only 1,600, rather than 3,000, shares were exercisable under the restrictions expressed in the agreements. Third, respondent presented evidence that his deteriorating health and lack of liquid capital [sic] make it impossible for him to exercise the options without obtaining a loan. Respondent would be required to raise a total of $33,864 in order to exercise his rights under the agreements as of June 6, 1982. Finally, the margin requirements imposed by law restrict respondent from borrowing more than 50\% of the full purchase price. Even if respondent were able to obtain a loan for that amount, he would have to raise almost $17,000 from his own sources. Given the above scenario, it is possible, if not probable, that respondent might never be able to exercise the options prior to the expiration dates of the purchase agreements.

\textit{Id.} at 1047-48, 457 N.E.2d at 1026-27. The court thus determined that, until they were exercised, the stock options did not constitute marital property subject to division under \textsection 503 of the Illinois Marriage and Dissolution of Marriage Act. \textit{Id.} at 1048, 457 N.E.2d at 1027.
\end{flushright}
amount which was assumed in calculating the award to the non-employed spouse.\textsuperscript{132} This concern has also been expressed in cases involving non-vested pension benefits, where the possibility exists that the employee spouse’s death or termination of employment will destroy the pension rights before they mature.\textsuperscript{133} In \textit{In re Marriage of Brown},\textsuperscript{134} the Supreme Court of California held that non-vested pension rights constitute community property subject to division upon divorce.\textsuperscript{135} In so holding, the court observed that if “uncertainties affecting the vesting or maturation of the pension” make a present valuation of the rights inappropriate, a court can retain jurisdiction and award each spouse a proportionate share of each pension payment as it is paid.\textsuperscript{136} The advantage of such an approach is that it “divides equally the risk that the pension will fail to vest.”\textsuperscript{137}

\textsuperscript{132} \textit{In re Marriage of Evans}, 85 Ill. 2d 523, 528, 426 N.E.2d 854, 857 (1981) (no evidence introduced to show value of non-vested stock shares and retirement benefits; lower court did not err in refusing to divide these potential future employment benefits as marital property).

\textsuperscript{133} \textit{See, e.g., In re Marriage of Fairchild}, 110 Ill. App. 3d 470, 473, 442 N.E.2d 557, 560 (1982) (The accrued value of the pension benefit was $24,642, but the employee would only be entitled to the vested value of $6,069.); \textit{In re Marriage of Hunt}, 78 Ill. App. 3d 653, 662-63, 397 N.E.2d 511, 519 (1979) (addressing the concern over the difficulty of placing a present value on a pension that has not matured); \textit{In re Marriage of Brown}, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976) (“In dividing nonvested pension rights as community property the court must take account of the possibility that death or termination of employment may destroy those rights before they mature.”).

\textsuperscript{134} 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

\textsuperscript{135} In its holding, the California Supreme Court reversed its prior decision, \textit{French v. French}, 17 Cal. 2d 775, 112 P.2d 235 (1935), which concluded that non-vested pension rights are not property but instead a mere expectancy not subject to division upon divorce. \textit{Brown}, 15 Cal. 3d at 851, 544 P.2d at 569, 126 Cal. Rptr. at 640.

\textsuperscript{136} \textit{Brown}, 15 Cal. 3d at 848-49, 544 P.2d at 567, 126 Cal. Rptr. at 639. The \textit{Brown} court also held that although its decision would not apply retroactively to cases where “the property rights of the marriage have already been adjudicated by a decree of dissolution,” it would be applied retroactively “to any case in which the property rights arising from the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights.” \textit{Id.} at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641.

\textsuperscript{137} \textit{Id.} at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639. \textit{See also In re Marriage of Hunt}, 78 Ill. App. 3d 653, 664, 34 Ill. 55, 63, 397 N.E.2d 511, 519 (1979) (retained jurisdiction is particularly appropriate for non-vested pension rights); \textit{In re Marriage of Skaden}, 19 Cal. 3d 679, 688, 566 P.2d 249, 253, 139 Cal. Rptr. 615, 619 (1977) (retained jurisdiction approach “has the additional advantage of removing from the employee spouse the risk of paying the community for rights which may not mature.”).

Courts in other jurisdictions have relied on \textit{Brown} in adopting the retained jurisdiction approach in this context. \textit{See, e.g., In re Marriage of Fairchild}, 110 Ill. App. 3d 470, 442 N.E.2d 557 (1982); \textit{Hunt}, 78 Ill. App. 3d 653, 397 N.E.2d 511; \textit{Cearley v. Cearley}, 544 S.W.2d 661 (Tex. 1976) (superseded by the Uniformed Services Former Spouses’ Protection Act in 1982, which allows for distribution upon divorce of military nondisability retirement benefits). \textit{See also Skaden}, 19 Cal. 3d at 682, 688, 566 P.2d at 249, 253-54, 139 Cal. Rptr. at 615, 619-20 (California Supreme Court held that “vested ‘termination benefits’ contained in
B. The Probate Process

Probate courts are subject to the general precept that once a court of competent jurisdiction obtains jurisdiction over a matter, it retains jurisdiction until the matter is disposed of completely. Typically, probate courts derive their jurisdiction from state statutes and constitutions which define the scope of the courts' power to exercise and retain jurisdiction. Therefore, the extent to which probate courts can adjudicate matters arising during the course of an administration varies from state to state. Once a state statute

an insurance sales agent's agreement with an insurer" constitute a "divisible property interest," and observed that under the Brown decision, the trial court has discretion to divide this property and may choose to exercise retained jurisdiction in appropriate cases.

Nevertheless, the method is not without some disadvantages. Continuing judicial supervision over the pension payments entails an undesirable element of delay, see Skaden, 19 Cal. 3d at 688, 566 P.2d at 253, 139 Cal. Rptr. at 619 and imposes an administrative burden on the courts. See Brown, 15 Cal. 3d at 849, 544 P.2d at 567, 126 Cal. Rptr. at 639. Brown, however, also notes that this burden should not preclude use of the retained jurisdiction approach in this context since such an administrative burden exists in other situations, such as judicial supervision of alimony awards, where retained jurisdiction is well accepted. In addition, the use of retained jurisdiction in this area necessitates an ongoing connection between the divorced parties' economic affairs, and provides the employee spouse with an additional degree of control over the economic situation of the non-employee spouse. See Bonavich, supra note 126, at 32. For these reasons, a lump sum disposition of such pension benefits may be preferable, especially in those instances where the court can evaluate the risk that the employee spouse's death or termination of employment will destroy the pension rights before their maturation and account for this risk in determining the present value of these rights. See Brown, 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639. See also Hardie & Sutcliffe, Reserving Jurisdiction: A Potential Trap, 2 CAL. LAW, July-Aug. 1982, at 33 (favoring present disposition of all retirement benefits over retained jurisdiction approach). The retained jurisdiction method is, however, a feasible alternative where a present valuation of the assets is impossible or exceedingly difficult. See, e.g., Hunt, 78 Ill. App. 3d at 663, 397 N.E.2d at 519 (retained jurisdiction is appropriate in situations where the present value of the pension or profit sharing plan can be determined, but "the type, or lack, of other marital property makes it impractical or impossible to award sufficient offsetting marital property to the nonemployee spouse . . . "); Bonavich, supra note 126, at 15-16, 32-33 (arguing that all accrued or earned private pension plan interests should be considered property subject to division upon divorce and that courts can exercise retained jurisdiction with regard to the disposition of such property when it is incapable of present valuation).

138. See Fairfield Fed. Sav. & Loan Co. v. Pickering, 23 Ohio Law Abs. 591 (1937). The court notes that this doctrine "is essential to the proper and orderly administration of the laws" and "is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and process." Id. at 594 (quoting 7 R.C.L., Courts, § 105 (1929)). See also Hartman v. Hartman, 228 Ark. 692, 696, 309 S.W.2d 737, 740 (1958) (court quotes general rule governing jurisdiction of probate court); infra notes 140-44 and accompanying text.

139. See, e.g., Ark. CONST. of 1874, art. VII, § 34 (1947), as amended by Amendment 24, § 1 (Equity judges shall be the probate court judges and shall have "exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates, as is now vested in courts of probate, or may be hereafter prescribed by law."); Colo. CONST. of 1876, art. VI, § 9(3) (1973) ("In the city and county of Denver, exclusive original jurisdiction in all
vests the probate court with jurisdiction over a particular matter, however, the court retains jurisdiction until the administration of the estate is complete. 140 In light of the delays which can arise dur-

matters of probate, settlements of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, the adjudication of the mentally ill, and such other jurisdiction as may be provided by law shall be vested in a probate court . . . .”); ARK. STAT. ANN. § 62-2004(b) (1971) (“The Probate Court shall have jurisdiction of the administration, settlement and distribution of estates of decedents, the probate of wills, the persons and estates of minors, persons of unsound mind and their estates, the determination of heirship, adoption, and (concurrent with jurisdiction of other courts) jurisdiction to restore lost wills and for the construction of wills when incident to the administration of an estate; and all such other matters as are now or may hereafter be by law provided.”); COLO. REV. STAT. § 13-9-103(3) (1973) (The probate court of Denver “has jurisdiction to determine every legal and equitable question arising in connection with decedents’, wards’, and absentees’ estates, so far as the question concerns any person who is before the court by reason of any asserted right in any of the property of the estate or by reason of any asserted obligation of the estate . . . .”); OHIO REV. CODE ANN. § 2101.24 (Page 1985) (Probate court has exclusive jurisdiction to perform specified acts, including the power “to direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates.”). See also infra note 151 and accompanying text.

See generally E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 612 (3d ed. 1985). The authors of the text note that although greater efficiency and convenience would be promoted by vesting in probate courts all powers necessary to effect a complete administration of an estate, the wide variation in the degree of competence of probate courts poses a significant obstacle to such a reform. Id. at 613.

140. See, e.g., Turner v. Alton Banking & Trust Co., 166 F.2d 305 (8th Cir. 1948) (proper remedy for negligent executor’s sale lies in probate court as part of estate proceedings since probate court in Illinois is court of continuing jurisdiction); Copley v. Copley, 80 Cal. App. 3d 97, 145 Cal. Rptr. 437 (1978) (“The [state] supreme court, by decisional process, has extended jurisdiction of the probate court to allow a determination of the whole matter once before it.”); In re Bayley Trust, 127 Vt. 380, 383-84, 250 A.2d 516, 518 (1969) (probate court had jurisdiction to approve partial termination of testamentary trust since its jurisdiction was ongoing); see also supra note 138 and accompanying text; see infra notes 141-51 and accompanying text.

Situations can arise where a federal court has coordinate or concurrent jurisdiction with a state court with respect to a matter involving the administration of an estate. See, e.g., De Korwin v. First Nat'l Bank, 136 F. Supp. 720, 723 (N.D. Ill. 1955) (federal court had supervision and direction of distribution of estate; could enjoin beneficiary from further prosecution of state court partition of trust assets). Although federal courts do not have probate jurisdiction and may not administer a decedent's estate, see In re Broderick's Will, 88 U.S. (21 Wall.) 503, 509-10, 517 (1874) they may assume jurisdiction in a suit brought by a claimant against a decedent’s estate “so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.” Markham v. Allen, 326 U.S. 490, 494 (1946) (federal jurisdiction sustained because no interference with probate court’s administration of the estate). See also Rosenberg v. Baum, 153 F.2d 10, 13 (10th Cir. 1946) (Where “diversity of citizenship is present and the requisite amount is in controversy, a United States Court has jurisdiction to determine questions relating to the interests of heirs, devisees, or legatees which may be adjudicated without interfering with the control of the probate court in the general administration of the estate.”).

In an in rem or quasi in rem action where the court has or must have possession of the property to grant the requested relief, the court which first acquires jurisdiction may exercise it exclusively. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466-67 (1939);
ing the probate process,\(^{141}\) a probate court may deem it necessary to

Starr v. Rupp, 421 F.2d 999, 1005 (6th Cir. 1970). Thus, the probate court may retain jurisdiction over a matter without interference from the federal judiciary if the probate court acquires its jurisdiction first and has sufficient authority to provide full and adequate relief. See, e.g., Princess Lida of Thurn and Taxis, 305 U.S. at 456 (state court has exclusive jurisdiction over quasi in rem proceeding because trustees filed for account prior to federal court action); Farrell v. O'Brien, 199 U.S. 89, 114-16 (1905) (federal court lacked jurisdiction to declare the non-existence of a nuncupative will since supplementary proceedings incident to settling of estate must be held in probate court of original jurisdiction); In re Broderie's Will, 88 U.S. (21 Wall.) 503, 509-10 (1874) (probate court retained jurisdiction over proceedings because it had the power to "revise proceedings tainted with mistake, fraud or illegality" and thus could provide adequate relief to the plaintiff); Starr v. Rupp, 421 F.2d 999, 1007 (6th Cir. 1970) (federal court could not interfere with administration of estate because state probate court had prior jurisdiction over res of decedent's estate and had already approved executor's sale of stock and partial account). But see Barnes v. Brandrup, 506 F. Supp. 396, 403 (S.D.N.Y. 1981) (federal subject matter jurisdiction because federal action was filed before the Connecticut probate court action and Connecticut probate court lacked power to adjudicate all claims effectively and lacked exclusive jurisdiction under Connecticut law); De Korwin v. First Nat'l Bank, 136 F. Supp. 720 (N.D. Ill. 1955) (federal court's jurisdiction attached first). See also Note, Federal Court Probate Proceedings, 45 IND. L.J. 387 (1970) (advocating exercise of federal jurisdiction when out-of-state beneficiaries seek to bring mismanagement claims against executors).

Similar principles apply with respect to whether a probate court may exercise continuing jurisdiction to the exclusion of another state court. In Fairfield Fed. Sav. & Loan Co. v. Pickering, 23 Ohio Law Abs. 591 (1937), a mortgagee filed a foreclosure action in the Common Pleas Court against a deceased mortgagor subsequent to the filing of an action in the Probate Court by the administrator of the deceased mortgagor to sell the same real estate to pay debts. Both actions included the same parties. The court observed that the Probate Court and the Common Pleas Court have concurrent jurisdiction and either court could afford complete relief to the parties. It then applied the general rule that "where actions have been commenced in different courts, having concurrent jurisdiction, that court should retain jurisdiction before whom proceedings may be first had, and whose jurisdiction first attaches," and held that the Common Pleas Court therefore lacked jurisdiction to grant foreclosure. Id. at 593-94. See also Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184 (Ga. Sup. Ct. 1984) (Superior Court could not intervene because probate court had initially assumed jurisdiction and could fairly adjudicate issues); In re Bayley Trust, 127 Vt. 380, 384, 250 A.2d 516, 519 (1969) ("where the probate court is wanting in authority to grant adequate equitable relief concerning persons or claims beyond its reach, equity jurisdiction may be invoked to provide essential assistance"); Murray v. Cartmell, 118 Vt. 178, 180-82, 102 A.2d 853, 855-56 (1954) (Court of Chancery without jurisdiction to construe a stipulation varying terms of distribution under will where probate court had jurisdiction over probate of will). But see Dztenborn v. Hartford-National Bank & Trust Co., 121 Conn. 388, 185 A. 82 (1936) (beneficiary's action in Superior Court allowed notwithstanding trustee's prior filing in probate court of its final account).

141. In Prime v. Hyne, 260 Cal. App. 2d 397, 67 Cal. Rptr. 170 (1968), the court observed that "[d]istribution of the estate of a decedent is subject to many possible delays . . . such as delay in the institution of probate proceedings, neglect and inattention, [and] protracted litigation." Id. at 400-01, 67 Cal. Rptr. at 173.

As an interesting aside, it should be noted that the possibility that an estate will take longer than twenty-one years to settle underlies the general precept that the rule against perpetuities is violated by a testator's bequest to persons to be ascertained when his estate is finally settled. See generally T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 188-89 (2nd ed. 1984). The rule against perpetuities will uphold only
exercise its power of retained jurisdiction long after a will initially is admitted to probate.

In addition, the dispositive provisions of a testator’s will frequently necessitate long-term supervision over the estate by the probate court. For example, the testator’s will in In re Curtis’ Estate\(^\text{142}\) provided that his widow should have a life estate in his property, and upon her death, the remainder should be divided between his sister and nephew and their respective children.\(^\text{143}\) A decree of distribution was entered on October 7, 1922, after which the testator’s widow commingled the testator’s assets with her own property. She died testate in December, 1934, leaving all of her property to her own relatives. Her husband’s sister and nephew then petitioned the probate court having jurisdiction over the testator’s will for an accounting of the residue of the testator’s estate which was in the wife’s possession at the time of her death. Such an accounting and a decree requiring payment was ordered by the lower court and affirmed by the state supreme court. In so holding, the court observed that the October 7, 1922, decree was not final because it could not provide for the ultimate disposition of the testator’s estate. This final disposition could occur only after the widow’s death when the remaindersmen and their respective shares could be ascen-

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\(^{142}\) See J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). Thus, because the bequest is not limited to people alive at the time of the testator’s death who could qualify as lives in being and save the gift, the uncertainty that this imposes on the probate process mandates a violation under the traditional application of the rule. The logic of this application of the rule against perpetuities is, however, extremely questionable since it rarely takes more than twenty-one years to settle an estate. See T. Bergin & P. Haskell, supra, at 188-89. See also Asche v. Asche, 42 Del. Ch. 545, 552-60, 216 A.2d 272, 276-80 (1966) (provision in will that payment of beneficial interests to testator's granddaughters or their lawful issue was to be suspended until their father's will was probated; held not to be a violation of the rule against perpetuities); Fla. Stat. Ann. § 689, 22(5)(c) (West 1986) (“If the duration or vesting of an interest is contingent upon the probate of a will . . . [or] the settlement of an estate . . . it is presumed that the creator of such interest intended that the contingency occur, if at all, within 21 years from the effective date of the instrument creating the interest.”); ILL. ANN. STAT. ch. 30, para. 194(c) (Smith-Hurd 1985) (In the case of an interest conditioned upon the probate of a will or the administration of an estate, it shall be presumed that such will occur within the period of the rule against perpetuities.); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d); RESTATEMENT OF PROPERTY § 374, comment f (1944) (“When a will directs distribution to be made to persons to be ascertained ‘on the probate of this will,’ or ‘on the conclusion of the administration of this estate,’ it is reasonable to infer that the testator has merely envisaged those preliminaries required by law prior to the time when distribution first becomes practicable, and that the quoted language was not intended to postpone the ascertainment of the distributees by the injecting of a period of indefinite length.”). 

\(^{143}\) 109 Vt. 44, 192 A. 13 (1937).

\(^{143}\) Id. at 13-14. (The testator died on April 21, 1921).
tained. Therefore, the probate court had not exhausted its original jurisdiction since such "continues until the estate is fully administered and no new lapse of time can prevent the court from enforcing the settlement."\textsuperscript{144}

Sometimes probate courts retain jurisdiction for specific purposes such as determining attorney's fees,\textsuperscript{145} settling the accounts of a guardian in a guardianship estate,\textsuperscript{146} and compelling the executor to make an accounting.\textsuperscript{147} Moreover, even after the estate has been settled, the probate court may have an opportunity to exercise its continuing jurisdiction as it has the power to revoke its prior orders and reopen the case if the settlement of the estate was irregular or induced by fraud or mistake.\textsuperscript{148} Typically, probate courts also have the authority to supervise the administration of testamentary trusts,\textsuperscript{149} and the exercise of this power frequently requires courts to

\begin{itemize}
\item \textsuperscript{144} Id. at 15.
\item \textsuperscript{145} See Murukas v. Murukas, 99 Ill. App. 2d 342, 240 N.E.2d 797 (1968) (retained jurisdiction to determine attorney's fees; Chancery Division jurisdiction to impose a lien on future distributions of the estate for the payment of such fees).
\item \textsuperscript{146} See In re Estate of Ehle, 267 Cal. App. 2d 24, 72 Cal. Rptr. 474 (1968) (retained jurisdiction to award attorneys' fees and expenses for services rendered to the guardian without need for filing a claim in the deceased ward's estate).
\item \textsuperscript{147} See Turner v. Alton Banking & Trust Co., 166 F.2d 305, 310 (8th Cir. 1948) ("The probate court in Illinois is a court of continuing jurisdiction" and "can compel an executor or administrator to account at any time and may enter judgment against him for loss occasioned to the estate by his wrongful acts.").
\item \textsuperscript{148} See, e.g., In re Estate of Fehling, 34 Colo. App. 445, 448, 528 P.2d 407, 409 (Colo. 1974) (approval irregularly made; probate court could revoke order approving report in connection with distributee's action to obtain payment of his legacy); First & Citizens Nat'l Bank v. Seip, 43 Ohio App. 440, 445, 183 N.E. 448, 449 (1931) (judgment of probate court approving the executor's final account "continues as a bar to any claim of the heirs for any money rights growing out of the settlement of the estate until such judgment is reversed or is attacked for fraud or mistake"); IND. CODE ANN. § 29-1-1-21 (Burns 1985) ("For illegality, fraud or mistake, upon application filed within one year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgment and decrees or grant a rehearing therein.").
retain jurisdiction after distribution of the estate for purposes such as determining the ultimate beneficiaries of the trust property, settling the accounts, and ruling upon the trustee’s acts. The extent to which a probate court can exercise its continuing jurisdiction is limited, however, by the state probate code. Thus, in an Ohio case, the appellate court held that the probate court erred in retaining jurisdiction indefinitely to reexamine a tax assessment in the future because the state code did not grant the probate court this power.

parties concerning internal affairs of trusts, but stipulating that “a proceeding under this section does not result in continuing supervision by the court over the administration of the trust”); CAL. PROB. CODE § 1120 (West 1986) (Probate court retains power to supervise trust only with testator’s expressed intent); IND. CODE ANN. § 30-4-6-2 (Burns 1972) (Probate court has continuing jurisdiction to supervise administration of trust only if settlor so expressly directs in terms of trust); Alexander v. Alexander, 262 Ark. 612, 626, 561 S.W.2d 59, 66 (1978) (Arkansas probate court without jurisdiction to administer a testamentary trust.).

Some state statutes draw a distinction between testamentary and inter vivos trusts, allowing the probate court to retain jurisdiction over the former but not the latter. See, e.g., CONN. STAT. ANN. § 45-267 (West 1981). But see CAL. PROB. CODE §§ 1138-1138.14 (West 1986) (amending California Probate Code by granting probate courts jurisdiction over inter vivos trusts similar to their jurisdiction over testamentary trusts); MICH. COMP. LAWS ANN. § 700.22 (West 1985) (granting probate court jurisdiction “to determine an action or proceeding involving settlement of an inter vivos trust”). In such states, the courts with jurisdiction over equitable matters retain residual jurisdiction over inter vivos trusts. See generally P. Haskell, Preface To Law of Trusts 47 (1975) (Noting that in most jurisdictions, inter vivos trusts are subject to the jurisdiction of the court having jurisdiction over equitable matters generally, whereas testamentary trusts are subject to the probate court’s jurisdiction; as a result, separate accounting proceedings may have to be conducted.). Moreover, some jurisdictions subject testamentary trusts to a much greater degree of judicial scrutiny than inter vivos trusts. See P. Haskell, supra, at 47 (“[T]he testamentary trustee frequently is required by statute to submit an account to the probate court periodically, such as every year or every two or three years, whereas the inter vivos trustee often has no statutory obligation to submit periodic accounts.”).

150. See, e.g., In re Gray’s Estate, 66 F.2d 367 (7th Cir. 1933) (probate court had continuing jurisdiction and control over testamentary trusts where decedent’s estate was closed and trust property turned over to trustees); In re Estate of Howard, 58 Cal. App. 3d 250, 256-58, 129 Cal. Rptr. 836, 840 (1976) (probate court with retained jurisdiction erred in failing to consider present and former beneficiaries’ claims regarding trustees’ misconduct); In re Bayley Trust, 127 Vt. 380, 383, 250 A.2d 516, 518 (1969) (probate court’s jurisdiction ongoing; authority to approve a partial termination); In re Smith’s Estate, 4 Cal. App. 2d 548, 552-53, 41 P.2d 565, 567-68 (1935) (probate court jurisdiction after distribution of the estate to determine that petitioner was beneficiary under trust). But see Barnes v. Brandrup, 506 F. Supp. 396, 401 (S.D.N.Y. 1981) (court observed that although Connecticut statute provides for the probate court’s “continuing jurisdiction” over testamentary trusts, such jurisdiction “is not tantamount to providing that the court will continuously exercise jurisdiction over the trust corpus”; therefore, the federal court was not divested of jurisdiction due to a previously filed state probate court action because probate court did not have continuing jurisdiction over trusts by virtue of previously filed and settled accounts).

151. Graham v. Day, 12 Ohio App. 2d 9, 230 N.E.2d 453 (1967). See also McLellan’s Estate v. McLellan, 8 Cal. 2d 49, 56, 63 P.2d 1120, 1123-24 (1936) (probate court’s power does not include the power to render a personal judgment against the trustee); In re Trusts Proctor, 140 Vt. 6, 8-9, 433 A.2d 300, 302 (1981) (State statute granting probate court juris-
C. Specific Performance of Long-Term Contracts

Traditionally, courts have declined to grant the equitable remedy of specific performance where enforcement of the contract at issue requires continuous, long-term supervision by the judiciary.\(^\text{152}\)

This general precept was announced by the Supreme Court in Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339 (1870). That case involved a perpetual contract to quarry marble, and the court cited "the peculiar character of the contract" and "the duties which it requires of the owners of the quarries" among the reasons justifying the denial of specific performance:

> These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, and whether it was of suitable size or shape or proportion.

*Id.* at 358-59 (emphasis in original).

Similarly, in Texas and Pac. Ry. Co. v. Marshall, 136 U.S. 393 (1890), the Supreme Court concluded that specific performance was an inappropriate remedy for a contract between a city and a railway company providing that the company would "permanently" establish its terminus and offices in the city in exchange for the city's loan of $300,000 in county bonds and sixty-six acres of land. Although the court initially held that the word "permanent" in the contract should not be understood as a requirement that the railway company retain its offices in the city in perpetuity, it then concluded that even if such an interpretation of the contract were sustained, specific performance of the contract was not an appropriate remedy due to the need for continuing judicial supervision. The Court, therefore, concluded that the city's proper remedy for the alleged contract violation was an action at law for damages.

Many subsequent courts have refused to specifically enforce contracts where enforcement would necessitate long-term supervision and direction on a continuous basis. See, e.g., Engemoen v. Rea, 26 F.2d 576, 579 (8th Cir. 1928) (five-year joint adventure contract, which had three more years to run, for feeding hogs, on an island, with garbage obtained from the city); Arizona Edison Co. v. Southern Sierras Power Co., 17 F.2d 739 (9th Cir. 1927) (fifteen-year contract between an electric company and a light, gas and water company whereby former agreed to supply to latter electric energy for light, heat, and power); Sewage & Water Board v. Howard, 175 F. 555 (5th Cir. 1909) (contract to supply water which could be maintained indefinitely); Blue Point Oyster Co. v. Haagenson, 209 F. 278, 281-82 (W.D. Wash. 1913) (twenty-year contracts, with sixteen remaining years, in which owners of oyster beds agreed to sell their entire oyster supply to a corporation); Munchak Corp. v. Caldwell, 46 N.C. App. 414, 265 S.E.2d 654 (1980) (contract provision requiring professional basketball team to provide player with life insurance in amount equal to 100 times the cash value of his pension until date player began drawing retirement); Yonan v. Oak Park Fed. Sav. and Loan Ass'n, 27 Ill. App. 3d 967, 972-75, 326 N.E.2d 773, 778-79 (1975) (contract to construct a building); Ryan v. Ocean Twelve, Inc., 316 A.2d 573 (Del. Ch. 1973) (agreement between condominium unit owners and developer requiring developer to fix a number of defects in units and guarantee against defective material and workmanship). See also RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981) ("A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforce-

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This general rule of equity is not a jurisdictional limitation. Instead, it is based on the policy of convenient administration, and need not be followed if specific performance of a particular contract is in the public interest. Moreover, courts are inclined to order specific performance of long-term contracts when the provisions of the contract are uncomplicated and easy to enforce.

The recent trend toward more liberal use of specific performance has resulted in the enforcement of a wide variety of long

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153. See Fleischer v. James Drug Stores, 11 N.J. 138, 148, 62 A.2d 383, 388 (1948) (“Equity may decline jurisdiction where the execution of its decree for specific performance would entail continuing and constant superintendence over a considerable period of time; but this is a rule of convenience of administration, rather than a limitation on jurisdiction . . . .”).

154. See, e.g., Virginian Ry. v. System Fed’n No. 40, 300 U.S. 515, 552-53 (1937) (Court, in affirming district court’s decree in equity commanding railway company to negotiate with the authorized representative of the employees, observed that “[t]he peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its services to the public, is a matter of public concern.”); Joy v. St. Louis, 138 U.S. 1, 47-50 (1891) (Circuit Court had power to specifically enforce agreement granting railway companies the continuing right, unlimited in time, to use for a fair compensation a right of way running through a public park.). But see Arizona Edison Co. v. Southern Sierras Power Co., 17 F.2d 739, 741 (9th Cir. 1927) (specific performance of fifteen-year contract for supply of electric energy denied, court noting that “public interests were in no way imperiled, and no principle of public policy prevented the relegation of the plaintiff to his legal remedies”).

155. As early as 1894, the New York Court of Appeals recognized that although there existed a split of authority regarding the propriety of granting specific performance of long-term contracts, the weight of authority allowed a court of equity, in its discretion, to grant a decree of specific performance when the contract provisions were uncomplicated and easy to enforce. Prospect Park v. C.I.R. Co., 144 N.Y. 152, 159-60, 39 N.E. 17, 19 (1894) (agreement between two railroad companies whereby one agreed to allow the other to run cars over its tracks for twenty-one years). See also Texas Co. v. Central Fuel Co., 194 F. 1, 14-15 (8th Cir. 1912) (long-term nature of contract does not preclude specific performance where contract does not involve “skill, personal labor, and cultivated judgment” and is unlikely to require judicial supervision if performed in good faith); Western Union Tel. Co. v. Pennsylvania Co., 129 F. 849, 869-71 (3rd Cir. 1904) (court of equity may grant specific performance of a contract which is continuous in operation where such relief simply requires preservation of the status quo which has existed between the parties for nearly half a century).

156. See Linzer, On the Amorality of Contract Remedies—Efficiency, Equity, and the Soc-
term contracts.\textsuperscript{157} For example, courts have specifically enforced long-term agreements such as requirements contracts,\textsuperscript{158} mortgage commitments,\textsuperscript{159} leases of shopping center spaces,\textsuperscript{160} a cooperative


157. Although modern courts may be more prone to grant specific performance of long-term contracts \textit{see Linzer, supra note 156, at 126-27}, several decisions in the late nineteenth and early twentieth centuries allowed this remedy in cases involving contracts with many years left to run. For example, in Franklin Tel. Co. v. Harrison, 145 U.S. 459, 474 (1892) the Supreme Court specifically enforced an agreement under which a manufacturing company obtained from a telegraph company the right to use, indefinitely, a telegraph wire constructed by the manufacturing company upon the telegraph company's poles. In so holding, the court noted that periodic actions at law to recover damages for the denial of such use would be an inadequate substitute for an injunction which would safeguard the plaintiffs against "perpetually recurring denials of their rights." \textit{See also} Union Pac. Ry. v. Chicago & C. Ry. Co., 163 U.S. 564 (1896) (Court specifically enforced 999-year agreement for trackage rights).

Although \textit{Union Pacific} involved contracts between railroads and therefore might have been sustained upon the public interest exception to denials of specific performance \textit{see supra note 154 and accompanying text}, the court also emphasized that the public in general benefits when parties to a contract honor their respective obligations. \textit{Id.} at 604. This expansive view of "public interest" arguably would favor specific performance in cases unaffected by a true public exigency. \textit{See also} St. Regis Paper Co. v. Santa Clara Lumber, 173 N.Y. 149, 160, 65 N.E. 967, 970 (1903) ("the time over which a contract extends is not necessarily controlling as to specific performance").

158. \textit{See, e.g.,} LaClede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39 (8th Cir. 1975) (contract to supply propane gas which, although lacking a definite time of duration, was likely to end in 10 or 15 years).

159. \textit{See First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan Ass'n}, 610 F.2d 164 (3d Cir. 1979) (specific performance of standby commitment for permanent mortgage); Selective Builders, Inc. v. Hudson City Sav. Bank, 137 N.J. Super. 500, 349 A.2d 564 (Ch. Div. 1975) (specific performance of permanent mortgage loan commitment). \textit{Selective Builders} represents a departure from the traditional denial of specific performance of such loan agreements on the ground that because money is fungible, a damage remedy is adequate. \textit{See Linzer, supra note 156, at 126-27. See also} Groot, \textit{Specific Performance of Contracts to Provide Permanent Financing}, 60 CORNELL L. REV. 718, 742 (1975) (author advocates confining remedy of specific performance in cases involving breach of a loan commitment to those "in which a lender is actually able to prove inability to make an alternative investment or a borrower can demonstrate the unavailability of alternate financing.").

contract,¹⁶¹ a perpetual contract to provide hospital accommodations and services,¹⁶² a pension contract,¹⁶³ and even the alimony provisions of separation agreements which have not been included in the divorce decrees.¹⁶⁴ Some courts justify their decisions to order specific performance of long-term contracts by minimizing the extent to which the enforcement of a particular contract would require judicial supervision,¹⁶⁵ or by focusing on the inadequacy of a damage remedy at law,¹⁶⁶ while others emphasize a strong public interest component.¹⁶⁷

v. Rosin Co., 246 A.2d 921 (Del. 1968) (no jurisdiction to grant specific performance since landlord could be compensated adequately in an action at law for damages).


¹⁶² See Portland Section of Council of Jewish Women v. Sister of Charity of Providence, 266 Or. 448, 513 P.2d 1183 (1973) (requiring defendant to furnish accommodations and services in perpetuity to one person at a time selected by plaintiff in return for plaintiff’s payment of $5000).


¹⁶⁴ See, e.g., Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979); Doerfler v. Doerfler, 196 A.2d 90 (D.C. 1963); Strasner v. Strasner, 232 Ark. 478, 338 S.W.2d 679 (1960). But see Note, Specific Performance of Separation Agreements: Is the Remedy Enforceable?, supra note 93, at 876 (noting that the practical significance of specifically enforcing separation agreements is diminished when courts refuse to hold a defaulting party in contempt of court on the ground that the judiciary’s use of the contempt power in this context violates the Constitution’s prohibition against imprisonment for debt).

¹⁶⁵ See, e.g., Ellison v. Ventura Port Dist., 80 Cal. App. 3d 574, 145 Cal. Rptr. 665, 669 (1978) (dredging of a channel does not require complex acts and “should place no great burden on the court to supervise.”); Roberts v. Brewer, 371 S.W.2d 424 (Tex. Ct. App. 1963) (exclusive right to place amusement machines in defendant’s lounge so long as defendant operates the establishment); Dover Shopping Center, Inc. v. Cushman’s Sons, Inc., 104 A.2d 785, 790-91 (N.J. 1960) (lessor waived judicial supervision); Fleischer v. James Drug Stores, 1 N.J. 138, 62 A.2d 383, 388 (1948) (Specific performance not impracticable because all that is required is that corporation furnish druggist with the same services and supplies as all other participants as long as contract exists).

¹⁶⁶ See, e.g., First Nat’l State Bank v. Commonwealth Fed. Sav. & Loan Ass’n, 610 F.2d 164, 171-74 (3d Cir. 1979) (evidence showed impracticability of calculating damages); City Stores Co. v. Ammerman, 266 F. Supp. 766, 776 (1967), aff’d, 394 F.2d 950 (D.C. Cir. 1968) (damages not capable of precise calculation and would “in no way compensate the plaintiff for loss of the right to participate in the shopping center enterprise and for the almost incalculable future advantages that might accrue to it as a result of extending its operations into the suburbs”); Moore v. Moore, 297 N.C. 14, 17, 252 S.E.2d 735, 738 (1979) (multiple damage actions at law would involve “unusual and extreme hardship”); Dover Shopping Center, Inc. v. Cushman’s Sons, Inc., 63 N.J. Super. 384, 394, 164 A.2d 785, 791 (1960) (“difficulty in measuring the harm that would come from the withdrawal of one of the members of a semi-cooperative enterprise like a shopping center”); Fleischer, 1 N.J. at 140, 62 A.2d at 387-88 (1948) (damage action at law for corporation’s breach of contract by discontinuing service to druggist would not afford adequate remedy).

¹⁶⁷ See, e.g., LaClede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 39 (8th Cir. 1975) (propane gas supply contract).
Virtually no court has discussed in detail the mechanics by which specific enforcement of a long-term contract will be effectuated through retained jurisdiction. As a practical matter, the enforcement of a contract with many remaining years may necessitate continuous judicial involvement for a long period of time.\textsuperscript{168} In Roberts v. Brewer,\textsuperscript{169} for example, the court specifically enforced an agreement in which the defendant lounge operator agreed to give the plaintiff the exclusive right to place amusement machines in her place of business for as long as the defendant operated the establishment. In so holding, the court rejected the defendant's contention that specific enforcement of the agreement should not be granted because it would require constant supervision by the court over a long period of time.\textsuperscript{170} In another case, Ammerman v. City Stores Co.,\textsuperscript{171} the court specifically enforced an option contract under which shopping center operators promised to offer a long-term lease in the center to the plaintiff department store with terms at least equal to those granted other major department stores. Although the option contract lacked several substantial terms, the district court found that the "crucial elements of rate of rental and the amount of space" could be determined easily from the defendant's lease with another department store.\textsuperscript{172} Furthermore, in dismissing the defendant's argument that a grant of specific performance would involve the court in "insuperable difficulties of supervision," the court observed that the appropriate standards for construction of the plaintiff's store were detailed in defendant's lease with another department store "with sufficient particularity as to make design and approval of plaintiff's store a fairly simple matter, if the parties deal with each other in good faith and expeditiously."\textsuperscript{173} In order to carry out its order of specific performance, the court retained jurisdiction and reserved the option of appointing a special

\textsuperscript{168} Once a court orders specific performance, that court's jurisdiction over the case continues until the party involved has complied with the decree. See Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 461 (1939). See also Texas Co. v. Central Fuel Oil Co., 194 F. 117 (8th Cir. 1912) (noting that seminal federal cases have granted specific performance of long-term contracts although the remedy "may necessarily result in the court retaining the cause to settle questions which may arise under the contract thereafter").

\textsuperscript{169} 371 S.W.2d 424 (Tex. 1963).

\textsuperscript{170} See id. at 425. The court did not believe that specific enforcement of the agreement would require "constant or continuous supervision by the court" since all that would be required is that the defendant place plaintiff's machines in her business establishment "as long as she operates the same." Id. See supra note 165 and accompanying text.

\textsuperscript{171} 266 F. Supp. 766 (1967), aff'd, 394 F.2d 930 (D.C. Cir. 1968).

\textsuperscript{172} Ammerman, 266 F. Supp. at 774.

\textsuperscript{173} Ammerman, 266 F. Supp. at 778.
master to help settle any differences which might arise.\textsuperscript{174} \textit{Ammerman} illustrates the willingness of some courts to award specific performance and retain jurisdiction even though such action may involve the court in a continuous and difficult process of long-term supervision.\textsuperscript{175}

\textbf{D. Workers' Compensation}

Retained jurisdiction is an important factor in many states in cases involving workers' compensation claims. The theory underlying worker's compensation is that the injured worker should receive some funds in the nature of partial wage replacement for his loss of present and future earning capacity.\textsuperscript{176} Frequently, the severity of a particular injury and the extent to which it will incapacitate a

\begin{footnotesize}
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\item \textsuperscript{174} \textit{Id.} at 778, 394 F.2d at 956.
\item \textsuperscript{175} The district court in \textit{Ammerman} thus found that the difficulties of supervision in specifically enforcing the option contract did not outweigh the importance of specific performance to the plaintiff. \textit{Ammerman}, 266 F. Supp. at 776. Link v. State, 180 Mont. 469, 591 P.2d 214 (1979) is another decision in which the lower court explicitly retained jurisdiction to insure compliance with its decree of specific performance. \textit{Id.} at 479, 591 P.2d at 220 (quoting District Court Finding of Fact No. 42). In \textit{Link}, the plaintiff concessionaires brought an action against the State of Montana for specific performance of an agreement under which the Montana State Park Commission agreed to operate and maintain a mountain railroad and provide payments to the plaintiffs of a certain percentage of the railroad fare. Under the original agreement between the plaintiffs and defendant, the plaintiff concessionaires were given the right to operate concessions at the state park for payment of 10\% of their gross receipts to the State Park Commission. In addition, the plaintiffs agreed to construct certain permanent improvements, which were to become the property of the Park Commission upon construction and were to be leased to the plaintiffs. This agreement was to last for a twenty-five year term, and the plaintiffs had an option to renew. The plaintiffs constructed a mountain railroad under this agreement which they operated for three years, at which time the parties signed a supplemental agreement whereby the Park Commission took over the operation and maintenance of the railroad in exchange for paying the plaintiffs a certain percentage of the railroad fare to compensate them for their equity in the railroad. At the expiration of the original agreement, the plaintiffs exercised their option to renew as per the terms of the supplemental agreement. Six years later, the successor to the Park Commission refused to make any further repairs to the railroad and discontinued its use.

The lower court specifically enforced the agreement and ordered the state to provide plaintiffs with an operable railroad which the plaintiffs could run. The Supreme Court of Montana affirmed the lower court's decree, but ordered the state to complete its performance of the agreement by constructing a working railroad within two years from the date of the issuance of the opinion. In so holding, the court rejected the State's argument that granting specific performance of the agreement would require the court to engage in "continuous protracted supervision and direction with the requirement of special knowledge, skill and judgment." \textit{Id.} at 483, 591 P.2d at 222. In support of its position, the Montana Supreme Court observed that "[a] court sitting in equity has all of the power requisite to render justice between the parties, particularly where 'the intent and disposition of the department is not to perform its contractual obligations.'" \textit{Id.} (quoting District Court's Conclusion of Law K).
\item \textsuperscript{176} Kelly, \textit{Workers' Compensation and the Periodic Payment Settlement Technique}, INS. COUNS. J., Oct. 1981, at 659, 660.
\end{enumerate}
\end{footnotesize}
worker in the future are unknown at the time when the state commission or other appropriate body determines the initial award. Provisions for reopening cases and modifying awards exist in every jurisdiction to combat this uncertainty, but the laws of each state vary significantly with respect to the qualifications and limitations upon a claimant's right to seek modification. 177 In nearly all jurisdictions, however, the exercise of retained jurisdiction by the state worker's compensation commission is the vehicle through which worker's compensation awards are modified.

Although disability awards may be classified either as permanent or temporary, retained jurisdiction typically is exercised on a long-term basis with respect to permanent disability awards. Some states place a ceiling upon the number of weeks for which permanent disability can be granted, 178 while others allow a claimant to receive permanent disability for life. 179 States also differ with respect to the time limitations placed upon the commission's authority to reopen and modify all disability awards. 180 The number of years for which a commission can retain jurisdiction over a particular case thus depends upon the state's particular rules governing the duration of the original award or the duration of the modification period, or both. 181

In a few states such as New York, 182 Maryland, 183 and North


178. See, e.g., N.M. STAT. ANN. §§ 52-1-41, 52-1-42 (1978) (award of either permanent total or partial permanent disability may not exceed 600 weeks).

179. See, e.g., ILL. ANN. STAT. ch. 48, paras. 138.8(7)(b), 138.8(e) and 138.8(f) (Smith-Hurd 1986) (allowing total permanent disability for the claimant's life but limiting awards of partial permanent disability resulting from loss of specific members of the body to set periods of time); N.Y. WORK. COMP. LAW § 15(1) (allowing awards of permanent total disability for the entire term of the disability).

180. See infra notes 191-95 and accompanying text.

181. See infra 197-209 and accompanying text.

182. See N.Y. WORK. COMP. LAW § 123 ("The power and jurisdiction of the board over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings, awards, decisions or orders relating thereto, as in its opinion may be just . . . "); Desrosiers v. A. Filkins, Inc., 11 A.D.2d 820, 202 N.Y.S.2d 814 (1960) (Under § 123 of statute granting Board continuing jurisdiction over all matters before it, the case was properly reopened in the interest of justice although medical evidence did not establish change in condition of injured employee); Landrum v. Empire Carriers Corp., 2 A.D.2d 912, 156 N.Y.S.2d 448 (1956) (Board did not exceed limits of its discretion under statutory grant of continuing jurisdiction in reopening case to permit consideration of claim for double compensation on ground that claimant was under 18 at time of the accident after Board had awarded single compensation and closed the case). But see Palmeri v. E.I. DuPont DeNemours & Co., 3 A.D.2d 782, 160 N.Y.S.2d 62 (1957) (court assumed, without
Dakota, statutes exist which invest the commission with a broad scope of authority to reopen worker’s compensation cases “in the interest of justice or for any good reason.” North Dakota, for example, has a statute which provides that if the original claim for compensation was properly filed, the commission may review the award “at any time . . . and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.” In discussing that state’s worker’s compensation laws, the North Dakota Supreme Court observed: “There appears to be nothing in our statute and no case law in our state which limits the bureau to reopening an award only upon proof of a change in the claimant’s condition.” North Dakota thus insures, without qualification, the ongoing jurisdiction of the state commission for an indefinite period of time. The effect of this approach is to preclude the operation of res judicata with respect to all commission decisions on all issues.

For reasons of administrative convenience, most jurisdictions impose some limitations on a commission’s power to reopen and deciding, that Board’s statutory power to reopen cases under § 123 of the Workmen’s Compensation Law is limited by § 22 to cases where there has been a “change of condition”).

183. See Md. Ann. Code art. 101, § 40(c) (1986) (“The powers and jurisdiction of the Commission over each case shall be continuing, and it may, from time to time, make such modifications or changes with respect to former findings or orders with respect thereto as in its opinion may be justified . . . . ”); Industrial Commission Rules of Procedure No. 11 (providing that Commission can modify awards upon application of a party only upon changed conditions, but can exercise unqualified continuing jurisdiction upon its own motion “and for reasons deemed by it to be sufficient” can “make such modification or change with respect to its former findings or orders relating to any such case as in its opinion may be just”); Subsequent Injury Fund v. Baker, 40 Md. App. 339, 345, 392 A.2d 94, 98 (1978) (“Maryland, which has one of the broadest re-opening statutes, not only gives the Commission continuing jurisdiction over each case, it also invests the Commission with blanket power to make such changes as in its opinion may be justified.”); Stevenson v. Hill, 170 Md. 676, 684, 185 A. 551, 555 (1936) (observing that the Commission’s power to reopen is not limited to cases in which the disability has become aggravated, diminished or terminated).

184. See infra notes 186-88 and accompanying text.


188. See id. at 107-08. In Haggart, the court held that a 1962 award of temporary total disability payments was not res judicata of any issue and that when the Bureau granted the employer’s petition for a rehearing of a 1963 award of permanent total disability and permitted the employer “to go into all the issues, not just that of whether the injury was temporary or permanent, the case was before the Bureau just as though those issues were being faced for the first time.” Id. at 108.
modify awards. Typically, a claimant must prove mistake or fraud, present newly discovered evidence, or show that his condition has changed since the initial award. Moreover, although some states do not place any time limitations upon the commission’s authority to reopen a case and modify an award due to a claimant’s changed condition, the majority of jurisdictions preclude the commission from reopening a case after a certain period. The methods by which states limit the modification period include setting fixed periods for modification running from the time of the injury, the award date, or the date of final payment.

Many jurisdictions allow the state commission to exercise retained jurisdiction over a worker’s compensation case on a long-term basis. This authority arises by virtue of the rules governing the duration of the original award or the relevant modification period, or both. For example, the New Mexico statute enables the commission to retain jurisdiction to modify awards for over eleven

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189. A. Larson, supra note 185, § 81.00.

190. See, e.g., Ky. Rev. Stat. Ann. § 342.125 (Baldwin 1969); Nev. Rev. Stat. § 616.545 (1979); Buxton v. Industrial Comm’n, 587 P.2d 121, 123 (Utah 1978) (In discussing the statute permitting the Industrial Commission to make modifications of its former orders as “in its opinion may be justified,” the Utah Supreme Court observed that the Utah Workmen’s Compensation Act has been construed to “require, as the basis of modification, evidence of some significant change or new development in the claimant’s injury or proof of the previous award’s inadequacy.”) (citations omitted); Comment, Vermont Workers’ Compensation Cases, supra note 177, at 289-90. See also Nackley, The Continuing Jurisdiction of the Ohio Industrial Commission, 4 Ohio N.U.L. Rev. 727, 731-34 (1977) (observing that the Ohio statute which confers unqualified continuing jurisdiction on the Industrial Commission for a set period of time appears to be limited by judicial interpretations requiring evidence of new or changed conditions to support modifications of final orders).

191. Comment, Vermont Workers’ Compensation Cases, supra note 177, at 290 n.13. The comment also notes that although Vermont’s modification statute, V.T. Stat. Ann. tit. 21, § 668 (1978), does not contain any time limitation, the only relevant case, Bosquet v. Howe Scale Co., 96 Vt. 364, 120 A. 171 (1923), has interpreted the statute as requiring that any modifications occur before the pending compensation claim is disposed of, thus preventing a reopening after the final payment from the original award. Comment, Vermont Workers’ Compensation Cases, supra note 177, at 291-94.

192. A. Larson, supra note 185, § 18.21.


194. See, e.g., Ill. Ann. Stat. ch. 48, para. 138.19(h) (Smith-Hurd 1983) (jurisdiction continued for 30 months after award date to modify award at the request of either party). But see id., para. 138.8(g) (every award for permanent total disability is subject “to annual adjustments as to the amount of the compensation rate therein provided”).


196. See A. Larson, supra note 185, § 81.53(a), for list of jurisdictions.
years.\(^{197}\) In West Virginia, the commission’s authority to modify an award of permanent disability can be exercised for an indefinite period of time, as the operative statute allows a case involving a permanent disability award for a non-fatal injury to be reopened within a five-year period “after the Commissioner shall have made the last payment in the original award or any subsequent increase.”\(^ {198}\) Similarly, in those states lacking any time limitation on modifying disability awards,\(^ {199}\) the respective commissions presumably retain jurisdiction over a case until the claimant’s death.\(^ {200}\)

In those jurisdictions where the commission retains jurisdiction for a substantial period of time, modifications of the original award have been allowed many years after the initial award was rendered.\(^ {201}\) The principle of res judicata generally does not bar a subsequent modification upon a showing of changed circumstances because a compensation award is regarded as adjudicating the claimant’s condition at the time the award is entered and is not determinative of the claimant’s future condition.\(^ {202}\) Metropolitan Casualty Insurance Co. v. Industrial Commission,\(^ {203}\) a Wisconsin case, involved a petition for modification filed over twenty years after the

\(^{197}\) In Churchill v. City of Alburquerque, 66 N.M. 325, 327, 347 P.2d 752, 752, 753 (1959), the court held that in New Mexico a judgment involving disability is not final until the full statutory period of 550 weeks has passed, and therefore the court automatically retains jurisdiction during this period to modify awards. N.M. Stat. Ann. § 52-1-41A (1978) now provides for permanent disability up to 600 weeks.

\(^{198}\) W. Va. Code § 24-4-16 (1985) (emphasis supplied). See also Gregg v. Sun Oil Co., 388 N.E.2d 388, 390 (Ind. 1979) (Commission can adjudicate applications for increases of awards so long as they are “filed within one year from the last day on which compensation was paid, either under the original award or a previous modification . . . .”) (footnote omitted). (emphasis supplied); Md. Ann. Code art. 101, § 40(b) & (c) (1985) (continuing jurisdiction to readjust payments so long as the application for such modifications are “made to the Commission within five years next following the last payment of compensation”).

\(^{199}\) See Comment, Vermont Workers’ Compensation Cases, supra note 177, at 290 n.13.

\(^{200}\) See, e.g., Nev. Rev. Stat. § 616.545 (1979) (“If a change of circumstances warrants an increase or rearrangement of compensation during the life of an injured employee, application may be made therefor.”) (emphasis supplied); Minn. Stat. Ann. § 176.461 (Supp. 1983) (“[T]he worker’s compensation court of appeals, for cause, at any time after an award, upon application of either party . . . may set the award aside and grant a new hearing . . . .”).

\(^{201}\) For example, New York has taken steps to alleviate the possible problems this could cause by creating a special “fund for reopened cases” out of which claims based on cases reopened at least seven years after an injury and three years after the last compensation payment are paid. See N.Y. Work. Comp. Law § 25-a (McKinney 1965). The statute also provides that no claim will be allowed against the fund unless filed within “eighteen years from the date of the injury or death and . . . eighty years from the date of the last payment of compensation.” Id. § 25-a(6).

\(^{202}\) See infra notes 261-62 and accompanying text.

\(^{203}\) 260 Wis. 298, 50 N.W.2d 399 (1951).
initial injury. In that case, the employee was injured in the autumn of 1927 but did not suffer a disability from the accident until August 1928.\textsuperscript{204} He received a sum for his disability in the fall of 1928.\textsuperscript{205} In May 1949, the employee filed a second claim with respect to the 1927 injury, and the commission issued an interlocutory order requiring the insurance company\textsuperscript{206} to pay for medical services rendered to the claimant in 1948 and 1949, and reserving jurisdiction as to the duration and extent of the claimant’s disability.\textsuperscript{207} The Supreme Court of Wisconsin affirmed the commission’s order, holding that the state’s six-year statute of limitations\textsuperscript{208} applies only to the time in which a claimant must institute proceedings, and that the limitation had no application once proceedings have been commenced.\textsuperscript{209}

In contrast to the time limitations which may exist with respect to modifying disability benefits, most states lack a limitation on the period of time for which a claimant can recover medical benefits in a worker’s compensation case. Instead, many states require that an employer pay all initial, as well continuing, medical, surgical, supply, and retraining costs until the claimant is cured or ready to reenter the work force either in his previous capacity or in a new position.\textsuperscript{210} The exercise of retained jurisdiction by the state commission is critical in this context, as it is the mechanism through which these continuing medical benefits are awarded. Due to the absence of any time limitations on these awards, a commission can be called upon to enforce a claim for medical benefits long after the issuance of the original award. Thus, in Andrew v. Decker,\textsuperscript{211} the Maryland

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\item \textsuperscript{204} Id. at 299-300, 50 N.W.2d at 400. The employee, a shoe factory worker, injured his left ankle when a shoe rack fell on him. In August 1928, he developed an ulcer as a result of the injury and was disabled until October 13, 1928. Id.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id. at 300-01, 50 N.W.2d at 400. The employer corporation was dissolved in 1939, but the Metropolitan court held that the dissolution did not terminate the insurance carrier’s liability. Id. at 309, 50 N.W.2d at 404.
\item \textsuperscript{207} Id. at 301, 50 N.W.2d at 401.
\item \textsuperscript{208} Ch. 453, § 3, Laws of 1929 (currently Wis. Stat. Ann. § 102.17(4) (West 1973)) which provides: “The right of an employee to proceed under Section 102.17 shall not extend beyond 12 years from the date of injury or death or from the date that compensation, other than treatment or burial expenses, was last paid, whichever date is latest.”
\item \textsuperscript{209} Metropolitan, 260 Wis. at 306-07, 50 N.W.2d at 403.
\item \textsuperscript{211} 245 Md. 459, 226 A.2d 241 (1967).
\end{itemize}
Court of Appeals upheld a claim for medical expenses in a worker’s compensation case even though the claim was made twelve years after the last payment under the original award. In so holding, the court observed that the liability of the employer to furnish free nursing services and treatment is not subject to a period of limitations.\textsuperscript{212}

A state commission also can expressly reserve jurisdiction in a given situation, in effect investing the commission with continuing jurisdiction. This approach typically is invoked when a commission cannot determine the extent of a claimant’s permanent disability at the time of hearing and when the medical evidence suggests the need for future treatment. In such instances, any order entered by the commission will not be regarded as final, and the commission may retain jurisdiction for an indefinite period.\textsuperscript{213}

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\textsuperscript{212} Id. at 463, 226 A.2d at 243. See also Castellano’s v. Industrial Comm’n, 15 Ariz. App. 319, 488 P.2d 675 (1971) (reopened medical award 18 years after injury); Workman’s Compensation Dep’t v. Niezaag, 452 P.2d 214 (Wyo. 1969) (reopening for further medical benefits 14 years after injury).

\textsuperscript{213} In Wisconsin, for example, the following test is utilized for reserving jurisdiction in this context: An employee’s disability is no longer temporary when the point is reached that there has occurred all of the improvement that is likely to occur as a result of treatment and convalescence. At such point the commission is enabled to make a determination of percentage of permanent disability and award compensation benefits therefor. If the record before the commission indicates that a definite determination cannot then be made that the employee will not sustain a greater percentage of disability in the future the commission should reserve jurisdiction by making its award interlocutory.

Larsen Co. v. Industrial Comm’n, 9 Wis. 2d 386, 392-93, 101 N.W.2d 129, 132 (1960). See also Manitowoc County v. Department of Industry, Labor & Human Relations (ILHR), 88 Wis. 2d 430, 276 N.W.2d 755 (1979) (affirmed retained jurisdiction; credible medical evidence showed that claimant’s permanent disability likely to increase); County of Vernon v. Department of ILHR, 60 Wis. 2d 736, 211 N.W.2d 441 (1973) (reserving jurisdiction regarding permanent disability). Courts in other jurisdictions have also approved decisions of state commissions to retain jurisdiction to make an award of permanent disability benefits. See, e.g., Reynolds v. Browning Ferris Indus., 106 Idaho 894, 684 P.2d 296 (1984) (retention of jurisdiction “for a reasonable time” pending completion of claimant’s retraining and subsequent final permanent disability rating when the anticipated retraining period exceeded the state’s five year limitation for modification of awards and pending the determination of a final impairment rating when the effects of claimant’s degenerative medical condition would probably become evident over a period of time exceeding the five year limit); Brooks v. Duncan, 96 Idaho 579, 583, 532 P.2d 921, 925 (1975) (the relevant statutes “do not set any public policy limiting the amount of time within which the Industrial Commission can retain jurisdiction after making a temporary allowance in order to make a final permanent award to an injured employee”); Pratt v. Central Upholstery Co., 252 N.C. 716, 720, 722, 115 S.E.2d 27, 32-33 (1960) (“Commission does not exceed its authority when it retains jurisdiction for further adjustments pending final award.”). See generally, A. Larson, supra note 185, at § 81.53(a).

In addition, sometimes a commission will retain jurisdiction for a specific purpose for only a limited period of time. See, e.g., Boccarossa v. Nationwide MutuMutual Ins. Co., 104 R.I. 711,
In some jurisdictions, the commission's authority to retain jurisdiction is broadly interpreted. In Wisconsin, for example, the state supreme court held that an interlocutory order of the commission which specifically reserved jurisdiction only with regard to permanent disability and medical treatment did not prevent the commission from awarding further temporary disability benefits where there was no finding that the claimant's healing period had ended.\textsuperscript{214} The court noted cases holding that res judicata does not apply to interlocutory orders of the Industrial Commission\textsuperscript{215} and rejected the employer's contention that retaining jurisdiction over a single issue does not reserve the power to reconsider all issues.\textsuperscript{216}

Other jurisdictions take a more narrow view regarding the scope of the commission's authority to retain jurisdiction. In \textit{Trigg v. Industrial Commission},\textsuperscript{217} the Illinois Commission ordered payment of the award to the employee's widow as the employee's "sole dependent," and stated that the award was "subject to the further order of this Commission."\textsuperscript{218} When the widow remarried, the daughter petitioned the commission for the balance of the award, alleging that the initial order reserved jurisdiction in the commission "to make such further orders therein as it might deem proper."\textsuperscript{219} The state supreme court rejected this argument and held that the prior order was res judicata because under the existing statute the commission lacked the authority to reopen its prior order which determined the widow to be the sole dependent.\textsuperscript{220} In so holding, the court drew a distinction between retaining jurisdiction over a matter which remained open for future adjudication "and a general order purporting to reserve jurisdiction over a cause when an order has been entered covering and adjudicating all matters in

\textsuperscript{214} American Motors Corp. v. Industrial Comm'n, 26 Wis. 2d 165, 132 N.W.2d 238 (1965).
\textsuperscript{215} Id. at 170 n.6, 132 N.W.2d at 241 n.6.
\textsuperscript{216} Id. at 169, 132 N.W.2d at 240-41.
\textsuperscript{217} 364 Ill. 581, 5 N.E.2d 394 (1936).
\textsuperscript{218} Id. at 583, 5 N.E.2d at 395.
\textsuperscript{219} Id. at 585, 5 N.E.2d at 396.
\textsuperscript{220} Id. at 588-89, 5 N.E.2d at 398. In this regard, the court also observed:
To permit a general reservation of a cause after an order determining those who constitute the dependents of the deceased at the time of his death, fixing the award and directing payment to a named dependent for her sole support, would be judicial legislation by judgment. There would be no place in the course of the litigation where and when it could be definitely known that it had ended.
Id. at 587-88, 5 N.E.2d at 397.
issue." According to the court, the commission may retain jurisdiction in the former situation, but it lacks the power to relitigate, review, vacate, or modify matters decided in the latter instance.222 Similarly, in Call v. Benevolent and Protective Order of Elks,223 the Supreme Court of South Dakota stated that although retaining jurisdiction "is a legitimate and logical method for the department to utilize in administering the provisions of the worker's compensation statutes," it "should be used cautiously and only in exceptional cases."224 The court further noted that even if the Department of Labor retains jurisdiction over one or more specific issues, it should enter a final order in all other matters so that the process does not "provide a secondary means of reviewing an otherwise final order."225

Sometimes a state commission will not expressly reserve jurisdiction over a particular matter but will do so by implication. In these instances, courts generally will uphold the commission's exercise of continuing jurisdiction.226 For example, in Williams v. Safeway Stores,227 the Alaska Supreme Court held that the state board's order impliedly reserved jurisdiction regarding the degree of the claimant's permanent disability by stating that the claimant's condition of permanent partial disability had changed from the original determination of fifteen percent "to an undetermined degree."228 The court emphasized the medical reports before the

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221. Id. at 588, 5 N.E.2d at 397.
222. Id. See also Sanz v. Eden Roc Hotel, 140 So. 2d 104, 107 (Fla. 1962) (deputy lacks power to relitigate or review matter decided by order entered after adjudicating all matters at issue whereas he can retain jurisdiction over a matter which is postponed for future adjudication).
224. Id. at 140.
225. Id. In Call, the court affirmed the Department of Labor's reservation of jurisdiction regarding compensation for the claimant's partial disability until the time when the degree of such disability was capable of proof. The court noted, however, that because the department entered a final order denying the claimant's petition for temporary total and permanent total disability, "those issues are res judicata" and could only be modified upon a showing of changed conditions pursuant to the statutory provision. Id. See infra notes 257-62 and accompanying text.
226. See generally A. Larson, supra note 185, § 81-53(b) and cases cited therein.
228. Id. at 1088. In July 1966, the Board awarded the claimant temporary total disability and 15% permanent partial disability compensation. The claimant then petitioned for a modification of the original award, and while that petition was pending, underwent a spinal fusion operation. At the time of the hearing on the modification petition, the claimant's doctors were not able to rate his degree of permanent disability, and the order which the Board issued in 1968 on the modification petition reflects this uncertainty. The Safeway action was opened in 1972 when the claimant requested that the Board reopen consideration of
board which presumed permanent disability but found that the degree of such disability could not be rated at the time of the hearing, and suggested that the language of the board's order must be viewed "in its evidentiary context." Nevertheless, the court observed that "whether jurisdiction is impliedly reserved is inherently a case-by-case determination" and cautioned that such an implied reservation of jurisdiction should be found "[o]nly in the exceptional case." Other courts have found an implied reservation of jurisdiction even where the commission's order lacked any language which would support continuing jurisdiction. Thus, in Palmeri v. Riggs-Sargent, Inc., an Indiana Appellate Court ruled that the Industrial Board's jurisdiction regarding the claimant's permanent partial disability continued indefinitely where the claimant had originally requested both permanent partial and total temporary disability and where the board apparently never ruled on the issue of permanent disability.

In sum, although the laws of each state vary regarding both the circumstances under which continuing jurisdiction may be reserved, and the applicable time limitations on such jurisdiction, the general scheme of worker's compensation allows the appropriate state commission to retain jurisdiction in numerous instances. Indeed, this continuing jurisdiction is critical if the spirit of the law is to be effectuated and justice served.

his permanent total disability compensation. Id. The Board's 1968 modification order which was at issue in Safeway provided in pertinent part: "That the petition for modification is granted, and the Board's July 19, 1965 order is hereby modified. The applicant's condition of permanent partial disability has changed from 15 percent as of February 7, 1966 to an undetermined degree..." Id. at 1090. In holding that the Board had impliedly reserved jurisdiction over the issue of permanent disability, the court stated: "In its evidentiary context, the board's quoted language verges upon an express reservation of jurisdiction. Short of the phrase, 'we reserve jurisdiction to determine permanent disability,' the board could not have indicated more clearly that further compensation proceedings were contemplated as soon as [the claimant's] condition stabilized." Id. at 1091.

229. Id. at 1091-92.
230. Id. at 1091. See also Druley v. Keller, 14 Ohio Misc. 81, 236 N.E.2d 228 (1966) (Commission's original ruling on claimant's petition for medical bills which stated "[w]hen claimant or her counsel submit proper paid bills covering the amounts she wished refunded, claimant's motion be further considered" held to be vague regarding any time limitations for compliance; commission retained jurisdiction to consider claimant's petition for reimbursement filed six years later).

232. Id. See also Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960) (claimant's post-surgery condition had not been determined sufficiently for complete assessment of all claimant's compensation rights; Commission's approval was a preliminary and interlocutory award).
E. Other Contexts

The foregoing discussion is not intended to provide an exhaustive review of all of the areas in which the judiciary has utilized retained jurisdiction. The potential for retained jurisdiction exists whenever a judgment is rendered which is payable on a periodic basis rather than in a lump sum. Moreover, cases involving anti-

233. Periodic payments are authorized by statutes allowing a judgment debtor with limited financial resources to pay from his income or by installments. See, e.g., N.J. REV. STAT. § 2A:17-64 (1952) (authorizing installment payments and allowing either party to petition for modification of the order at any time); N.Y. C.P.L.R. § 5226 (McKinney 1978). In addition, a form of periodic payment is now used under many no-fault automobile insurance statutes. See Elligett, The Periodic Payment of Judgments, 46 INS. COUN. J., Jan., 1979, at 130, 133.

Recently, much attention has been focused on the adoption of a periodic payment procedure in the context of tort claims. See American Bank and Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 369, 683 P.2d 670, 674, 204 Cal. Rptr. 671, 677 (1984) (upholding constitutionality of state statute providing for periodic payment of future damages in a medical malpractice action). In 1980, the National Conference of Commissioners on Uniform State Laws approved the “Model Periodic Payment of Judgments Act” which utilizes this approach for compensating future tort damage awards. Although no state has yet adopted the Model Act, several states have enacted laws which permit periodic payment of the future damage component of medical malpractice awards. See generally Hillard, Alternative Recovery Methods: Structured Settlements and Periodic Payment of Judgments, 34 FIC Q., Spr. 1984, at 237, 262-69 (citing representative statutes).

Some of these periodic payment statutes governing medical malpractice awards allow modification of the award in certain instances, thus triggering the operation of retained jurisdiction. See, e.g., ALASKA CIV. PROC. CODE § 09.55.548(a) (1983) (authorizing annual cost of living adjustments for unpaid payments); CAL. CIV. PROC. CODE § 667.7 (1980) (allowing court to order all payments and resulting damages in event judgment debtor continually fails to make payments and providing for modification upon judgment creditor’s death upon petition of any party); N.M. STAT. ANN. §§ 41-5-7B, 41-5-9A (1986) (court retains jurisdiction to adjust periodic payment award for future medical care). See also Elligett, supra at 140-44 (in discussing possibilities of reevaluation and reversion of tort judgment awards payable on a periodic basis, author notes potential burden such procedures could place upon the judiciary); Note, Damages-Installment Verdict in Tort Action, 12 VAND. L. REV. 490, 492 (1959) (noting that a court in a tort action may have to retain jurisdiction to order the entire judgment due where the judgment debtor fails to make a payment, but that retained jurisdiction for this purpose should not be problematic in those jurisdictions where law and equity are joined).

Case authority in this general area is sparse, but at least one state supreme court has found no constitutional objection to a provision in the state Medical Malpractice Act allowing modification or termination of judgments on the basis of specified contingencies stated in advance of the original judgment, assuming such provision referred only to periodic payments rather than lump sum awards. See Arneson v. Olson, 270 N.W.2d 125, 137 (N.D. 1978) (holding statute unconstitutional on other grounds). Installment judgments absent statutory authorization are rare in the tort area, but one state supreme court has upheld a jury verdict awarding a personal injury plaintiff $36,000 payable in monthly installments payments of $150 over a period of 20 years. M & P Stores, Inc. v. Taylor, 326 P.2d 804 (Okla. 1958). In Taylor, the trial court struck the jury’s periodic payment procedure subsequent to its discharge of the jury and the Oklahoma supreme court held that “after the acceptance of the verdict and discharge of the jury the court is without authority to change the verdict.” Id. at 808. The supreme court clearly disapproved of the installment payment procedure, however, and it is therefore unclear whether such a verdict would be upheld if the defendant objected to it a
trust and civil rights injunctions also demonstrate the judiciary's willingness to exercise long-term supervision over contentious parties.\textsuperscript{234} Even the 1984 Bankruptcy Act implicitly authorizes retained jurisdiction in a number of contexts, such as permitting the court to modify the payments of the debtor-in-possession before the completion of his payments under the plan.\textsuperscript{235} Given the numerous instances in which the doctrine is invoked, it is necessary to ques-

\textsuperscript{234} See Schwartz, supra note 152, at 293. The landmark case on the subject of antitrust divestiture under the Sherman Act involves Swift & Company and several other meat packing companies. In a consent decree entered into in 1920, all of the defendant companies were required to divest themselves of their various subsidiary food processing companies and were restricted to the operation of meat packing units. In the last paragraph of this order, the court specifically retained jurisdiction to alter the order and take any other necessary action. See United States v. Swift & Co., No. 37623 (D.C. Sup. Ct. Feb. 27, 1920). This provision for retained jurisdiction was exercised as late as 1960, although the court in that case declined to alter the original order. See United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill. 1960).

In the civil rights area, the retained jurisdiction approach is illustrated by Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964), wherein the court preliminarily enjoined the Alabama County Board of Education from operating a compulsory biracial school system. The express reservation of jurisdiction provided for by the court in \textit{Carr} was invoked many times during the course of the litigation surrounding the case. For a comprehensive treatment of the first five years of litigation in this school desegregation case, see O. Fiss, \textit{Injunctions} 415-81 (1972).

\textsuperscript{235} In Chapter 13 of the 1984 Bankruptcy Code, which governs wage earners, the section authorizing post-confirmation modification provides, in pertinent part:

\textit{Modification of Plan After Confirmation} (a) At any time after confirmation but before the completion of payments under a plan, the plan may be modified to—(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; or (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan. . . . (c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329. Section 1322(c) provides that the original plan "may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." 11 U.S.C. § 1322(c). Thus, the statute provides the same three-year limit on the repayment period under the modified plan as is imposed on the original plan, absent the court's approval for a cause of a longer period not exceeding five years. Presumably, the court retains jurisdiction during the repayment period for the purpose of approving modifications of the plan.

The Code also provides for post-confirmation modifications under Chapter 11 proceedings governing business reorganizations, see 11 U.S.C. § 1127(b) (allowing post-confirmation modifications only if circumstances warrant such modification). Moreover, in all bankruptcy proceedings, the court is authorized to reopen a case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350. \textit{See also} 11 U.S.C. § 945 (providing for retained jurisdiction over a case "for such period of time as is necessary for the successful execution of the plan" in the context of cases involving bankrupt municipalities).
tion whether any significant differences exist between those areas in which retained jurisdiction successfully operates and the award of future damages to a lessor based on anticipatory breach.

III. THE VIABILITY OF RETAINED JURISDICTION IN A LESSOR'S DAMAGE ACTION BASED ON ANTICIPATORY BREACH

The forgoing discussion demonstrates that retained jurisdiction frequently is invoked to facilitate an equitable resolution of many types of legal disputes. Nevertheless, little precedent exists for the exercise of retained jurisdiction in a lessor's action against his defaulting tenant based on anticipatory breach. The judiciary's apparent reluctance to utilize retained jurisdiction in this context is indeed curious. Fundamental fairness concerns strongly favor its use and no legal issues or compelling policy arguments militate against the adoption of this approach.

Currently, most courts do not require a defaulting lessee to compensate his lessor for any future damages which are not reasonably capable of calculation at the time of the trial. This approach results in an arbitrary determination of damages and tends to penalize lessors in those situations where the value of the leased premises declines subsequent to the time period for which the court accords the lessor damages. Lessors who have entered into long-term leases are in an especially vulnerable position, particularly when the economic climate is such that the availability of rental units far exceeds the demand. Tenant defaults are most likely to occur in these circumstances, because an oversupply of rental units typically affords tenants the opportunity to negotiate very advantageous deals. If a landlord refuses to renegotiate the terms of a lease which is undesirable from the tenant's standpoint, the tenant can easily locate many more receptive lessors. Such periodic gluts of leased premises are a frequent occurrence in our country, and unfortunately neither their existence nor duration can be predicted with any degree of certainty.

If courts were to retain jurisdiction in damage actions by lessors based on anticipatory breach, lessors or their assigns would be afforded the opportunity to prove all of the damages suffered as a result of a particular tenant's unwarranted default. The court adju-

236. See supra notes 15-16 and accompanying text; supra notes 47-69 and accompanying text.
237. See supra text accompanying notes 16-17.
238. See Ross, supra note 18, at 58; Bayless, supra note 18, at 11.
239. See supra notes 18-21 and accompanying text.
indicating such a dispute would not be placed in the position of making a single arbitrary damage award but instead would periodically assess the damages. This approach insures the fulfillment of both parties’ expectations upon entering into the original lease, as the lessor is assured he will receive all of the sums to which he is entitled under the original contract, and the tenant is prohibited from paying less than the amount initially contemplated. Assuming a lessor has satisfied all of the covenants and obligations placed upon him by the original lease agreement, he should not be forced to suffer a financial loss just because circumstances beyond his control have lowered the rental value of his premises. Indeed, if the rental value of the premises rose sharply subsequent to the commencement of the lease term, the tenant of a long-term lease for a stipulated rent would expect to reap the benefit of his bargain and would have a cause of action against his lessor for an unwarranted eviction.240

In assessing whether the concept of retained jurisdiction would operate as successfully in the type of landlord-tenant dispute under consideration as it does in cases involving the areas of law discussed in the preceding section, two primary inquiries must be addressed. First, do any well-entrenched rules of law exist which would preclude the use of retained jurisdiction in damage actions by lessors based on anticipatory breach? The discussion of this issue will show that although the source of authority for retaining jurisdiction in this context is not as well defined as it is in the other areas examined, no legal basis exists to justify a court’s refusal to retain jurisdiction in this type of damage action. The second question which will be explored is whether the relevant practical difficulties associated with retained jurisdiction weigh more heavily in the landlord-tenant area than in the other areas reviewed. The analysis of this issue will disclose no significant differences in the inconvenience to the judiciary caused by retaining jurisdiction.

A. Legal Considerations

As the discussion in section II discloses, courts adjudicating divorce cases, probate courts, and state commissions hearing worker’s compensation claims generally derive their authority to retain jurisdiction over a particular cause from the governing state statutes.241 In contrast, specific performance is an equitable remedy and a court

240. See.Rectangle (Second) of Property § 10.2 (1976) (specifying tenant’s damages upon a lessor’s “failure to fulfill his obligations under the lease”).

241. But see supra notes 83, 100-01, and 117-23 and accompanying text.
of equity traditionally has broad discretion to grant any relief which it deems appropriate. Thus, it can be argued that absent specific statutory authority, no basis exists for permitting retained jurisdiction in an action for damages at law. Although this argument may have some superficial appeal, the following analysis demonstrates that it does not pose a major obstacle to the adoption of retained jurisdiction in a lessor's action at law for damages based on anticipatory breach.

The common law tradition generally regarded an award of damages as a final judgment, payable in a single sum and incapable of subsequent adjustment. With regard to the assessment of future damages, this single recovery rule has been criticized on the ground that it requires courts to exercise "the difficult and uncertain task of prophecy, with no chance for second-guessing where the prophesy turns out to be mistaken." Despite the force of such criticism, installment judgments, absent statutory authorization, are uncommon in actions at law for damages.

The situation is different in equity, however, as precedent exists for the abandonment of the single recovery rule. In *Holden v. Construction Machinery Company*, an action in equity for specific performance of an employment contract, the trial court elected to award damages on a continuing basis for an indefinite period of time rather than award a single lump sum. The case involved a dispute between two brothers who had agreed that both of them would have employment with the family corporation for an equal duration and that "their compensation, salaries and bonuses would

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242. "Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before." H.M. Clinton, McClintock on Equity § 29, at 76 (2d ed. 1948).

243. See Frankel v. United States, 321 F. Supp. 1331, 1340 (E.D. Pa. 1970) (concluding that the Single Recovery Rule was premised on the rationales of finality and judicial economy), aff'd sub nom., Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972) (suggesting it is not the province of the court to authorize novel awards; thus, until Congress affirmatively authorizes other than lump-sum money judgments, no other recovery is available); Note, Damages-Installment Verdict in Tort Action, supra note 233, at 490-91.

244. S. Schreiber, DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 21 (1965). Although the quoted comment appearing in the text was made in the context of damages awarded in wrongful death and personal injury actions, it would appear to be pertinent to any type of award with a future damage component.

245. See supra discussion of M & P Stores, Inc. v. Taylor, 326 P.2d 804 (Okla. 1955), note 233; Note, Damages-Installment Verdict in Tort Action, supra note 233, at 492 ("there will probably be very few, if any, installment judgments without legislative action, especially in tort and contract actions").

always be the same."\textsuperscript{247} The trial court was sensitive to the hostile relations between the brothers and, rather than grant specific performance of the employment contract, ordered that both parties to the suit file a verified statement of earnings on the first of each year so that the plaintiff could be awarded, on an annual basis, any difference in compensation which existed between the two brothers.\textsuperscript{248} The trial court also retained jurisdiction over the cause to "annually determine and adjudicate the compensation" due the plaintiff.\textsuperscript{249} In affirming this judgment, the Supreme Court of Iowa rejected the defendant's argument that no precedent existed to support such a continuing award, and instead emphasized the power of a court of equity to fashion an appropriate remedy.\textsuperscript{250}

If a court of equity has the power to retain jurisdiction to supervise an ongoing damage award, no logical reason exists to deny a court of law this same authority. Today courts of law and equity are joined in the majority of jurisdictions. Where this joinder has occurred, the trial courts of general jurisdiction exercise powers of both law and equity.\textsuperscript{251} Even in the few jurisdictions which still maintain separate courts of law and equity or separate divisions of a single court, the same procedures are used for both law and equity in all but a handful of states.\textsuperscript{252}

In the merged jurisdictions, the only basis for distinguishing an action at law from an action in equity is the type of relief requested by the plaintiff. This point can be illustrated in the context of \textit{Holden v. Construction Machinery Co.},\textsuperscript{253} discussed earlier. If the plaintiff in that case had requested damages rather than specific performance, the case would have been termed an action at law rather than an equity action. Had the action arose in one of the merged jurisdictions the same court would have decided the case regardless of its categorization as a legal or equitable action. In these jurisdictions, the argument for allowing courts to retain jurisdiction and award continuing damages despite the case's categorization as a legal action is especially persuasive. \textit{Holden} arose in Iowa, however, where actions at law and equity are tried by separate divisions.

\textsuperscript{247} Id. at 353.
\textsuperscript{248} Id. at 363.
\textsuperscript{249} Id. at 364.
\textsuperscript{250} Id. at 363-64.
\textsuperscript{251} See generally D. Dobbs, Remedies § 2.6 (1973).
\textsuperscript{252} Id. It should be noted, however, that even merged jurisdictions differentiate between law and equity cases with respect to the right to a jury trial. \textit{Id.}
\textsuperscript{253} 202 N.W.2d 348 (Iowa 1973).
of the same court.\footnote{254} Although a different judge would have presided over the case if it had been an action at law, both divisions adhere to the same rules of procedure.\footnote{255} The law judge therefore could have retained jurisdiction over the case just as easily as the equity judge had exercised this power in the actual case. Even in the few jurisdictions which still maintain separate procedures for law and equity actions,\footnote{256} no basis exists for granting one judicial branch the authority to retain jurisdiction and denying that same power to the other branch. Thus, any reluctance by courts deciding actions at law to abandoning the single recovery rule in appropriate cases and ordering damages payable periodically is justified only on the basis of the outmoded separation of law and equity, and this dichotomy is totally unwarranted in light of the current structure of our judicial system.

A second argument which might be advanced to preclude the operation of retained jurisdiction in a lessor's action for damages based on anticipatory breach is that the legal principle of res judicata bars a reassessment of damages subsequent to the initial award. The doctrine of res judicata prevents parties or their privies from relitigating facts and issues which were or could have been resolved by a court of competent jurisdiction in an earlier suit.\footnote{257} The doctrine seeks to preserve judicial economy by barring repetitious lawsuits involving the same cause of action.\footnote{258} This policy concern dictates that litigation come to a close and the matter contested between the parties be forever settled.\footnote{259} Thus, if a plaintiff has the right to recover present and future damages immediately for a breach of contract, res judicata will prevent a recovery of further damages for the same breach in a subsequent action.\footnote{260}

Under the retained jurisdiction approach advocated in this Article, the initial damage award could be viewed as an interlocutory rather than a final order. Thus, any hearing involving a reassess-
ment of damages would be considered a continuation of the original lawsuit rather than a new cause of action. This characterization of the reassessment hearing would eliminate completely any concerns based on res judicata as the doctrine only applies to separate causes of action.

Even if the original damage award is regarded as a final order, the doctrine of res judicata should not preclude the exercise of retained jurisdiction in this context. Despite the importance of the public policy furthered by res judicata, courts have cautioned against a strict application of the doctrine so as not to defeat the ends of justice. Thus, in situations where a material change in circumstances has occurred subsequent to the rendering of a judgment, res judicata will not act as a bar to the relitigation of issues affected by the altered conditions. This exception to the application of res judicata provides a basis for allowing a court to retain jurisdiction over a lessor's action for damages based on anticipatory breach. A lessor should not have to bear the burden of changes in the economy which result in a depression of the rental value of the vacated premises subsequent to the court's initial determination of damages. This is precisely the type of situation to which the change of circumstances exception to res judicata should apply.

Moreover, allowing a lessor to return to court to prove future damages will not create any more of a drain on the judicial system than currently is permissible. Recall that a tenant's liability to his lessor for an unwarranted default may be characterized either as rent or as damages. If the sums due the lessor are viewed as rent, the lessor must sue the defaulting tenant on a periodic basis as each installment falls due since a lessee's obligation to pay rent ordinarily cannot be accelerated. When a lessor sues for rent accruing subsequent to a prior judgment awarding past-due rent, courts have held that res judicata does not bar the subsequent suit because the plaintiff is suing for rents accruing after the prior adjudication, and therefore, the subsequent suit is based upon a different cause of action. Although an award of damages based on anticipatory

261. See, e.g., In re Di Carlo's Estate, 3 Cal. 2d 225, 44 P.2d 562 (1935).
262. See, e.g., Cloverlanes Bowl, Inc. v. Gordon, 46 Mich. App. 518, 524, 208 N.W.2d 598, 602 (1973) (first judgment not res judicata of plaintiff's rights to parcel of land stemming from subsequent zoning ordinance and condemnation suit). See also supra note 202 and accompanying text.
263. See supra notes 4-7 and accompanying text.
breach is distinguishable from periodic actions for rent in that the entire amount of damages theoretically is due and owing to the lessor at the time of the initial suit, the circumstances may be such that the future damages cannot be computed with certainty at the time of the initial trial. From a functional standpoint, if the judiciary can tolerate the burden placed upon its resources by periodic suits for rent, it clearly should be willing to permit subsequent reassessments of damage awards under a long-term lease. In any given case a reassessment undoubtedly would be required far less frequently than subsequent actions for monthly or annual installments of rent, and thus would pose much less of an inconvenience to the judiciary than the periodic actions which currently are sanctioned.

B. Practical Considerations

As the foregoing discussion regarding res judicata demonstrates, the utilization of retained jurisdiction in the context of a lessor’s action for damages based on anticipatory breach would not pose a greater burden upon the judiciary’s resources than presently exists in landlord-tenant disputes of this nature. Another question which must be explored is whether the practical difficulties associated with retaining jurisdiction are more burdensome in landlord-tenant actions than in other types of legal disputes. One area pertinent to this inquiry which merits examination is the relative length of time during which a court would have to exercise its continuing jurisdiction.

Many commercial leases are of a long-term nature. If courts were to retain jurisdiction for the purpose of reassessing a lessor’s damages, it is conceivable that a court would be called upon to exercise this power for close to a ninety-nine year period. Of course, this scenario assumes the existence of a ninety-nine year lease which was breached very early in the lease term. Most default situations probably would not involve such a lengthy period of time.

Even if the potential for a long-term supervisory period exists in the landlord-tenant context, the other areas reviewed in this Article also can involve prolonged time frames. For example, in divorce cases in which courts retain jurisdiction to modify maintenance and


265. Recall that in Hawkinson v. Johnson, 122 F.2d 724 (8th Cir.), cert. denied, 314 U.S. 694 (1941), the Eighth Circuit affirmed the trial court’s decision to fix the lessor’s future damages for a period of 10 years. See supra text accompanying notes 47-52.
custody orders, a court can exercise its authority to modify such provisions any time during the life of the divorced spouse receiving maintenance or during the minority of a child. Similarly, the foregoing discussion regarding worker's compensation demonstrates that in certain instances the state commission can retain jurisdiction over a cause for the entire life of the claimant.\textsuperscript{266} Finally, in disputes involving the probate process and specific enforcement of long-term contracts, courts may be faced with the prospect of retaining jurisdiction for an indefinite period of time.\textsuperscript{267} In light of these comparisons, the retention of jurisdiction by a court for the duration of a long-term commercial lease is not especially problematic.

Additional considerations bolster the argument for retained jurisdiction in a lessor's action for damages based on anticipatory breach. One important factor is that a court will not be required to engage in an arduous and complex process of supervision to satisfy its purpose in retaining jurisdiction in this context. The reassessment of damages merely should require a simple calculation by the court following a short hearing in which the lessor presents evidence of a further decline in the rental value of the premises. Even if several such hearings are necessary during the course of the unexpired lease term, the overall burden on the court would be minimal.

Another factor is that retained jurisdiction in the landlord-tenant context will not typically necessitate a continuing connection between the economic affairs of parties who once shared an intimate personal relationship. Although the relationships between most lessors and their defaulting lessees undoubtedly are not particularly amicable, the termination of a landlord-tenant relationship probably is not nearly as devastating to the parties as the termination of a marriage. Therefore, the problems resulting from continuing contact between ex-lesseors and lessees are not likely to be as great as those involving ex-spouses.\textsuperscript{268}

Of course, the retained jurisdiction approach advocated in this Article potentially will entail some practical difficulties. It is possible that a defaulting lessee will become bankrupt, die, or relocate during the unexpired lease term. Some standard mechanisms for dealing with these contingencies must be devised. In the case of a

\textsuperscript{266} See supra notes 198-212 and accompanying text.
\textsuperscript{267} See supra notes 141-44, 157, 161, 162, 168-75 and accompanying text.
\textsuperscript{268} See supra note 125 and accompanying text.
lessee's bankruptcy, any remaining damages due the lessor should be treated as all other debts owed by the lessee. The lessee's status as a business or individual should be immaterial in the case of bankruptcy, as the Bankruptcy Act governs both individual wage earners and businesses.\textsuperscript{269}

The death of a defaulting lessee will be an issue only where the lessee is an individual rather than a corporation. This problem will rarely surface, however, given that most long-term leases are commercial in nature. Nevertheless, when the death of a defaulting lessee who is individually liable occurs, the lessor can file a claim against the estate.\textsuperscript{270} Even though the total amount due the lessor may not be computable until shortly before the end of the unexpired lease term, the deceased lessee's representative can set aside a sum sufficient to cover any potential amount due the lessor. An interesting question may be raised as to whether the amount to be set aside should be determined by the court with original jurisdiction over the anticipatory breach action or the probate court supervising the administration of the estate. Presumably, this situation would be resolved by the general rule that "where actions have been commenced in different courts, having concurrent jurisdiction, that court should retain jurisdiction before whom proceedings may be first had, and whose jurisdiction first attaches."\textsuperscript{271} Thus, assuming that the defaulting lessee's death occurs subsequent to the lessor's institution of the anticipatory breach action, any disputed future damages should be resolved by the court with original jurisdiction over the landlord-tenant action.

Finally, the problem presented by defaulting lessees of long-term leases relocating to areas outside the jurisdiction of the original court is not likely to be great given that many commercial enterprises tend to remain in their original locations or expand rather than relocate to completely new areas. Nevertheless, in the event of such a relocation by either a commercial or individual lessee, the court which adjudicated the original anticipatory breach action should be able to exercise continuing in personam jurisdiction over the defendant for purposes of reassessing the damage award, assuming the defendant receives adequate notice of the reassessment proceeding. This is the position taken by divorce courts exercising

\textsuperscript{269} See supra note 235.

\textsuperscript{270} See, e.g., CAL. PROB. CODE § 700 (West 1956); ILL. ANN. STAT. § 18-1 (Smith-Hurd 1978); N.J. STAT. ANN. § 3B:22-4 (West 1983).

retained jurisdiction to modify support or custody orders when one or both of the parties involved has moved to an area outside the court's jurisdiction. The Second Restatement of Conflicts of Laws also endorses this approach by providing that once "a state obtains judicial jurisdiction over a party to an action, the jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action."

As a practical matter, it may be difficult for the lessor to obtain satisfaction of the reassessed damages if the lessee has left the state of original jurisdiction without leaving behind any assets. In these circumstances, the judgment rendered in the original state must be converted into a judgment in the forum where the lessee currently resides or transacts business. Presumably, if this second forum is a sister state of the first forum, the exercise of continuing jurisdiction by the original court and the existence of the reassessed damage award will entitle the new judgment to full faith and credit in the second forum. The defendant lessee therefore will be precluded from contesting the content of the new judgment or the supporting findings.

The above analysis illustrates that the concept of retained jurisdiction would function as effectively in a lessor's action for damages based on anticipatory breach as it does in the areas of divorce, probate, specific performance of long-term contracts, and worker's compensation. Despite the absence of specific statutory authority

272. Cox v. Cox, 457 F.2d 1190 (3d Cir. 1972) (Pursuant to Virgin Island statute providing for court's authority to modify alimony and custody any time after judgment, court has continuing in personam jurisdiction over both parties to divorce regarding custody matters, even though neither party currently is an inhabitant of jurisdiction.); Brown v. Brown, 506 P.2d 386 (Colo. Ct. App. 1972) (trial court acquired jurisdiction of ex-husband when he initiated divorce proceedings and thus has continuing in personam jurisdiction over him to modify child support orders and enforce such orders through its powers of contempt; service on ex-husband in another state was sufficient to provide suitable notice and an opportunity to be heard); Kosch v. Kosch, 113 So. 2d 547 (Fla. 1959) (divorce court exercising jurisdiction in original proceedings has jurisdiction over parties in supplemental proceeding to increase, decrease or enforce alimony or child support as long as reasonable notice with an opportunity to be heard is afforded out-of-state party). See also Freed & Foster, Family Law in the Fifty States: An Overview, 17 Fam. L.Q. 365, 424-25 (1984) (noting that many states have long-arm statutes which specifically allow jurisdiction over an out-of-state spouse in matters involving child support and maintenance).

273. Restatement (Second) of Conflict of Laws § 26 (1969). This section also provides that a party must receive "reasonable notice and reasonable opportunity to be heard . . . at each new step in the proceeding." See also N.Y. Civ. Prac. L. & R. 5226:5 (McKinney 1978) (after a judgment debtor has left New York permanently, a New York court should be allowed to exercise in personam jurisdiction over the debtor for an installment payment based on the court's "continuing jurisdiction" over the debtor for enforcement purposes).

for the use of retained jurisdiction in this context, no well-established rules of law would be violated by the adoption of this approach by courts adjudicating such damage actions. Courts of equity always have enjoyed a broad degree of discretion with respect to the fashioning of appropriate remedies. In light of the current merger of law and equity, a court adjudicating a dispute involving damages rather than equitable relief similarly should possess the authority to order the most equitable resolution.

Moreover, the foregoing examination of the relevant practical difficulties associated with retained jurisdiction reveals that the functional problems would not be of a greater magnitude in the landlord-tenant field than in those areas in which retained jurisdiction currently operates. Courts adjudicating the type of landlord-tenant dispute considered herein would not be confronted with a difficult process of supervision and the length of time for which jurisdiction would have to be retained in the majority of these actions probably is no greater than the duration required in other types of actions. Finally, any practical difficulties which are specific to the landlord-tenant area, such as the bankruptcy, death, or relocation of a defaulting lessee, can be resolved in a systematic fashion once the concept of retained jurisdiction becomes adopted.

IV. CONCLUSION

The adoption of anticipatory breach has facilitated a lessor’s expeditious recovery of losses resulting from a lessee’s unwarranted default. Nevertheless, if the doctrine of anticipatory breach is to achieve its maximum potential in this context, courts must take the additional step of retaining jurisdiction in such damage actions involving long-term leases when all of a lessor’s future damages cannot be predicted with certainty at the time of the initial trial. Precedent for the exercise of retained jurisdiction exists in several other legal contexts, and no compelling reasons justify the judiciary’s failure to adopt this approach in a lessor’s action for damages based on anticipatory breach. If courts were to invoke the concept of retained jurisdiction as discussed in this Article, lessors no longer would be forced to accept arbitrary determinations of their damages. Instead, lessors would be afforded the opportunity to realize all losses suffered as a result of a tenant’s unwarranted default.