

**A REVIEW OF MICHIGAN’S EQUITABLE PROPERTY DISTRIBUTION LAWS  
INCIDENT TO DIVORCE**

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**INTRODUCTION**

The process of “going through” a divorce is an agonizing, stressful, and life changing event for most people. The emotional and financial stresses that accompany the breakup of a marriage, particularly a long marriage, frequently begin when the parties start contemplating a divorce and last, in many instances, several years after the legal battles have been fought. One of the most stressful aspects of the divorce proceeding is the division of property. In Michigan, those stresses are further compounded by a complex statutory system whose hallmark is uncertainty.

The focus of this uncertainty centers around two issues. The first, and less contentious issue due to Michigan Court Rule 7.215<sup>1</sup> and the Court of Appeals’ decision in *Reeves v. Reeves*,<sup>2</sup> asks whether Michigan possesses a unitary classification version of the equitable property distribution system (“unitary classification”) or a dual classification version of the equitable property distribution system (“dual

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<sup>1</sup> See MCR 7.215 (I) (1) (2001). This court rule holds that “[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” *Id.*

<sup>2</sup> 226 Mich. App. 490, 575 N.W.2d 1 (1997).

classification”).<sup>3</sup> Despite the fact that the Michigan Supreme Court has not ruled on this particular subject, and that there exist excellent arguments for Michigan as a unitary classification system, it will be shown that Michigan has adopted a dual classification version of the equitable property distribution system.<sup>4</sup> The issue then becomes how to properly interpret Michigan’s statutory scheme—and, in terms of public policy, to what extent that system incorporates the marital partnership theory.<sup>5</sup>

This paper will focus on the above-mentioned issues and on the problems facing Michigan attorneys as they attempt to advocate for their clients. As such, the two different models of equitable distribution, dual classification and unitary classification will be examined. Additionally, this paper will briefly review the different arguments on this subject posed by Messrs. Brett R. Turner and John F. Schaefer, two preeminent attorneys in the field of family law.<sup>6</sup> The questions left unanswered by the Court of Appeals’ decision in *Reeves v. Reeves*, including the role of Michigan’s four property

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<sup>3</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 114. [hereinafter Turner, *Eating Jello With Chopsticks*]; see also Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115, 125-26 (1997). Both the unitary and dual classification property distribution systems are two different models within the equitable distribution system. See Turner, *Eating Jello With Chopsticks*, at 114. In short, a unitary system allows judges to divide all of the parties’ property—regardless of how or when it came to the owning party. See *id.* Ms. Bell refers to this method of distribution as the “kitchen sink” or “hotchpot” system. See Bell at 125.

<sup>4</sup> *Reeves v. Reeves*, 226 Mich. App. 490, 575 N.W.2d 1 (1997); see also *Daly v. Daly*, No. 217638, 2001 Mich. App. Lexis at \*2 (June, 8 2001); see also *McLean v. Mclean*, No. 223757, 2001 Mich. App. Lexis 802 at \*3-4 (April 27, 2001); see also *Bachran v. Bachran*, No. 226937, 2001 Mich. App. Lexis 1178 at \*6 (August 21, 2001); see also *Zerrenner v. Zerrenner*, No. 219301, 2001 Mich. App. Lexis 621 at \*2 (February 2, 2001).

<sup>5</sup> See Bell, *supra* note 3, at 124-25. “Equitable distribution is based upon the marital partnership theory adopted from community property law.” *Id.*

<sup>6</sup> Mr. Turner is the Editor-in-Chief of “Divorce Litigation” and works as a senior attorney with the National Legal Research Group based out of Charlottesville Virginia. See Turner, *Eating Jello With Chopsticks*, *supra* note 3, at 122. He has completed over 1000 research projects on family law issues over the past fifteen years. See *id.* He is a practicing member of the North Carolina Bar. See *id.* Mr. Schaefer is the founder and senior partner of the Law Firm of John F. Schaefer. See John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, 171 (2000). He has been an adjunct professor at Michigan State University-Detroit College of Law, a trustee of

division statutes, what exactly constitutes marital property, and how that property should be divided will also be addressed. Finally, it will be shown that the property distribution system adopted by Michigan incorporates the very best aspects of the marital partnership theory while accounting for its analytical weaknesses.

## **I. UNITARY CLASSIFICATION DIVISION**

In order to fully understand why some level of controversy persists over whether Michigan possesses a unitary classification or dual classification property distribution system, it is necessary to acquire at least a working knowledge of the differences between these two systems. The following two sections will highlight the major differences between the systems. Additionally, examples of other states' statutes that have clearer and more precise models of property distribution will be used to further demonstrate the complex and unique nature of Michigan's statutory system.

In its simplest description, a jurisdiction following the unitary classification system has the authority to divide any asset owned by the parties upon divorce "regardless of how and when the asset was acquired."<sup>7</sup> This is the model followed by such jurisdictions as Ohio and Massachusetts.<sup>8</sup> One very important distinction, however, between the model followed by Massachusetts and the model espoused by unitary property division advocates in Michigan is the fact that there exists statutory authority in

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the Detroit College of Law, and Chairperson of the Detroit College of Law foundation. *See id.* Mr. Schaefer is a member of the Michigan Bar and specializes in domestic relations. *See id.*

<sup>7</sup> John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, (2000).

<sup>8</sup> *See* Brett R. Turner, *Equitable Distribution of Property* 40 (2nd ed. 1994).

Massachusetts unequivocally identifying Massachusetts as a unitary classification jurisdiction.<sup>9</sup> There is no such clarity in Michigan.<sup>10</sup>

Reproduced for the reader's edification is a portion of the most important part of the Massachusetts statute.

In determining . . . the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of the parties and the opportunity of each for future acquisition of capital assets and income.

MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1993).

Those that advocate for a unitary classification system in Michigan necessarily argue that, although this list of express elements is not found in any of the Michigan statutes, it can be gleaned from a Supreme Court opinion.<sup>11</sup> That opinion, *Sparks v. Sparks*,<sup>12</sup> sets out a list of factors similar to those listed in the Massachusetts statute.<sup>13</sup>

The unitary property distribution system has received its share of criticism.<sup>14</sup> Its cited weaknesses include predictability and consistency.<sup>15</sup> Additionally, it may have a tendency to foster unnecessary litigation.<sup>16</sup>

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<sup>9</sup> See *id.* (citing MASS. GEN. LAWS ANN. ch. 208, § 34 (West. 1998)). The Massachusetts statute clearly states: "Upon divorce . . . [t]he court may assign to either the husband or wife all or any part of the state of the other, including but not limited to, all vested and non-vested benefits, rights and funds accrued during the marriage. . ." *Id.*

<sup>10</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 114; see also Schaefer, *supra* note 7, at 170. Advocates for a unitary classification system in Michigan can only convincingly advocate for this system by pre-supposing that Michigan's property distribution system is not entirely statutory in nature. See Schaefer, *supra* note 7, at 170.

<sup>11</sup> See Schaefer, *supra* note 7, at 169.

<sup>12</sup> 440 Mich. 141, 159-60, 485 N.W.2d 893, 901 (1992).

<sup>13</sup> See *Sparks v. Sparks*, 440 Mich. 141, 159-60, 485 N.W.2d 893, 901 (1992).

<sup>14</sup> See Turner, *Equitable Distribution of Property*, *supra* note 8, at 42. The unitary division system is sometimes criticized as an arbitrary and inherently unfair system of distribution. See *id.* Why, some have asked, should one party's separate inheritance be thrown 'into the mix' for division merely because the two parties had been married for a time? On the surface, the system appears to ignore the marital partnership theory and the idea that an award of property should take into account the individual contributions of the

## II. DUAL CLASSIFICATION PROPERTY DIVISION

Dual classification systems introduce two new terms to the property division lexicon, separate or non-marital property.<sup>17</sup> At the outset, before the property division begins, as a matter of law, the trial judge separates the property previously owned by the marital unit into two different categories.<sup>18</sup> One category is commonly referred to as marital property and the other is termed non-marital or separate property.<sup>19</sup> Essentially, “[s]eparate property is awarded to the owning spouse [and] marital property is divided equitably” between the two spouses.<sup>20</sup> Separate property is generally defined as that property which was acquired before the marriage, by inheritance, or by the personal efforts of only one of the parties.<sup>21</sup> The State of Virginia possesses a developed, dual classification system.<sup>22</sup>

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parties. *See id.* When implemented, however, this is not the case. *See id.* As Mr. Turner has noted, “[t]he all property [or unitary] system reaches fairer results in practice than one might first suspect.” *Id.* Most unitary or all-property division statutes, including the just reprinted Massachusetts statute, include in their terms some standard allowing for the court to take into account the contributions of the parties. *See id.* As a result, most courts in practice tend to award the majority of an asset’s value to the spouse who had contributed the majority of the asset’s value. *See id.* Generally, when courts stray from this logic, there is valid reasoning that can be found in one of the other factors. Those other factors may include the age, health, life status, or financial need of the parties. *See id.* Thus, the marital partnership theory remains a driving force behind unitary classification systems, albeit not as readily obvious as in a dual classification system. *See id.*

<sup>15</sup> *See id.* Mr. Turner notes that other perceived weaknesses of the unitary classification system include a lack of consistency and predictability, and a tendency to foster litigation. *See id.* Regarding consistency and predictability, although the statutes of the minority of states that follow the unitary system set out a list of factors that should be considered, the ultimate decision on how to divide the asset belongs to the trial judge. This great deal of discretion leads to inconsistent judgments and works to upset the predictability of the system. *See id.*

<sup>16</sup> *See id.* at 43. As a result of this unpredictability, greater emphasis is given to litigation. *See id.* Because every asset may be divided, and the parties may not necessarily be aware of the trial judge’s disposition, each asset is contested. Thus, litigation is increased.

<sup>17</sup> *See* Brett R. Turner, *Equitable Distribution of Property*, 43 (2<sup>nd</sup> ed. 1994).

<sup>18</sup> *See* Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, *Divorce Litigation*, June 2000, at 114.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* VA. CODE ANN. § 20-107.3 (2001); *see also* Michie’s *Jurisprudence of Virginia and West Virginia*, *Divorce and Alimony* § 50, 2 (2001). Michie’s jurisprudence also sheds some light on what is considered

The Virginia statute reads as follows:

Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, or upon filing with the court . . . the court upon request of either party, shall determine the legal title as between the parties, and the ownership and value of all property, real or personal, tangible or intangible, of the parties and shall consider which of such property is separate property, which is marital property, and which is part separate and part marital . . . .

VA. CODE ANN. § 20-107.3 (2001).

This paragraph is the first to appear in the Virginia statute, and just as clearly as Massachusetts indicates that it follows a unitary classification system, Virginia makes just as clear that it has adopted a dual classification system.<sup>23</sup> Furthermore, Virginia's statute clearly defines separate property. Virginia's statutory system presents a stark contrast to that of Michigan's. Unfortunately, Michigan's statutory system does not possess the clarity and simplicity found in Virginia's statutes.<sup>24</sup>

Separate property is (1) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party; (iii) all property acquired during the marriage in exchange for or the from the proceeds of a sale of separate property, provided that such property acquired during the marriage is maintained as separate property . . . . The increase in value of separate property during the marriage is separate property, unless marital property or personal efforts of either

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marital property. "All property acquired by either spouse during the marriage is presumed to be marital property in the absence of satisfactory evidence that it is separate property. . . ." *Id.*

<sup>22</sup> See John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, 170 (2000).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions.

VA CODE ANN. § 20-107.3 (2001).

Dual classification has also received a number of critiques. However, it is also often lauded as the fairer of the two systems, the more predictable, and the intuitively more acceptable of the two systems to the public.<sup>25</sup>

### III. MESSRS. TURNER'S AND SCHAEFER'S POSITIONS

There are, at present, two articles which discuss the controversy over whether Michigan possesses a dual or unitary classification system. In his article, *Eating Jello With Chopsticks*, Brett Turner argues that the Michigan statutory scheme, when read in conjunction with the correct cases, provides for a dual classification system.<sup>26</sup> Mr. Turner asserts that the four statutes lay the framework for the dual classification scheme, and that the role of the factors in *Sparks v. Sparks*<sup>27</sup> is to determine the equitable division of the marital property.<sup>28</sup>

#### A. ARGUMENTS FOR UNITARY CLASSIFICATION

Mr. Schaefer, on the other hand, relying on the Supreme Court's opinion in *Sparks v. Sparks* argues that the common law power to divide property by the courts still

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<sup>25</sup> See Turner, Equitable Distribution of Property, *supra* note 17, at 43. Regarding its widespread acceptability, a majority of the states now utilize some form of dual classification. See *id.* Arguably the dual classification system brings an element of predictability and intuitive correctness. See *id.* "There is considerable common sense in the notion that property acquired during the marriage is 'ours,' while property acquired from extra-judicial sources is 'his' or 'hers.'" *Id.*

<sup>26</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 115.

<sup>27</sup> 440 Mich. 141, 159-60, 485 N.W.2d 893, 901 (1992).

<sup>28</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 115-16. The author of this paper generally agrees with Mr. Turner's analysis with some modifications and expansions/elaborations of Mr. Turner's theories.

exists in Michigan, and as such, that Michigan possesses a unitary classification system.<sup>29</sup>

The basic premise of Mr. Schaefer's argument rests on the underlying logic behind the *Sparks* court's refusal to hold that any type of rigid formulation should govern property distribution.<sup>30</sup>

The argument for a unitary system in Michigan can be expressed in the following manner. First, the intent of the court in *Sparks* is strongly against the adoption of any strict property division equation.<sup>31</sup> The trial courts should be provided broad discretion to decide what is considered equitable by the facts of each particular case. Second, the court made a list of mandatory extra-statutory considerations.<sup>32</sup> The Supreme Court emphasized to lower courts that these are relevant considerations and that the lower courts are required to make specific findings of fact as to each of the factors which are relevant to the distribution of property.<sup>33</sup> Third, the roles of the statutes are as a codification of some of the relevant factors enunciated by the court in *Sparks*.<sup>34</sup> Finally, *Sparks* is a Supreme Court opinion and is, or should be, controlling over the Court of Appeals' decision in *Reeves v. Reeves*.<sup>35</sup>

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<sup>29</sup> See John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, 170 (2000). Mr. Schaefer writes that the court explicitly held that "[i]t is not desirable, or feasible, for us to establish a rigid framework . . . [t]he trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formula." *Id.* (quoting *Sparks v. Sparks*, 440 Mich. 141, 158-59, 485 N.W.2d 893, 900-01 (1992)). Furthermore, the court in *Sparks* provided a list of considerations that are not explicitly listed in any statutes. *See id.* Mr. Schaefer argues that by listing these extra-statutory considerations, and encouraging the lower courts to follow them, the Michigan Supreme Court rejected the premise that property distribution is governed entirely by statute. *See id.*

<sup>30</sup> *See Sparks*, 440 Mich. at 158; *see also id.* at 169.

<sup>31</sup> *See id.* at 159. The Court specifically noted that "the division of property is not governed by any set rules." *See also* Schaefer, *supra* note 29, at 169.

<sup>32</sup> *See id.* at 159-60; *see also* Schaefer, *supra* note 29, at 170.

<sup>33</sup> *See id.*

<sup>34</sup> *See* Schaefer, *supra* note 29, at 170. Mr. Schaefer writes, "In other words, the Michigan Supreme Court held that the statute only codified what would ultimately become the second *Sparks* factor for dividing marital property." *Id.*

<sup>35</sup> 226 Mich. App. 490, 575 N.W.2d 1 (1997).

Using the system espoused by Mr. Schaefer and the court's decision in *Sparks*, Michigan's system would be unitary and all property would be divided according to the following factors:<sup>36</sup>

[T]he following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, (9) general principles of equity.

*Sparks v. Sparks*, 440 Mich. 141, 159-60 (1992).

In terms of practice, this system would certainly be easier to use. The lawyer advocating for his client would know what factors the courts rely on and would be able to

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<sup>36</sup> *See id.* Mr. Schaefer's criticism of the Court of Appeals' decision in *Reeves* is twofold. First, it is accurately pointed out that the *Reeves* opinion ignores a "contrary line of cases that [should] take precedence." *Id.* The courts in those cases failed to cite statutory authority directly on point and instead chose a broad and perhaps questionable interpretation of § 18. The Court of Appeals noted that, although the exact language of the statute provides for pension benefits acquired during the marriage, it did not specifically exclude pension benefits acquired before the marriage. *See id.* Although it is not uncommon for courts to draw inferences from a statute's silence on the subject, it would appear as though a more plausible reading would have been that § 18 allows for only the division of pension benefits acquired during the marriage. And, as such, the court would have to look to one of the other remaining statutes in order to find authority to invade the separate estates of the owning spouse. *See Turner, Eating Jello With Chopsticks, supra* note 28, at 118.

The second main criticism lies in the fact that the Supreme Court's opinion in *Sparks v. Sparks* includes the "contributions of the parties" in its list of considerations. *Id.* Since no statute explicitly requires the courts to first distinguish between marital and separate property--Mr. Schaefer views this preliminary initial division of assets as allowing "the tail of the second *Sparks* factor to wag the tail of the remaining eight." *Id.* The court in *Sparks v. Sparks* held that there are nine equal factors, and that "contributions of the parties," is just one of those factors. Therefore, it is inappropriate to elevate that second factor to a position of greater import. *See id.* Mr. Schaefer also notes that a plain reading of the four Michigan statutes provides no indication that Michigan has adopted a dual classification system. *See id.*

advocate using those factors. In his most recent article on the subject, Mr. Turner has addressed some of the weaknesses of the unitary classification argument.<sup>37</sup>

**B. REEVES V. REEVES AND UNANSWERED QUESTIONS**

Despite the compelling nature of Mr. Schaefer's argument and the interesting questions it presents, this controversy has arguably been resolved by default due to Michigan Court Rule 7.215. This court rule holds that once a panel of the Court of Appeals has decided an issue, the other panels of the Court of Appeals must follow that decision unless or until the Michigan Supreme Court grants certiorari and reverses or affirms that opinion.<sup>38</sup>

That being said, the Court of Appeals has spoken, and in *Reeves v. Reeves* has clearly held that Michigan is a dual classification jurisdiction.<sup>39</sup> In that case, the court explicitly recognized the existence of both separate property and marital property.<sup>40</sup> The

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<sup>37</sup> See Turner, *Eating Jello With Chopsticks*, *supra* note 28, at 115-21. Mr. Turner also identifies a number of cases that seemingly conflict with the position advocated by Mr. Schaefer. The first of those opinions is *Dart v. Dart*, 460 Mich. 573, 584-86, 597 N.W.2d 82, 86-88 (1999). The issue in that case was whether a divorce rendered in England “violated Michigan’s public policy by treating the husband’s inherited trust income as separate property.” Turner, *Eating Jello With Chopsticks*, *supra* note 28, at 115. The court, quoting from *Lee v. Lee*, 191 Mich. App. 73, 477 N.W.2d 432 (1991), recognized that property received through inheritance and kept separate from marital property was generally considered separate property unless one of the statutory exceptions apply. Mr. Turner concludes by noting that if the courts of this state recognize the concept of separate property, then Michigan cannot be a unitary classification state. *See id.* Additionally, Mr. Turner takes note with the argument that the *Sparks* court impliedly held that the common law judicial power to divide property still exists in Michigan. *See id.* To conclude that the trial courts possess the common law power to divide property appears to ignore the Supreme Court’s holding in both *Charlton v. Charlton*, 397 Mich. 84, 243 N.W.2d 261 (1976) and *Stamadianos v. Stamadianos*, 425 Mich. 1, 385 N.W.2d 604, (1986). *See* Turner, *Eating Jello With Chopsticks*, *supra* note 26, at 115-16. The Supreme Court in both of those cases decided both of those cases by noting that the power of the courts to divide property in Michigan was governed strictly by statute. *See id.*

Note, however, that *Dart v. Dart* also dealt with such issues as comity and res judicata—this could have been an alternate basis for affirming the decision, as opposed to concluding that Michigan is a dual classification jurisdiction. Indeed, the court in *Dart v. Dart* says “[c]onsequently, res judicata bars the plaintiff from relitigating the property distribution issues. The English Court decided this issue on the merits. Res Judicata bars a subsequent action between the same parties when the evidence or essential facts are identical.” *Dart*, 460 Mich. at 586.

<sup>38</sup> *See* MCR 7.215 (I) (1) 2001.

<sup>39</sup> *See* *Reeves v. Reeves*, 226 Mich. App. 490, 494, 575 N.W.2d 1, 2-4 (1997).

<sup>40</sup> *See id.*

court reasoned that in dividing property a trial court “must strive for an equitable division of increases in marital assets ‘that may have occurred between the *beginning* and the end of the marriage.’”<sup>41</sup> The court then reasoned from this statement that the trial court’s first step is to determine and classify separate from marital property.<sup>42</sup>

Furthermore, the Court of Appeals then makes the assertion that “[t]his distinction between marital and separate estates has long been recognized in this state.”<sup>43</sup> The court refers to the policy of keeping marital property apart from separate property unless certain conditions exist as the “doctrine of noninvasion.”<sup>44</sup> The court also cites two statutory exceptions to this doctrine, § 23 and § 401.<sup>45</sup>

What the court failed to spell out in *Reeves*, and what has been the subject of a great deal of confusion to even experienced attorneys is precisely how the statutory scheme is meant to work in its entirety. Recall, that although the court in *Reeves* declared Michigan to be a dual classification state, and also clearly stated that § 23 and § 401 provided exceptions to the doctrine of noninvasion, it did not specifically state what constitutes the marital estate, or how marital property should be divided and distributed. Indeed, the opinion provides a useful outline on how the property division process works,

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<sup>41</sup> *Id.* (citing *Bone v. Bone*, 148 Mich. App. 834, 838, 385 N.W.2d 706 (1986)).

<sup>42</sup> *See id.* at 493-94.

<sup>43</sup> *Reeves*, 226 Mich. App. at 494. (citing *Charlton*, 397 Mich. at 92-94).

<sup>44</sup> *Id.* The court then explicitly states that which had gone unsaid throughout all of the other opinions--that only the marital estate is to be divided equitably between the two parties, and the two parties leave with their separate property intact with “no invasion by the other party.” *Id.* Unless, that is, some statute specifically authorizes the invasion of that separate property.

<sup>45</sup> *See id.* In discussing § 23, the court again finds that it provides an exception based on financial need. Further, the court notes that § 23 was properly applied in *Charlton* where there was a finding of financial need. In its discussion of § 401, the court concludes that that particular statute was properly applied in *Hanaway v. Hanaway*, 208 Mich. App. 278, 527 N.W.2d 792, (1995). In that case, the court found that because the wife had taken care of all domestic duties, she had allowed the husband to focus his attention on his family’s closely held corporation. *See Hanaway*, 208 Mich. App. at 294. As a result, the court found that the husband’s inherited stock had “appreciated because of defendant’s efforts facilitated by plaintiff’s efforts at home.” *Reeves*, 226 Mich. App. at 494. (quoting *Hanaway*, 208 Mich. App. at 294).

but does not fully explain the process in a thorough step by step manner. The following two sections will shed some light on those unanswered questions and will suggest an interpretation of Michigan's statutory system.

#### IV. MICHIGAN'S STATUTORY SYSTEM

Theoretically, there exists some minor level of controversy over whether Michigan, at present, has truly adopted a unitary classification or dual classification system.<sup>46</sup> What is not debatable, however, is that Michigan possesses a system governed by statute.<sup>47</sup> The Michigan Supreme Court clearly stated in *Stamadianos v. Stamadianos*<sup>48</sup> that "there is no common-law authority to grant a judgment of divorce."<sup>49</sup> Furthermore, the court went on to note that "[t]he jurisdiction of the circuit courts in matters of divorce is strictly statutory."<sup>50</sup> The importance of this assertion lies in the fact that Michigan courts can only divide property according to an explicit command from one of Michigan's four property distribution statutes.<sup>51</sup>

Michigan has four property distribution statutes. The four statutes are: MCLA § 552.19 ("§ 19") discussing what constitutes marital property; 552.18 ("§ 18"), addressing the division of pension benefits; MCLA § 552.401 ("§ 401"), authorizing the division of property if the other party substantially contributed to that separate property; and MCLA

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<sup>46</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 121; see also John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, (2000).

<sup>47</sup> See *Stamadianos v. Stamadianos*, 425 Mich. 1, 4-5, 385 N.W.2d 604, 606 (1986); see also Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 116; see also *Charlton v. Charlton*, 397 Mich. 84, 92, 243 N.W.2d 1, 265 (1976). The court in *Charlton v. Charlton* makes it clear that in Michigan "[t]he laws of divorce are statutory in nature and the equitable disposition of property is confined to the limits of the applicable statutes." *Id.*

<sup>48</sup> 425 Mich. 1, 385 N.W.2d 604, (1986).

<sup>49</sup> *Stamadianos v. Stamadianos*, 425 Mich. 1, 4-5, 385 N.W.2d 604 (1986).

<sup>50</sup> *Id.* at 5.

§ 552.23 (“§ 23”), allowing the division of separate property if there is an insufficiency of wealth.

**A. THE ROLES OF MCLA § 552.19 AND MCLA § 552. 18**

Generally, there has been less written on § 19 and § 18. Court opinions tend to focus on the broader, and perhaps more easily understandable, provisions of § 401 and § 23. However, § 19 and § 18 play a vital role in Michigan’s system.

Section 19 is a fairly enigmatic and vague statute. A plain reading of the statute reveals very little by way of what function it was meant to ultimately serve in the property division scheme. Section 19 reads as follows:

Upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party *by reason of the marriage*, or for awarding to either party the value thereof, to be paid by either party in money.

MICH. COMP. LAWS ANN. § 552.19 (2001). (emphasis added).

The Court of Appeals in *Reeves* cited § 19 as the starting point for courts when dividing property.<sup>52</sup> Additionally, at least one scholar has argued that perhaps § 19 may serve an even greater function, due to its ambiguous terms, by allowing trial courts to enlarge exactly what constitutes the divisible marital estate.<sup>53</sup>

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<sup>51</sup> See Turner, *Eating Jello with Chopsticks*, *supra* note 46, at 116-18. This assertion further undercuts any argument that Michigan possesses a unitary system. Recall that the unitary property division advocates argue that Michigan’s system is not fully statutory.

<sup>52</sup> See *Reeves v. Reeves*, 226 Mich. App. 490, 493, 575 N.W.2d 1, 2-4 (1997).

<sup>53</sup> See Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 121. Mr. Turner has hypothesized that perhaps § 19 allows for the enlargement of divisible marital property by an expansive reading of the terms shall have “come to either party” by reason of the marriage. *Id.* Theoretically, this would allow the courts to convert separate property into marital property, capable of division, without resorting to the authorization provisions of the other statutes.

Section 18 deals with the division of vested pension benefits. Section 18 reads:

Any rights in and to vested pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system, payable to or on behalf of a party on account of service credit accrued by the party during the marriage shall be considered part of the marital estate subject to award by the court under this chapter.

MICH. COMP. LAWS ANN. § 552.18 (2001).

Section 18 is fairly self-explanatory. Its terms allow for the inclusion of vested retirement benefits accrued by either party during the marriage to be included in the marital estate. It does not, however, by its terms envision a situation where it would be permissible for courts to divide benefits accrued before the marriage.<sup>54</sup> Nonetheless, courts have found that pension benefits accrued before the marriage may be divided under § 18.<sup>55</sup>

#### **B. THE INTERACTION OF MCLA § 552.23 AND MCLA § 552.401**

Sections 23 and 401 have been extensively dealt with by the courts in Michigan. The Michigan Supreme Court case directly addressing the interplay between these two statutes is *Charlton v. Charlton*.<sup>56</sup> In that case, the court asserts that Michigan possesses a statutory property distribution system, and that property can only be distributed according to a command from one of the four statutes.<sup>57</sup>

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<sup>54</sup> See *id.* at 120.

<sup>55</sup> See *McMichael v. McMichael*, 217 Mich. App. 723, 730, 352 N.W.2d 688, 690-92 (1996); see also *Boonstra v. Boonstra*, 209 Mich. App. 558, 562, 531 N.W.2d 777, 779 (1995); see also Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 120. The relevance of these findings cannot be understated since this explicit finding, contrary to the command of any of the four property division statutes, may support arguments for a unitary classification system in Michigan.

<sup>56</sup> 397 Mich. 84, 243 N.W.2d 261 (1976).

<sup>57</sup> See *Charlton v. Charlton*, 397 Mich. 84, 92, 243 N.W.2d 261 (1976).

Essentially, a reading of § 23 and § 401 provides authorization for the division of separate property under certain fact specific, non-overlapping situations.<sup>58</sup> The first situation, according to the court in *Charlton*, are the circumstances of § 23 where the “property of either party can be awarded to the other party provided the ‘estate and effects awarded to either party shall be insufficient.’”<sup>59</sup> The second statute § 401, describes a situation where the separate property of either party may be awarded to the other if it appears as though one of the parties substantially contributed to the property’s acquisition.<sup>60</sup> Note, however, that a better reasoned approach would be to look to the provisions of § 401 first, and then utilize the need based provisions of § 23.<sup>61</sup>

The pertinent part of § 23 reads:

Upon entry of judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate . . . after considering the ability of the either party to pay and the character and situation of the parties, and all the other circumstances of the case.

MICH. COMP. LAWS ANN. § 522.23 (2001).

Section 23 seems to envision a situation where the separate property awarded to each spouse is not enough to maintain that spouse or the children in the manner to which they had become accustomed.<sup>62</sup> By its own terms, it allows for the awarding of the other

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<sup>58</sup> See *id.* at 93; see also Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 117.

<sup>59</sup> *Id.* (quoting MICH. COMP. LAWS ANN. § 552.23 (2001)).

<sup>60</sup> See *id.*

<sup>61</sup> See Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 120.

<sup>62</sup> See *id.* at 120; see also *Charlton*, 397 Mich. at 94.

spouse's real or personal estate, if the portion originally awarded was "insufficient for the suitable support and maintenance . . . ."<sup>63</sup>

Furthermore, this proposition seems to be supported by the Michigan Court of Appeals' decision in *Denman v. Denman*.<sup>64</sup> In that case, the Court of Appeals using the language from *Charlton* and the reasoning in *Grotelueschen v. Grotelueschen*,<sup>65</sup> affirmed a decision awarding part of one spouse's inheritance to the other.<sup>66</sup> The court found that an inheritance, normally considered separate property, may be "treated as part of the marital estate 'if an award otherwise was insufficient to maintain either party.'"<sup>67</sup> The problem with § 23 is that an expansive reading of it threatens to eclipse the other statutes.<sup>68</sup>

Whereas § 23 looked only to the needs of the parties, § 401 realizes that a party should be entitled to portion of that property to which they had contributed. Section 401 reads:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal owned by his or her spouse as it appears to be equitable under all the circumstances of the case, *if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property.*

MICH. COMP. LAWS ANN. § 552.401 (2001). (emphasis added).

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<sup>63</sup> MICH. COMP. LAWS ANN. § 552.23 (2001).

<sup>64</sup> 195 Mich. App. 109, 489 N.W.2d 161 (1992).

<sup>65</sup> 113 Mich. App. 395, 318 N.W.2d 227 (1982).

<sup>66</sup> See *Denman v. Denman*, 195 Mich. App. 109, 489 N.W.2d 161 (1992).

<sup>67</sup> *Id.* at 112; (quoting *Grotelueschen v. Grotelueschen*, 113 Mich. App. 395, 318 N.W.2d 227 (1982)).

As an interesting note, and as further proof that § 23 and § 401 should be read separately, the court in *Reeves*, 226 Mich. App. at 495, held that the separate estate "was unavailable for invasion because the other spouse had no involvement with that estate." *Id.* (emphasis added).

<sup>68</sup> See Turner, *Eating Jello With Chopsticks*, *supra* note 46, at 120. As such, Mr. Turner espouses the use of § 23 as "a remedy of last resort for financial need." *Id.*

Section 401 mandates that the court take into account the individual efforts of each spouse regarding the other spouse's separate property.<sup>69</sup> Thus, if it appears that the non-owning spouse substantially contributed to the owning spouse's "acquisition, improvement, or accumulation of the property" that spouse can be awarded a portion of the owning spouse's property.<sup>70</sup>

## V. NAVIGATING THE MICHIGAN STATUTORY SCHEME

As was previously mentioned, the court's opinion in *Reeves* clearly states that Michigan has adopted a dual classification property distribution system.<sup>71</sup> Additionally, this opinion introduces the doctrine of noninvasion and quite adequately covers the exceptions to this doctrine.<sup>72</sup> While explaining the exceptions, the Court of Appeals also briefly described how the system should function.<sup>73</sup> However, there remains some ambiguity and a few unanswered questions.

Utilizing the language found in § 19, the Court of Appeals states that "the court may divide all property that came 'to either party by *reason of the marriage*. . . .'"<sup>74</sup>

Unfortunately, the court provided very little guidance on just what the statutory language

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<sup>69</sup> See *Lee v. Lee*, 191 Mich. App. 73, 78, 477 N.W.2d 429, 432 (1991). This court seems to affirm the notion that it is reversible error to not take into account the other statutes. See *id.* In other words, it is arguably a mandatory step in the property distribution system to consider the effects of the statutes.

<sup>70</sup> MICH. COMP. LAWS ANN. § 552.401 (2001).

<sup>71</sup> See *Reeves v. Reeves*, 226 Mich. App. 490, 493-94, 575 N.W.2d 1, 2-4 (1997).

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* The section of the opinion emphasizing the workings of the entire system is somewhat brief. The Court of Appeals writes, "[t]he distribution of property is controlled by statute . . . . In granting a divorce, the court may divide all property that came 'to either party by *reason of the marriage*. . . ." MCL § 552.19; MSA 25.99 (emphasis added). When apportioning marital property the court must strive for an equitable division of increases in marital assets "that may have occurred between the *beginning* and the end of the marriage." *Bone v. Bone*, 148 Mich. App. 834, 838; 285 N.W.2d 706 (1986) (emphasis added). Thus, the trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets. *Byington v. Byington*, 224 Mich. App. 103, 114, n.4, 568 N.W.2d 141 (1997). . . . Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's separate estate with no invasion by the other party. However, a spouse's separate estate can be opened for redistribution when one of the statutory created exceptions is met." *Byington*, 224 Mich. App. at 114.

‘by reason of the marriage’ means. Additionally, the court’s opinion is silent as to how property determined to be marital property should be divided. Further, the court only mentions two exceptions § 23 and § 401. This may merely be an oversight, but Michigan has a third exception, § 18. By its terms, § 18 applies only to a very limited fact specific situation. However, it has been applied broadly and perhaps inaccurately by a number of courts.<sup>75</sup> As such, the role of § 18 in the statutory scheme must be clarified. The following two sections will address the concerns just mentioned and provide an elaboration on the *Reeves* interpreted statutory scheme.

**A. DEFINING MARITAL PROPERTY: MCLA § 552.19**

First, § 19 provides a working, although difficult, definition of what constitutes marital property.<sup>76</sup> Generally, this is unlike the system in place in other states. In other states, the separate property is defined, taken out of the property distribution process, and then the remaining marital property is divided.<sup>77</sup> Michigan’s process works in just the opposite manner. Separate property generally remains undefined. Instead, marital property is defined, divided, and the remaining property is considered nondivisible separate property--unless a statutory exception applies.<sup>78</sup> Marital property is defined by

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<sup>74</sup> *Id.* (quoting MICH. COMP. LAWS ANN. § 552.19).

<sup>75</sup> *See McMichael v. McMichael*, 217 Mich. App. 723, 731, 352 N.W.2d 688, 690-92 (1996); *see also* Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 120.

<sup>76</sup> *See id.*

<sup>77</sup> *See* VA. CODE ANN. § 20-107.3 (2001).

<sup>78</sup> *See* Turner, *Eating Jello With Chopsticks*, *supra* note 75, at 116-21; *see also* *Byington*, 224 Mich. App. at 118. This opinion authored just months before the Court of Appeals’ decision in *Reeves v. Reeves* says “there is no bright-line rule that classifies an asset as ‘marital property’ or ‘separate property.’ The trial court must examine when the asset was acquired and the claiming spouse’s contribution to the acquisition improvement or accumulation of the property case by case.” *Id.*

statute as property “that shall have come to either party by reason of the marriage.”<sup>79</sup> So the question becomes, what precisely does this language mean?

This phrase would first include property acquired by the marital unit during the marriage.<sup>80</sup> The Court of Appeals’ exact language called “for an equitable division of increases of marital assets ‘that may have occurred between the *beginning* and the end of the marriage.’”<sup>81</sup> So, at first glance, any assets acquired during the course of the marriage become marital property and, by implication, any assets acquired before the marriage become separate property and may not be divided--unless a statutory exception applies.

This reach-back mechanism provided by the statutes in Michigan is also somewhat dissimilar to the process used in most dual classification jurisdictions. Generally, there is no provision for reaching back into one party’s separate estate once a preliminary division of assets has occurred. Recall, the more frequently used statutory reach-back exceptions address the needs of the parties and the contributions of the parties.<sup>82</sup> There are compelling arguments for trying to avoid using one of the exceptions or reach-back statutes. Furthermore, Michigan’s broad statutory language provides a way to avoid using the exceptions.

To address the problems that could result from trial courts having to reach back into one party’s separate estate once the marital estate has been determined, § 19’s terms arguably include the potential for an expansive recharacterization of assets.<sup>83</sup> The Court

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<sup>79</sup> MICH. COMP. LAWS ANN. § 552.19.

<sup>80</sup> See *Reeves*, 226 Mich. App. at 493-94.

<sup>81</sup> See *id.* (quoting *Bone v. Bone*, 148 Mich. App. 834, 838, 385 N.W.2d 706 (1986)).

<sup>82</sup> See MICH. COMP. LAWS ANN. § 23 and § 401.

<sup>83</sup> See *Turner, Eating Jello With Chopsticks*, *supra* note 75, at 120. Please note, Mr. Turner does not advocate for a recharacterization theory, but does generally state that an expansive interpretation of the

of Appeals' language is restrictive and would allow only for the division of assets acquired during the course of the marriage.<sup>84</sup> This interpretation replaces the actual language of the statute with merely a time test. An equitable division of assets should mean something more substantive than that. Hence, the language of § 19 could encompass a factual scenario where an asset acquired by one of the parties prior to or from a source outside of the marriage, but used, considered, treated and/or objectively relied upon by the marital unit as marital property would fall under the terms of § 19.<sup>85</sup> Essentially, if the asset is indeed treated, considered and/or objectively 'relied upon'<sup>86</sup> as

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statute can allow for separate property to come in depending on how that property was treated. *See id.* He uses the example of a husband's premarital home, the exact example of which is reproduced below for the reader's edification.

<sup>84</sup> *See Reeves*, 226 Mich. App. at 493; *see also* John F. Schaefer, *The Uncertain State of Michigan Equitable Distribution Law Post-Reeves*, Michigan Bar Journal, 79 Mich. B.J. 168, 171 (2000).

<sup>85</sup> *See Turner, Eating Jello With Chopsticks*, *supra* note 75, at 120. Also note, Mr. Turner's test seems to turn only on the treatment of the asset. *See id.* This writer has chosen to include a reliance factor for reasons that will be made clear in the following note.

<sup>86</sup> *See* Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689, 739-40 (1990); *see also* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67, \*19, (1993). The author's inspiration for including a reliance factor came from these two articles criticizing the marital partnership theory's failure to fully provide for the needs of the dispossessed spouse (normally the wife). The idea is that that a reliance factor would be based on a party's expectations as to what they can expect in the future. *See Smith* at 739-40. Such a reliance results in an alteration of behavior due to future expectations. Ms. Smith writes "[a] new rationale must acknowledge that life choices made in reliance on the continuation of marriage--choices to have children, to invest in the human capital of the primary breadwinner, and to divide roles to enhance the economic productivity of one spouse—may entail ongoing burdens that survive beyond marriage." *Smith* at 739-40. Concededly, Ms. Smith is probably referring to a system that would provide continued support in the form of alimony or alimony-like payments, but this author is using it to make an argument for the recharacterization of property. For example, consider the following hypothetical. Suppose that a husband owns a hunting lodge. That the lodge is only used by the husband, is not considered or treated by the couple as the wife's property, but it is assumed that the lodge would be sold someday in the distant future to help provide for the retirement of the husband and wife. Of course, an argument could be made that in substance, at some level the lodge was perhaps considered the marital units if it was acknowledged by both that it would be sold. However, a straightforward reliance argument would be easier to use. The wife could argue that she relied upon, altered her behavior in reliance on, the sale of that hunting lodge. This reliance argument could give the court a reason to recharacterize the property as marital property and thus more easily divisible. The vague language of Michigan's statute would allow a lawyer to argue that the value of that lodge came to the wife 'by reason of the marriage.' Arguably, need is provided for in § 23, but allowing for the recharacterization of an asset would prevent the type of acrimony that can result from a party's perception that their separate property is being *taken* from them and *given* to the other.

marital property then it can be said that the non-owning spouse came to that particular separate asset, “by reason of the marriage.”<sup>87</sup> Hence, the courts could expand what constitutes divisible marital property and not have to utilize one of the other reach-back exceptions in order arrive at an equitable distribution.

The recharacterization aspect of § 19, however, can also serve to diminish the marital estate. Take, for example, a cottage previously owned by only one spouse but never used by the non-owning spouse, never considered the property of the other spouse, nor ever relied upon for any particular reason by the non-owning spouse.<sup>88</sup> That particular property never came to the non-owning spouse by reason of the marriage.<sup>89</sup> Indeed, a similar interpretation of § 19 has been followed by at least one decision out of the Court of Appeals.<sup>90</sup>

Arguably, the substantive recharacterization aspect of §19 would allow for more amicable property settlements. Parties are less likely to object to the division of the marital estate—even if that estate as been expanded by operation of statute—than they would be to reaching back into the separate estates of the owning parties to arrive at an

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Professor Starnes notes that a reliance model would “seek[] to protect a promisee’s interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made.” *Starnes* at \*19.

<sup>87</sup> See Turner, *Eating Jello With Chopsticks*, *supra* note 74, at 120. Mr. Turner writes, “§ 19 may enlarge the marital estate beyond the mere fruits of marital efforts. An asset can ‘come to the party’ even if it is not owned outright. For instance, if the husband’s premarital residence serves as the marital home for a long marriage, could it not be said that the home ‘came to’ to the wife by reason of the marriage? The wife certainly ‘came to’ the home for that reason: Likewise § 19 would seem to permit the division of separate property placed into joint title for any significant period of time. These fact situations share the common thread the nonmarital property was *treated as marital property during the marriage*. Where such treatment is significant and lasts a long period of time, the court may be justified in dividing property which was not in the strict sense a product of the marital partnership.” *Id.*

<sup>88</sup> See *Anderson v. Anderson*, No. 226676, 2001 Mich. App. LEXIS 1889, \*7-\*8 (Nov. 16, 2001). This Court of Appeals’ decision dealt with the keeping of an inherited interest in real estate separate from the marital estate. Although this decision does not support the reliance argument, it could be said that it supports the more narrow Turner-inspired ‘treatment’ argument.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

equitable distribution. Indeed, the recharacterization aspect of § 19 can also be credited with the advantage of looking to substance over form. Although the language from the Court of Appeals essentially restricts marital property to that property acquired during the marriage's existence, the recharacterization aspect of § 19 could allow for the exclusion of inherited or gifted separate property acquired during the marriage. Possibly, it is only a play on definitions, but intuitively, one would expect that parties are less likely to view the division as a hostile taking from one and giving to the other.

## **B. DIVIDING THE MARITAL ESTATE**

Now that marital property is established, the question then becomes how to divide that property equitably. The Court of Appeals' opinion in *Reeves* does not address this subject.<sup>91</sup> This is where the Supreme Court's opinion in *Sparks v. Sparks* fits into the equation.<sup>92</sup> The court in *Sparks* included a list of nine factors that can be used to divide the marital estate.<sup>93</sup> Trial courts, after first establishing the marital estate using § 19, may now seek to divide that estate in order to reach an equitable result using the factors laid out in *Sparks*. Using the *Sparks* factors should not negate the statutory nature of Michigan's system.<sup>94</sup> Indeed, the Supreme Court is merely using its interstitial law making power by providing the factors upon which trial courts may rely.<sup>95</sup>

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<sup>91</sup> See *Reeves*, 226 Mich. App. at 499-00 (Neff P.J., dissenting). Indeed, the dissent notes that the even if the separate estates were 'invaded,' that MCLA § 552.23 allows for that invasion and further that the trial court considered the factors laid out in *Sparks v. Sparks*. As such, Judge Neff found no error in the lower court's distribution.

<sup>92</sup> See *Turner, Eating Jello with Chopsticks*, *supra* note 75, at 116.

<sup>93</sup> See *Sparks v. Sparks*, 440 Mich. 141, 159-60, 485 N.W.2d 893 (1992). "[T]he following factors are to be considered wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, (9) general principles of equity." *Id.*

<sup>94</sup> See *Turner, Eating Jello With Chopsticks*, *supra* note 75, at 116.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

At this point, the marital property has been determined using § 19 and divided using the factors established by the Supreme Court in *Sparks*. The court must now consider whether any of the statutory exceptions apply. Indeed, it appears as though this is a required step in the statutory distribution scheme. The Court of Appeals in *Lee v. Lee*<sup>96</sup> held that a trial court erred by not considering the effect that the exceptions embodied in § 23 and § 401 would have on the distribution of property.<sup>97</sup>

### C. THE ROLES PLAYED BY THE OTHER EXCEPTIONS

The first exception is embodied in § 401. This provides for the invasion of a separate property if it can be found that the non-owning spouse substantially contributed to the acquisition, improvement etc. of the owning spouse's property.<sup>98</sup> Clearly, this would include property that a non-owning spouse had actually worked on, or when a non-owning spouse "significantly assists in the acquisition or growth of a spouse's separate asset . . . ."<sup>99</sup> It could also include fact scenarios where due to the non-owning spouse's efforts the owning spouse was able to devote more time to a thriving business.<sup>100</sup> Under that scenario, it could be said that the non-owning spouse directly contributed to the property's acquisition or improvement.<sup>101</sup>

Second, there is the exception embodied in § 23. As the court in *Reeves* pointed out, this is the need-based statute.<sup>102</sup> If, after dividing the marital property according to

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<sup>96</sup> 191 Mich. App. 73, 477 N.W.2d 432 (1991).

<sup>97</sup> See *Lee v. Lee*, 191 Mich. App. 73, 78-79, 477 N.W.2d 432 (1991).

<sup>98</sup> See *Reeves*, 226 Mich. App. at 494-95; see also *Charlton v. Charlton*, 397 Mich. 84, 93-94, 243 N.W.2d 261 (1976).

<sup>99</sup> *Id.*

<sup>100</sup> See *Hanaway v. Hanaway*, 208 Mich. App. 278, 294, 527 N.W.2d 792, (1995). The Court in this case noted that just because "plaintiff's contribution to the asset came in the form of household and family services is irrelevant. The marriage was a partnership. The couple nurtured a business and three children, and watched all four grow. Defendant does not claim that he could have done it all himself." *Id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *Reeves*, 226 Mich. App. at 494.

the *Sparks* factors and awarding to the parties their separate property the court finds that the amount awarded is insufficient to provide for the needs of the non-owning spouse, the court may ‘invade’ the separate property and award it to that spouse.<sup>103</sup> In making this determination, the court could inquire as to whether the award of the share of the marital property would be sufficient to provide for the non-owning spouse in the manner to which he or she had become accustomed.<sup>104</sup> If the court finds that that portion of property awarded is insufficient, then that division cannot be considered equitable. Hence an invasion of the owning spouses assets is authorized.

The last exception to the doctrine of noninvasion is §18. By its terms, § 18 applies to a very fact specific situation. Section 18 applies only to pension benefits vested during the marriage.<sup>105</sup> However, it has been applied in a very broad and arguably inappropriate manner.<sup>106</sup> When applying § 18, the courts have noted that its terms limit its application, but just as often as not have disregarded those terms and divided pension benefits that have vested before the marriage.<sup>107</sup> To be true to the statutory analysis in Michigan, the courts should apply § 18 according to its terms. As such, pension benefits acquired before the marriage would be considered no different than other separate property and could be divided only if one of the other exceptions found in § 23 or § 401 applies.<sup>108</sup>

## **VI. RECENT DEVELOPMENTS IN THE LAW**

A survey of the most recent Court of Appeals’ decision post-*Reeves* leaves little

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<sup>103</sup> See *id.*

<sup>104</sup> See *Charlton*, 397 Mich. at 94; see also *Reeves*, 226 Mich. App. at 494.

<sup>105</sup> See MICH. COMP. LAWS ANN. § 552.18.

<sup>106</sup> See *McMichael*, 217 Mich. App. at 731

<sup>107</sup> See *id.*

<sup>108</sup> See *Turner, Eating Jello With Chopsticks*, *supra* note 75, at 120.

doubt that Michigan has fully adopted a dual classification distribution system consistent with most of the theories suggested in this paper.<sup>109</sup> Nearly all of the Court of Appeals' opinions evidence direct support for the reasoning and logic behind *Reeves*.<sup>110</sup> However, all of these recent opinions have been unpublished. Therefore, although they support the reasoning behind *Reeves*, they are of little precedential value and cannot be used for stare decisis.<sup>111</sup>

These Appellate Court opinions almost invariably begin their analysis by noting that separate property and marital property exists.<sup>112</sup> Further, the courts also clearly state that separate property may be invaded only if one of the specific statutes applies.<sup>113</sup> As the Court of Appeals noted in *Zerrenner v. Zerrenner*, “[d]istribution of property pursuant to a divorce requires an initial determination of whether a particular asset is a marital asset or a separate asset.”<sup>114</sup> The language used by the court in *Anderson v. Anderson* provides additional support for the dual classification system in Michigan. In that case, the Court of Appeals said “[a] trial court’s initial consideration when undertaking to divide property in divorce proceedings is to discern whether property is part of the marital estate, or whether it is separate . . . .”<sup>115</sup> That court also noted that “[m]arital property is ‘property that came to either party by *reason of the marriage* . . .

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<sup>109</sup> See *Anderson v. Anderson*, No. 226677, 2001 Mich. App. Lexis 1889 at \*7 (Nov. 16, 2001).

<sup>110</sup> See *Daly v. Daly*, No. 217638, 2001 Mich. App. Lexis at \*2 (June, 8 2001); see also *McLean v. Mclean*, No. 223757, 2001 Mich. App. Lexis 802 at \*3-4 (April 27, 2001); see also *Bachran v. Bachran*, No. 226937, 2001 Mich. App. Lexis 1178 at \*6 (August 21, 2001); see also *Zerrenner v. Zerrenner*, No. 219301, 2001 Mich. App. Lexis 621 at \*2 (February 2, 2001); see also *Stoudemire v. Stoudemire*, 248 Mich. App. 325, 334, 639 N.W.2d 274 (2001).

<sup>111</sup> See MCR 7.215 (C) (1). The Court Rule specifically says “[a]n unpublished opinion is not precedentially binding under the rule of stare decisis.” *Id.*

<sup>112</sup> See *McLean*, 2001 Mich. App. Lexis 802 at \*3-4.

<sup>113</sup> See *id.*

<sup>114</sup> *Zerrenner*, 2001 Mich. App. Lexis 621 at \*2.

<sup>115</sup> *Anderson*, 2001 Mich. App. Lexis 1889 at \*7.

.<sup>116</sup> Even more support can be found in the court's recitation of the law in *Bachran v. Bachran*.<sup>117</sup> In that case the Court of Appeals held that separate property is not available for division unless a specific statute applies:

A spouse's separate property may be invaded for distribution only if: (1) after the distribution of the marital property, the distribution is insufficient for the suitable maintenance of either party, MCL 552.23 (1), or if (2) the trial court finds that the other spouse contributed to the acquisition, improvement, or accumulation of the property. MCL 552.401

*Bachran*, 2001 Mich. App. at 6.

These four quotes are just a few brief examples of the kind of language that has become all but boilerplate in the Court of Appeals' decisions addressing the division of property. It seems as though, unless overruled by the Supreme Court, the *Reeves* legal analysis is the standard in Michigan.

Furthermore, the *Reeves*/Turner-influenced application of Michigan's statutory scheme seems to have found support in at least a few of the Court of Appeals' cases.

Recall that § 19 is the starting point in the property division scheme and that § 19 can allow for the recharacterization of an asset as marital property based on its treatment.<sup>118</sup>

This recharacterization of assets was recently addressed by the Court of Appeals in two cases.<sup>119</sup> The Court of Appeals' decisions in *Anderson v. Anderson* and *Smith v. Smith* appear to lend support to a treatment based argument for classifying property as marital or separate.<sup>120</sup>

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<sup>116</sup> *Id.* (quoting MCLA § 552.19).

<sup>117</sup> *Bachran*, 2001 Mich. App. Lexis 1178 at \*6.

<sup>118</sup> See Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 121; see also *Reeves*, 226 Mich. App. at 493-94. Note, no court has endorsed the argument supporting a reliance factor as a basis for property division.

<sup>119</sup> See *Smith v. Smith*, No. 222536, 2002 Mich. App. Lexis 109 at \*2-4 (Jan. 29, 2002); see also *Anderson*, 2001 Mich. App. Lexis 1889 at \*7.

<sup>120</sup> See *Smith* 2002 Mich. App. Lexis 109 at \*2-4; see also *Anderson*, 2001 Mich. App. Lexis 1889 at \*7. In *Smith v. Smith*, the plaintiff alleged that the trial court erred by not including a cottage in the marital

It also appears as though the Court of Appeals has adopted the proposition that the use of the factors outlined by the court in *Sparks* should be used only to divide the marital estate.<sup>121</sup> In *McLean v. McLean*, the court included the now common-place *Reeves* language stating that “the marital estate is divided between the parties, and each party takes that party’s own separate estate without any invasion of the other.”<sup>122</sup> The court then finds that the home in dispute was part of the marital estate. Additionally, the court finds that the factors that should be considered when dividing the home include the duration of the marriage, contributions of the parties, age and health of the parties, and so on.<sup>123</sup> In other words, the court divided the property into two separate estates, pursuant to statutory guidelines, and then divided the marital estate using the factors listed by the court in *Sparks*.<sup>124</sup>

Section 401, as first interpreted by the Supreme Court in *Charlton v. Charlton* has been read consistently with that decision by the Court of Appeals. In *Zerrenner v. Zerrenner*, the Court of Appeals refused to hold that a portion of one spouse’s law firm should be excluded from the marital estate when there was evidence that the non-owning spouse worked in the firm and contributed to its success.<sup>125</sup> Other courts’ mention or use

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estate. In its review of this allegation, the court noted that “defendant’s temporary ownership of a joint interest in the cottage did not result in any increase in the parties’ net worth . . . . Moreover, there is no evidence that defendant occupied the residence.” *Id.* The court then concluded by saying that “[a]ccordingly, we do not believe that the trial court’s exclusion of the cottage from the marital estate was clearly erroneous.” *Id.* The facts of *Anderson* were discussed previously in an earlier section.

<sup>121</sup> See *McLean*, 2001 Mich. App. Lexis 802 at \*4-5.

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* (quoting *McDougal v. McDougal*, 451 Mich. 80, 89, 545 N.W.2d 357 (1996)).

<sup>124</sup> See *id.*

<sup>125</sup> See *id.* at \*4-5.

of § 401 reveals that they would apply it in a manner keeping with the precedent established by *Charlton* and *Reeves*.<sup>126</sup>

Section 18 is the last statutory provision that the Court of Appeals has still refused to properly reconcile with its own statutory language. Indeed, in almost all cases post-*Reeves* the court correctly interprets § 18 as allowing for the inclusion of pension benefits accrued during the marriage.<sup>127</sup> In its very next breath, however, the court is quick to point out that “pension benefits accrued before or after the marriage *may* be subject to property division.”<sup>128</sup> This statement alone is not necessarily incorrect provided it is properly qualified with statutory authority. In other words, that same statement should be properly stated as pension benefits accrued before or after a marriage may be divided if there is a need according to § 23, or if the other party somehow contributed to the acquisition of the pension benefit according to § 401.<sup>129</sup> The most recent Court of Appeals’ opinions refuse to qualify their statements permitting the division of pension benefits.<sup>130</sup> Indeed, these cases continue to cite case law as providing the authority necessary to divide pension benefits accrued outside the parameters of § 18.<sup>131</sup>

## VII. THE NEED FOR A RESOLUTION

Generally, the controversy over whether Michigan’s statutory scheme is a unitary classification system or a dual classification system has been resolved by default.<sup>132</sup>

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<sup>126</sup> See *Estep v. Estep*, No. 225018, 2001 Mich. App. Lexis at \*5 (Oct. 23, 2001); see also *Daly*, 2001 Mich. App. Lexis 1493 at \*5; see also *Zerrenner*, 2001 Mich. App. Lexis 621 at \*6; see also *Mclean*, 2001 Mich. App. Lexis at \*3-4.

<sup>127</sup> See *Medina*, 2001 Mich. App. Lexis 1259 at \*11 (Aug. 3 2001); see also *Bachran*, 2001 Mich. App. Lexis 1178 at \*2-3.

<sup>128</sup> *Bachran*, 2001 Mich. App. Lexis 1178 at \*2-3.

<sup>129</sup> See *Turner, Eating Jello with Chopsticks*, *supra* note 118, at 115-17.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* In that particular case the court cited *Boonstra v. Boonstra*, 209 Mich. App. 558, 563 (1993), and *Booth v. Booth*, 194 Mich. App. 284, 291 (1992).

<sup>132</sup> See MCR 7.215 (I) (1) (2001).

*Reeves* has stated the law in Michigan and the other panels of the Court of Appeals are bound to follow it—and so far, nearly all have without question. However, it should be noted that some level of controversy and doubt will continue to exist unless or until the Michigan Supreme Court or the Michigan Legislature acts on the matter. Furthermore, although the state of the law was clearly enunciated by the Court of Appeals in *Reeves*, it left a number of unanswered questions. Chief among those are exactly what constitutes marital property under § 19, and how does the judicially enhanced statutory scheme function. These are basic questions and should be put to rest once and for all by the Michigan Supreme Court or the Michigan legislature.

#### **VIII. MARITAL PARTNERSHIP THEORY AT WORK IN MICHIGAN**

Now that the operation of the statutory system in Michigan has been discussed and at least three views on the operation of the system have been explored, it is necessary to approach the subject from a more philosophical perspective and ask whether the marital partnership theory, at present the most dominant view on marriage and divorce in the United States, is incorporated in Michigan's system.<sup>133</sup> The simple answer to this question is a both a resounding “yes,” and at the same time a very definitive “no.”<sup>134</sup>

Despite Michigan's uncertainty in terms of its property distribution laws, it will be shown that if the statutory scheme advocated and explained in this paper is in fact considered the law in Michigan, then Michigan has incorporated all of the very best aspects of the marital partnership theory and very few of its weaknesses. Indeed, when viewed through the critical lenses of a number of scholars, the Michigan system is to be

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<sup>133</sup> See Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Tex. L. Rev. 689, 696 (1990).

<sup>134</sup> See *Hanaway v. Hanaway*, 208 Mich. App. 278, 294, 527 N.W.2d 792, (1995). The court in that case explicitly noted that “*the marriage was a partnership.*” *Id.* (emphasis added).

commended for its versatility and its flexibility. Michigan’s dual classification system simultaneously incorporates the contributions of the parties and continues to focus on individual needs.

The remainder of this paper will comment briefly on precisely what constitutes the marital partnership theory, its influences and development, its strengths and weaknesses, and most importantly how Michigan’s present system has managed to incorporate the theory into its statutory scheme.

#### **A. WHAT IS THE MARITAL PARTNERSHIP THEORY**

The marital partnership theory, now utilized to some extent in 49 states, attempts to transpose the well-developed, common-law principles of traditional partnership law onto the marital relationship.<sup>135</sup> This particular theory views marriage as an economic partnership.<sup>136</sup> Initially, the marital partnership theory found a great deal of acceptance on the part of reformers as a means for ensuring that the wife received a fair share of the property.<sup>137</sup> Regarding property distribution, the marital partnership theory envisions a situation where the spouses are awarded a share of property to which they had contributed—regardless of the exact manner of that contribution.<sup>138</sup> Much like the dual classification systems, property is generally divided on that basis into two categories,

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<sup>135</sup> See Alicia Brokars Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 Rutgers L. Rev. 569, 593-94 (1999); see also Smith, *supra* note 132, at 696. Ms. Smith writes that [n]early every state currently embraces the community-property concept of marriage as a partnership.” *Id.*

<sup>136</sup> See Kelly, *supra* note 135, at 593-94.

<sup>137</sup> See Smith, *supra* note 133, at 696. The idea behind the marital partnership theory was that “each spouse makes a contribution entitled to recognition.” *Id.* at 689. Ms. Smith also notes that the growth of this theory of marriage was in response to the then prevalent title theory used by the common-law property distribution states. See *id.* at 696.

<sup>138</sup> See Kelly, *supra* note 135, at 593-94; see also Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L. J. 115, 124-25 (1997). Ms. Bell expounding on the idea of marriage as a partnership writes “[t]he marital partnership

marital property and separate property.<sup>139</sup> Furthermore, this division of property is not considered a discretionary award, but a right.<sup>140</sup> Indeed, under marital partnership principles, a property award is granted “not because they [the other spouse] needs it, but because they have earned it.”<sup>141</sup> Note, however, that this de-emphasis on need has been cited as one major weakness of the marital partnership theory.<sup>142</sup>

Beyond the scope of mere property division, the partnership model of marriage has been lauded as having “great conceptual appeal.”<sup>143</sup> One of the basic tenets of partnership law is the equality of the partners.<sup>144</sup> It was hoped that this sense of equality so prevalent in the traditional partnership sense, when transposed onto the marital relationship, would encourage the honoring of “commitments between spouses” and an equal sharing of assets within the relationship.<sup>145</sup> Additionally, the very nature of the traditional partnership has a number of similarities to a marriage which made it easy for reformers of divorce law and proponents of the marital partnership theory to advocate for its acceptance and incorporation into state statutory schemes.<sup>146</sup>

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theory views marriage as a partnership in which both spouses contribute, financially or other wise, to the growth of the partnership and the accumulation of assets.” *Id.*

<sup>139</sup> See Smith, *supra* note 133, at 704.

<sup>140</sup> See Kelly, *supra* note 135, at 593-94.

<sup>141</sup> *Id.* Ms. Kelly writes, “[e]ach spouse is considered an equal partner who has made different but equally meaningful contributions, including financial additions, to the acquisition of marital assets. Thus each spouse is awarded a share of the marital estate, not because they need it but because they have earned it . . . . Each partner constructively consents to share both the risks and rewards of this project, so it seems entirely reasonable that each should have a claim to the fair share of assets should the partnership dissolve.” *Id.*

<sup>142</sup> See Smith, *supra* note 133, at 734. Ms. Smith notes that the marital partnership theory emphasizes the division of property over the idea of continuing support in the form of alimony.

<sup>143</sup> See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. Chi. L. Rev. 67, \*22, (1993).

<sup>144</sup> See *id.*

<sup>145</sup> *Id.* Professor Starnes has noted in her work that “[t]he ideal to which marriage aspires [is] that of equal partnerships between spouses who share, resources, responsibilities, and risks’ and thus perhaps some limited duty to sacrifice for the good of the partnership.” *Id.*

<sup>146</sup> See *id.* Professor Starnes notes a number of similarities between the traditional partnership and a marriage. She writes, “[b]oth relationships typically commence with the exchange of commitments . . . .

## B. ORIGINS OF THE MARITAL PARTNERSHIP THEORY

Essentially, modern marital partnership theory has its origins in two different bodies of law. In the first instance, marital partnership theory was inspired by the community property law already in place in the eight southwestern states.<sup>147</sup> In the second instance, the partnership theory of marriage is clearly influenced by traditional partnership principles.<sup>148</sup> Indeed, at least one scholar of this subject has found that the Uniform Marriage and Divorce Act evidences a number of influences by the Uniform Partnership Act.<sup>149</sup> Both of these bodies of law have played a role in the development of the modern marital partnership theory, and both have played a role its incorporation into the divorce statutes among the many states.<sup>150</sup>

Arguably, however, what truly spurred the widespread acceptance of the marital partnership theory was the advent of no fault divorce.<sup>151</sup> Essentially, as divorce became easier to obtain, reformers wanting to see women receive an equal share of property, encouraged the adoption of the marital partnership theory.<sup>152</sup> This awarding of property was seen as the best way to ensure that the women received some measure of security in the absence of continuing support from alimony. Indeed, alimony issues are beyond the scope of this paper, but there has been a decreasing reliance on alimony since the

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[b]oth relationships seek profits, though profits in the case of a marriage may be emotional, sexual, and perhaps spiritual as well as financial. Both often involve a specialization of labor. Commonly one partner contributes capital primarily or exclusively, while another contributes services primarily or exclusively.” *Id.*; see also, Smith, *supra* note 133, at 696. Ms. Smith writes that “[d]ivorce reformers seized upon [the] notion of marriage as an economic partnership.” *Id.*

<sup>147</sup> See Smith, *supra* note 133, at 689.

<sup>148</sup> See Starnes, *supra* note 143, at \*23.

<sup>149</sup> See *id.* Professor Starnes notes the partnership principles that seem to have “inspired the UMDA to adopt a partnership model for divorce.” *Id.*

<sup>150</sup> See *id.*; see also Smith, *supra* note 133, at 696-98.

<sup>151</sup> See Smith, *supra* note 133, at 690; see also Starnes, *supra* note 143, at \*8.

<sup>152</sup> See *id.*

adoption of the marital partnership theory; and, there are some that even view the awarding of alimony as a “threat to feminine independence.”<sup>153</sup>

### C. WEAKNESSES/CRITICISMS OF THE MARITAL PARTNERSHIP THEORY

Increasingly, the marital partnership theory has come under attack.<sup>154</sup> It has been criticized for not living up to its lofty objectives.<sup>155</sup> The marital partnership theory has the advantage of sounding fair and equitable in an abstract sense, but has the potential for misuse depending on how a particular state’s property distribution system applies the theory.<sup>156</sup>

Scholars have identified a number of analytical weak points where states that have implemented the marital partnership theory may have caused more harm than good. These potential weaknesses/analytical flaws are quite easily summarized and generally fit into two broad categories. First, a restrictive definition of precisely what constitutes marital property can have a detrimental effect on that category of property which is probably the most easily divided and most likely awarded to the wife.<sup>157</sup> Second, an emphasis on the idea that property should be awarded mostly on the basis of a party’s contributions, or conversely, a de-emphasis on need as a basis for a property award can also serve to severely limit the property that will be awarded to the wife.<sup>158</sup> This de-emphasis on need has been strengthened by the adoption of “the clean break” idea of a

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<sup>153</sup> See Starnes, *supra* note 143, at \*43. Professor Starnes cites Lenore J. Weitzman, *The Divorce Revolution*, (Free Press, 1985). Ostensibly, “[a]limony was sometimes viewed as an insult to women and an encumbrance to feminine independence.” *Id.*

<sup>154</sup> See Smith, *supra* note 133, at 689. Ms. Smith very blatantly says that “the partnership model has failed to achieve its objectives of decreasing the economic hardships of divorce on the dependent spouse and children. . . .” *Id.*

<sup>155</sup> See *id.* at 732.

<sup>156</sup> See Smith, *supra* note 133, at 689. Ms. Smith refers to the theory as “politically shrewd.” *Id.*

<sup>157</sup> See *id.* at 706; see also Kelly, *supra* note 135, at 595.

<sup>158</sup> See *id.* at 735.

divorce.<sup>159</sup> That is, the idea that when a marriage ends and property is distributed, there is no longer any need for continued support. This particular application of the marital partnership theory has worked a severe disservice on divorced women.<sup>160</sup>

Regarding this first issue, the marital partnership theory requires the division of property.<sup>161</sup> Property is divided into marital and separate property. This is a critical threshold issue.<sup>162</sup> Indeed, Ms. Smith notes that “[w]hether a spouse gains protection from a marital property system depends on how the system sorts separate and marital property.”<sup>163</sup> It is for that reason that a very restrictive definition of what constitutes marital property injures the wife’s ability to achieve economic parity. If, generally speaking, only marital property is divided, common sense says that if that category is kept small, then the wife, even if she receives the lion’s share of the estate, gets less overall.<sup>164</sup> Indeed, most scholars advocating for the effective implementation of this ideology, note that this can only be achieved through an expansive definition of what constitutes marital property.<sup>165</sup>

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<sup>159</sup> See Kelly, *supra* note 135, at 593.

<sup>160</sup> See Starnes, *supra* note 143, at 8.

<sup>161</sup> See Smith, *supra* note 133, at 706.

<sup>162</sup> See Kelly, *supra* note 135, at 595.

<sup>163</sup> Smith, *supra* note 133, at 692.

<sup>164</sup> See Kelly, *supra* note 135, at 692. Ms. Kelly’s article, *Sharing a piece of the Future Post-Divorce: Toward a More Equitable Distribution of Goodwill*, focuses on the importance of being able to include professional goodwill as a marital asset. See *id.* Ms. Kelly notes that most courts are reluctant to expand “the boundaries of what constitutes property.” *Id.* Ms. Kelly further notes, “[t]hose courts that refuse to recognize purely personal goodwill do so because it does not fit into conventional property concepts and instead appears to divide a share of a divorced spouse’s future income.” *Id.*

<sup>165</sup> See *id.*; see also Starnes, *supra* note 143, at \*8. In her article on the subject, Professor Starnes addresses the importance of expanding the definition of what constitutes divisible marital property. See *id.* She writes, “[s]ome courts and legislatures . . . have attempted to increase the pool of marital assets by expanding the definition of marital property. An expanded definition might include such nontraditional assets as a spouse’s pension, goodwill in a business, and a professional degree or license. Increasing the marital pot allows a court to award a low-income wife a larger share of traditional property or a lump-sum payment reflecting her share of nontraditional property.” *Id.* She also notes the concerns of “[h]uman capital theorists” and the importance of ensuring that a wife is property compensated for contributing to a husband’s increased earning potential. See *id.* at \*24. She does not reference this in terms of an inclusion

Regarding the second issue, the idea that property awards should be based primarily on the extent of the parties contributions has, perhaps inadvertently, caused the former emphasis on needs of the parties to dissipate.<sup>166</sup> Indeed, Ms. Smith writes that “[r]eliance on the marital partnership theory also caused the justification for sharing marital property to shift from monetary needs after marriage to nonmonetary contributions during marriage.”<sup>167</sup> Essentially, by switching the focus of the courts’ attention to issues such as contributions and acquisitions of assets away from immediate economic need, the marital partnership theory when implemented has detracted the court from focusing on need.<sup>168</sup> This focus away from need has had a particularly detrimental effect on women involved in relationships where the marital unit has not acquired a number of significant assets.<sup>169</sup> Professor Starnes, focussing in on the homemaker, notes quite simply that a one-time property division will just not provide the support necessary for women in relationships where the acquired assets are minimal.<sup>170</sup>

#### **D. THE WEAKNESSES APPLIED TO MICHIGAN’S SYSTEM**

Essentially, the weaknesses outlined in the previous section do not apply to Michigan. The dual classification system in place in Michigan may be complex, unique,

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in marital property, but in a discussion of the UPA and their buy-out provisions. She writes, “[t]he UPA buyout rules and their expansion in RUPA provide a useful analogy for the modern martial relationship . . . . A spouse’s decision to end the relationship results in her dissociation, but does not necessarily trigger a winding-up of any shared enterprise in which the spouses have invested. If this enterprise continues, a dissociated spouse should receive a buyout of her investment.” *Id.* at \*24.

<sup>166</sup> Smith, *supra* note 133, at 734.

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* Concededly, most of the arguments addressing the need for continued support tend to focus on the need for alimony-like payments and not division of property issues, but the concerns are still persuasive and applicable when discussing property division.

<sup>169</sup> *See Starnes, supra* note 143, at \*8. Professor Starnes addresses, at length, the difficulties women face upon divorce. These difficulties become acute when the division of property is considered the only means of support that the wife will receive from the marriage.

<sup>170</sup> *See id.* “When marital assets are substantial, a court might ease the financial straits of a homemaker with low income potential by awarding a significant amount of the marital property. Most marital estates,

difficult to understand, and arguably uncertain, but it has the distinct advantage of flexible application. Indeed, the Michigan statutory system, due to its broad definition of what can constitute marital property, its specific allowance for the contributions of the parties, both in the division of marital property and in the use of awarding separate property to another spouse, and most importantly, its § 23 “need based” provision ensures that the very best principles of the marital partnership theory are applied, yet provides for a “safety valve” continuing focus on need.<sup>171</sup>

Regarding the definition of what can constitute marital property. Repeatedly, those who study the subject suggest that for the marital partnership concept to succeed, marital property must be defined broadly.<sup>172</sup> It makes intuitive sense to enlarge that category of property which is most easily divided. Michigan clearly provides for this. If § 19 can be seen as the statute which defines marital property, it allows for the inclusion of any property which came to the parties by “reason of the marriage.”<sup>173</sup> This provision, is arguably, as broad a provision as one could draft.

First, textually there appears to be no restriction on what can constitute property. Therefore, Michigan’s broad definition should allow goodwill, professional degrees, and other nontraditional forms of property to come into the marital estate. Second, this author has argued that § 19 includes a “recharacterization provision” allowing for property, which traditionally would be considered separate property, but is treated, considered, and/or relied upon as marital property to be recharacterized as marital

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however, are too small to make this option feasible. It is not unusual for lower and middle-class couples to live from paycheck to paycheck and to own few if any significant assets.” *Id.*

<sup>171</sup> Brett R. Turner, *Eating Jello with Chopsticks: The Elusive Concept of Separate Property in Michigan*, Divorce Litigation, June 2000, at 120. Mr. Turner refers to § 23 as a “safety valve.” *Id.* He makes no reference to its application in a marital partnership sense.

<sup>172</sup> See Smith, *supra* 133, at 706.

property.<sup>174</sup> Third, most state statutes adhering to the marital partnership theory explicitly allow for property to be awarded on the basis of the parties contributions. Michigan is no exception, and indeed, makes an extra provision. In Michigan the contributions of the parties are considered in the division of martial property.<sup>175</sup> Also, the specific contributions of the parties are considered yet again when separate property is reviewed.<sup>176</sup> In other words, the Michigan statutory system looks twice to see that the contributions of the parties are taken into account. And, in fact, it is a mandatory step in the property division process.<sup>177</sup> Michigan should be applauded for taking such extra precautions when looking at the contributions of the parties. Indeed, by taking such precautions it has incorporated the very best aspects of the marital partnership theory. Note, however, that with the inclusion of § 23 it has managed to avoid one of the main detracting points from full incorporation of the martial partnership theory.<sup>178</sup>

Perhaps the biggest criticism of the marital partnership theory is that it caused the focus to shift from need to contributions of the parties.<sup>179</sup> Michigan does not possess that problem. Indeed, Michigan takes the same type of extra precautions with need as it does with contributions. Recall that the second factor in *Sparks* specifically addresses need, and more importantly, so does MCLA § 552.23.<sup>180</sup> This particular statute ensures that the courts MUST focus on the needs of the parties when dividing even separate

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<sup>173</sup> MICH. COMP. LAWS ANN. § 552.19; see also *Reeves*, 226 Mich. App. at 494.

<sup>174</sup> See *Turner, Eating Jello With Chopsticks*, *supra* note 171, at 121. Please note that this recharacterization theory was influenced by Brett Turner's hypothetical of the family home becoming marital property because it came to the non-owning spouse, 'by reason of the marriage.'

<sup>175</sup> See *Sparks v. Sparks*, 440 Mich. 141, 159-60, 485 N.W.2d 893, 901 (1992).

<sup>176</sup> See MICH. COMP. LAWS ANN. § 552.401.

<sup>177</sup> See *Lee v. Lee*, 191 Mich. App. 73, 78, 477 N.W.2d 429, 432 (1991).

<sup>178</sup> See MICH. COMP. LAWS ANN. § 552.23

<sup>179</sup> See *Smith*, *supra* note 133, at 734.

<sup>180</sup> See *Sparks*, 440 Mich. at 160.

property.<sup>181</sup> The focus on need is still strong in Michigan. Concededly, this does not go all the way in correcting the perception that the marital partnership theory also detracts from the notion of continuing support, but it prevents the courts from become entirely preoccupied with issues of contributions and acquisitions. Recall, that the standard was set by the court in *Charlton v. Charlton*, and that the ultimate goal in Michigan for property distribution is to see a just and equitable division of property, to that end, the award must be such to ensure that the spouse will receive enough property to support her in the manner to which she had been accustomed.<sup>182</sup> Michigan's statutory system augmented by the Supreme Court's decision in *Sparks* accomplishes that goal.

## **IX. CONCLUSION**

Clearly, the complex statutory system in Michigan requires clarification from the Michigan Legislature or from the Supreme Court. The definition of marital property must be clearly defined, and the role of the factors listed by the Supreme Court in *Sparks* must be decided. At the same time, however, the system used in Michigan is a unique system and has a number of very strong points. It is flexible and can be driven easily by the facts of each particular case. It allows for attorneys to make strong arguments for or against the inclusion of property into the marital estate. It also calls for attorneys to use their skills of persuasion when advocating the division of an owning spouse's separate property.

Furthermore, Michigan has implemented all of the strong aspect of the marital partnership theory, and has managed to account for its weak points. It defines marital

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<sup>181</sup> See MICH. COMP. LAWS ANN. § 552.23

property broadly, and never completely loses its focus on need. Hopefully, any future clarification will not take away from the strength of the Michigan system in this regard.

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<sup>182</sup> See *Charlton v. Charlton*, 397 Mich. 84, 94, 243 N.W.2d 261 (1976).