

The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property—Yours? Mine? Ours!

I. INTRODUCTION

Prior to the decision of the Georgia Supreme Court in *Stokes v. Stokes*,¹ the only theories for awarding one spouse's real property to the other spouse in a divorce action were alimony, resulting trust, and inceptive fraud.² In *Stokes*, the supreme court adopted a new theory of division of marital property when it recognized in each spouse the right to seek an equitable division of the property regardless of who holds title to the property and independent of any claim for alimony or any theory of trust or fraud.³ This Comment will present a discussion of the *Stokes* decision and the problems inherent in the creation of this new property right and will conclude with a recommendation to the Georgia Legislature to enact legislation to combat the potentially anomalous results that might occur with continued judicial definition of the new property right.

The Georgia Code provides for an award of permanent alimony to either spouse from the corpus of the other spouse's estate.⁴ Georgia courts often have interpreted this code section to authorize an award of one spouse's real property to the other spouse *as alimony*.⁵

If for some reason a spouse is not entitled to alimony, however, he or she may claim an interest in the other spouse's property based on a theory of resulting trust or fraud.⁶ Typically, an equitable claim based on a

1. 246 Ga. 765, 273 S.E.2d 169 (1980).

2. See, e.g., *Lowry v. Lowry*, 238 Ga. 593, 594, 234 S.E.2d 509, 510 (1977); *Byrd v. Byrd*, 238 Ga. 569, 570, 233 S.E.2d 799, 800 (1977); *Scales v. Scales*, 235 Ga. 509, 510, 220 S.E.2d 267, 268 (1975).

3. 246 Ga. at 768, 771, 273 S.E.2d at 171, 173.

4. "The finder of fact may grant permanent alimony to either party, either from the corpus of the estate or otherwise." OFFICIAL CODE OF GA. ANN. § 19-6-5(a) (Michie 1982), GA. CODE ANN. § 30-209(a) (Harrison 1980 & Supp. 1982) (editorial changes only).

5. See, e.g., *Anthony v. Anthony*, 236 Ga. 508, 509, 224 S.E.2d 349, 350 (1976); *Burgess v. Burgess*, 224 Ga. 180, 181, 160 S.E.2d 589, 590 (1968); *Wright v. Wright*, 208 Ga. 588, 589, 68 S.E.2d 573, 574 (1952).

6. D. MCCONAUGHEY, *GEORGIA DIVORCE, ALIMONY AND CHILD CUSTODY* § 12-3 (2d ed. 1980) [hereinafter cited as *MCCONAUGHEY*].

resulting trust theory exists in the situation in which one spouse has provided the purchase money for the property while legal title is taken in the other spouse's name.⁷ In this situation, a resulting trust in favor of the grantor-spouse may be shown.⁸ Although a presumption arises that the grantor's conveyance of title to the other spouse was a gift,⁹ this presumption may be rebutted by parol evidence concerning the nature and circumstances of the transaction.¹⁰ In addition, the grantor must establish that a resulting trust was contemplated and intended by both spouses.¹¹ Once the grantor has established the elements of a resulting trust, the court may award legal title by decree to the grantor to the extent of his or her equitable interest.¹²

Further, a spouse's interest in property may be divested upon a showing that the property was acquired by fraud.¹³ For example, if a spouse's promise to perform some task has provided the consideration that induced the execution of a deed and the other spouse can prove that the promise was fraudulently given with the intent not to perform the promised task, then the deed may be set aside for inceptive fraud.¹⁴

II. THE HOLDING IN *Stokes*

The decision of the supreme court in *Stokes* created an additional basis or theory for divesting a spouse in a divorce action of his or her real property. In *Stokes*, the court recognized the right of a spouse to seek an equitable division of property, regardless of who holds legal title to the property and completely independent of a claim for alimony or a claim to establish a resulting trust.¹⁵

In *Stokes*, the wife held exclusive title to the family home. Although the jury denied the wife's prayer for alimony, she was awarded a three-fourths interest in the house. The husband was granted a one-fourth interest in the home. In upholding the jury's award, the supreme court said that in divorce actions the lower court has ancillary jurisdiction to distribute equitably both real and personal property held in the name of

7. *Id.*

8. OFFICIAL CODE OF GA. ANN. § 53-12-28 (Michie 1982), GA. CODE ANN. § 108-116 (Harrison 1979) (editorial changes only).

9. *Id.*; see *Scales v. Scales*, 235 Ga. 509, 510, 220 S.E.2d 267, 268 (1975).

10. OFFICIAL CODE OF GA. ANN. § 53-12-34 (Michie 1982), GA. CODE ANN. § 108-108 (Harrison 1979) (editorial changes only).

11. *Ford v. Ford*, 243 Ga. 763, 764, 256 S.E.2d 446, 447 (1979).

12. See, e.g., *Barnes v. Barnes*, 230 Ga. 226, 227, 196 S.E.2d 390, 391 (1973); *Burgess v. Burgess*, 224 Ga. 180, 181, 160 S.E.2d 589, 590 (1968).

13. *McCONAUGHEY*, *supra* note 6, § 12-3.

14. See, e.g., *Pavlovski v. Klassing*, 134 Ga. 704, 707, 68 S.E. 511, 512 (1910).

15. 246 Ga. at 768, 273 S.E.2d at 171.

either spouse, not as alimony but as an equitable division of property.¹⁶ In essence, the decision in *Stokes* granted each spouse an unqualified equitable interest in the other spouse's property.

III. IMPLICATIONS AND RAMIFICATIONS

The supreme court's decision in *Stokes*, based upon imaginary precedent¹⁷ and ostensibly the court's ipse dixit, immediately prompted questions concerning the implications and ramifications of this newly created property interest.¹⁸ More specifically, questions were raised about the effects the *Stokes* decision would have upon creditors' rights, testate and intestate succession, and the taxation of intranspousal property transfers. The answer to most, if not all, of these questions revolves around the time that this equitable right vests in the nontitle-holding spouse. Although the commentators have suggested that the *Stokes* decision supports two contradictory solutions to the vesting question (i.e., vesting at time of acquisition or at time of divorce),¹⁹ the supreme court has interpreted *Stokes* to mean that a spouse has only an expectant interest in

16. *Id.* at 771, 273 S.E.2d at 173. Compare the court's holding with the following quote from the same court's footnote in *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980): "We note here that a so-called 'property settlement' can only exist by virtue of an agreement. The only method by which a trial judge or jury can award one spouse's property to the other is by granting alimony. . . ." *Id.* at 234 n.1, 271 S.E.2d at 148 n.1.

17. In his very cogent and persuasive dissent, Justice Bowles distinguished every case on which the majority relied. Highly critical of the majority's misplaced reliance on these cases, Justice Bowles stated that, in his view, "the majority opinion . . . establishe[d] and implement[ed] property rights [in Georgia] which have not heretofore existed." 246 Ga. at 773, 273 S.E.2d at 175 (Bowles, J., dissenting).

18. See Bennett, *Georgia Becomes a Quasi Community Property State*, 17 GA. ST. B.J. 134 (1981) [hereinafter cited as Bennett].

19. *E.g., id.* at 136. Bennett suggests that the first possible solution would vest the nontitle-holding spouse with equitable rights in the marital property as it was acquired. In light of the court's partial reliance on GA. CODE ANN. § 53-502 (Harrison 1982), OFFICIAL CODE OF GA. ANN. § 19-3-9 (Michie 1982) (editorial changes only), which provides that the separate property of each spouse shall remain separate after marriage, Bennett argues that, conversely, property accumulated during the marriage by either spouse is equitably owned by both during the course of the marital relationship. Carried a step further, this approach not only vests the nontitle-holding spouse with equitable rights assertable upon divorce, but also gives this spouse equitable property rights that survive the death of either spouse.

The second possible solution Bennett suggests is based upon the court's discussion of GA. CODE ANN. § 30-118 (Harrison 1980), OFFICIAL CODE OF GA. ANN. § 19-5-13 (Michie 1982) (editorial changes only). In view of the majority's partial reliance on this code section, which refers to the verdicts of juries disposing of property in divorce cases, arguably the equitable interests created by *Stokes* do not vest until the final decree of divorce. Instead of vesting the nontitle-holding spouse with an equitable interest in the marital property as it accumulates, this second interpretation of *Stokes* gives the nontitle-holding spouse a mere expectancy in property accumulated in the other spouse's name. Bennett, *supra* note 18, at 136.

property accumulated in the other spouse's name during the marriage.²⁰

A. Questions Answered

In a decision handed down on the same day as *Stokes*, the supreme court foreshadowed its leaning toward the expectancy rule when it intimated in *Bedford v. Bedford*²¹ that the equitable rights in *Stokes* arose only from the divorce.²² The case of *Segars v. Brooks*,²³ however, was the supreme court's first opinion that provided a definitive answer to the vesting question. In *Segars*, the court was confronted with the issue of whether a *Stokes* claim for equitable division of property survived the death of the claimant during the pendency of the divorce proceedings. The wife's petition for relief in the divorce action sought a decree of fee simple title to the couple's home.²⁴ Holding that a *Stokes* claim for equitable division of property abated with the death of the wife, the court stated:

A *Stokes* claim for equitable division of property cannot be filed or maintained separate from divorce proceedings To the contrary, a *Stokes* claim only can be filed or maintained in and ancillary to divorce proceedings. The reason for this rule is that a *Stokes* claim arises from a marital relation and divorce. Accordingly, a *Stokes* claim arises either after or contemporaneously with the filing of a claim for divorce and must abate if not pursued to entry of judgment after or contemporaneously with entry of a decree of divorce. In a few words, no divorce means no equitable division of property.²⁵

Although the trial court could have entered a decree of divorce on the pleadings, no decree was issued before the wife's death. The court reasoned that until the divorce decree was entered, the presumption that the parties might have reconciled their differences and continued their marriage must prevail.²⁶ Based on this presumption, the court concluded that it could not state that as a result of the divorce proceedings a right would have arisen that would have been inheritable and, therefore, subject to the claim of the intestate wife's administratrix.²⁷

In *Owens v. Owens*,²⁸ the supreme court, in an opinion written by Jus-

20. See *infra* text accompanying notes 21-32.

21. 246 Ga. 780, 273 S.E.2d 167 (1980).

22. *Id.* at 781, 273 S.E.2d at 168.

23. 248 Ga. 427, 284 S.E.2d 13 (1981).

24. *Id.* at 427, 284 S.E.2d at 14.

25. *Id.* at 428, 284 S.E.2d at 14 (citation omitted).

26. *Id.* at 428, 284 S.E.2d at 15.

27. *Id.*

28. 248 Ga. 720, 286 S.E.2d 25 (1982).

tice Weltner, was confronted again with the problem of survivability of a *Stokes* claim for equitable division of property. In *Owens*, a suit was brought by the deceased wife's executrix. The executrix sought to establish an interest in a seventy-two acre tract of land that the husband owned.²⁹ The jury awarded the wife's estate a one-half interest in the seventy-two acre tract.³⁰

Commenting on the husband's objection to the trial judge's charge on a *Stokes* equitable division of property, the supreme court stated:

We recently held in *Segars v. Brooks* . . . that "[a] *Stokes* claim for equitable division of property cannot be filed or maintained separate from divorce proceedings . . ." *Stokes* recognized the contributions of both parties to a marriage, and allows a jury to divide their property equitably at the demise of the marriage, in order that each spouse may continue his or her life outside of the marital relationship. *However, no property rights are created in the assets of the marriage while the parties are still married.*³¹

Thus, it appears from the *Segars* and *Owens* decisions that a *Stokes* claim for an equitable division of property arises only after the entry of a final decree of divorce. The death of either spouse before the divorce decree is entered results in the 'death' of that spouse's *Stokes* claim.

In addition to answering some of the questions surrounding the vesting issue, the supreme court has resolved several collateral issues that *Stokes* raised. In *Peters v. Peters*,³² the court addressed the question of whether an adulterous wife is precluded from obtaining an equitable division of property. The Georgia Code provides that a party is not entitled to alimony if it can be established that the separation was caused by that party's adulterous conduct.³³ In *Peters*, however, the court stated that while an adulterous spouse is precluded from obtaining alimony, he or she is not precluded from obtaining an equitable division of property.³⁴ The court added, however, that when an equitable division of property is in issue, the parties' conduct during marriage is relevant and admissible evidence.³⁵

29. *Id.* at 720, 286 S.E.2d at 26. Prior to this action that the executrix commenced, the wife sued the husband for divorce. The wife died, however, before a divorce decree was entered.

30. *Id.*

31. *Id.* (quoting *Segars*, 248 Ga. at 428, 284 S.E.2d at 14) (emphasis added) (citation omitted).

32. 248 Ga. 490, 283 S.E.2d 454 (1981).

33. GA. CODE ANN. § 30-201 (Harrison 1980), OFFICIAL CODE OF GA. ANN. § 19-6-1(b) (Michie 1982) (editorial changes only).

34. 248 Ga. at 491, 283 S.E.2d at 455.

35. *Id.* at 491-92, 283 S.E.2d at 455.

In *Moore v. Moore*,³⁶ the supreme court was confronted with another and more important aspect of equitable division of property. In an attempt to clarify and limit the scope of its decision in *Stokes*, the court held in *Moore* that the only property subject to equitable division is the real and personal property acquired by the parties *during* marriage.³⁷ The court further held that the jury's determination of the equitable apportionment of the marital property should be guided by, among other things, the estate of each party, any previous marriage of either party, and each spouse's contribution of service to the family unit.³⁸

B. Questions Unanswered

With the vesting problem apparently resolved, the Georgia courts are now in a better position to resolve the issues concerning the effect of *Stokes* on taxation, intestate and testate succession, and creditors' rights. Although these issues have yet to be litigated, an analysis of the potential problems in these areas and the formulation of plausible solutions is possible.

Taxation. Georgia's adoption of the expectancy theory of equitable division of property raises an interesting question regarding federal income tax liability. A spouse who is forced to convey some or all of his or her property to the other spouse pursuant to an equitable division may experience taxable gains on the transfer.³⁹ The tax liability of the divested spouse depends on the nature of the receiving spouse's interest in the property prior to divorce.⁴⁰ When the receiving spouse's interest in the property is considered to be vested, the courts have considered the transfer a division of jointly owned property and, therefore, not a taxable event.⁴¹ If the receiving spouse's rights in the property are expectant or

36. 249 Ga. 27, 287 S.E.2d 185 (1982).

37. *Id.* at 28, 287 S.E.2d at 186.

38. *Id.* at 28, 287 S.E.2d at 186-87.

39. I.R.C. § 1222 (1976 & Supp. IV 1980).

40. In *United States v. Davis*, 370 U.S. 65 (1962), the United States Supreme Court held that a husband-taxpayer realized a taxable gain on the transfer of appreciated property pursuant to a property settlement agreement. The Court looked to Delaware law and rejected the husband's argument that the property transfer was nothing more than a division between co-owners. Delaware law, the court stated, gives the wife only an inchoate interest in her husband's property and therefore precludes any argument that the two were co-owners. *Id.* at 70. The husband's tax liability was calculated accordingly based on the difference between his basis in the property and the fair market value of the property at the time of transfer. *Id.* at 72.

41. See, e.g., *Bosch v. United States*, 590 F.2d 165, 168 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). Under community property principles, in which each spouse has an equal vested interest in all property acquired during marriage, the courts have considered an equal division not to be a taxable event. If the division of property, however, is less than

inchoate, the courts have deemed these transfers taxable gains for the transferring spouse.⁴³

In light of *Segars* and *Owens*, a federal court interpreting Georgia law concerning the substantive property rights of the receiving spouse can be expected to treat the transfer of appreciated property pursuant to an equitable division as a taxable event. For example, suppose that title to the family home is held in the husband's name. If the divorce action results in an equitable division of property in which the husband is forced to transfer the house to the wife, the husband is faced with a potentially substantial taxable gain. If the house was purchased during the early years of a twenty-year marriage, the appreciation in the house's value could be considerable. Capital gains taxes on the transfer of the appreciated property to the wife similarly could be substantial. The wife's mere expectancy in the property prior to divorce would make the transfer a taxable disposition.⁴⁴ The husband's transfer of the property pursuant to the equitable division would be in consideration for the release of his marital obligations. Because the wife's interest in the property was not presently vested during the marriage, the transfer would not be a division of commonly owned property.

The above example illustrates one of the possible burdensome and inequitable results of the expectancy rule.⁴⁴ A spouse who is ordered to transfer appreciated property pursuant to a divorce decree realizes nothing tangible in return. Viewing the property transfer from the practical side, the taxpayer-spouse is faced with an onerous and seemingly unfair tax consequence imposed by the expectancy rule since the transfer yields no funds that the taxpayer-spouse could use to pay the capital gains tax.⁴⁵

Creditors' Rights. The adoption of the expectancy rule by Georgia will minimize the effect of the *Stokes* property interest on creditors' rights. The uncertainty surrounding *Stokes* immediately after it was decided prompted some commentators to predict far-reaching ramifications and complications in the area of creditors' rights.⁴⁶ It was thought that if a spouse had a presently vested equitable interest in property held in the

equal, all property received in excess of an equal share constitutes a taxable gain. See, e.g., *Carriers v. Commissioner*, 64 T.C. 959 (1975). See also Rev. Rul. 76-83, 1976-1 C.B. 213.

42. See, e.g., *Wiles v. Commissioner*, 499 F.2d 255, 257 (10th Cir.), cert. denied, 419 U.S. 996 (1974).

43. See *supra* note 40.

44. For a discussion of some of the other potentially harsh results of the expectancy rule, see *infra* text accompanying notes 52-54.

45. Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 122 (1980) [hereinafter cited as Note, *New York's Equitable Distribution Law*].

46. Bennett, *supra* note 18, at 132. See also Cheeley & Cheeley, *Domestic Relations, Annual Survey of Georgia Law, 1980-1981*, 33 MERCER L. REV. 109, 118-20 (1981).

name of the other spouse, then a creditor of the spouse without title could look to that property to satisfy a debt since the Georgia Code provides that a creditor may reach the equitable assets of a debtor when there is a danger that the debt may not be satisfied from the debtor's legal assets.⁴⁷

The groundswell of problems in this area has not and likely will not materialize because of the supreme court's decision to opt for the expectancy rule. The inchoate and contingent nature of the nontitle-holding spouse's interest should not be considered an equitable asset. It has long been the rule in Georgia that as beneficiary under a will, a judgment debtor who has only a bare contingency or possibility and not a presently vested right can not have his interest subjected to sale by the judgment creditor.⁴⁸ Similarly, if a beneficiary's interest in a trust is indefinite or contingent, the beneficiary's interest cannot be reached by his creditors.⁴⁹ These analogous situations, which concern the creation of expectant interests by will and by trust, provide a basis for the conclusion that creditors' rights will not affect or be affected by the creation of an expectant equitable interest in an opposing spouse's property. The spouse who holds title to a particular piece of property should not be concerned with the possibility that a creditor might be able to carve out the other spouse's interest in the property in order to satisfy a debt. While the marriage continues, the nontitle-holding spouse has no legally cognizable interest in the property that a creditor could rightfully reach.

Testate and Intestate Succession. The extent to which testate and intestate succession would be affected by the newly created property right also became the subject of debate immediately following the *Stokes* decision. One question was whether a wife could devise her interest in her husband's property notwithstanding the terms of the husband's will. Another question was whether the heirs at law could rightfully claim a deceased spouse's interests in the other spouse's property if the decedent died intestate. Once again, the supreme court's adoption of the expectancy rule plays a pivotal role in answering these questions.

A spouse with no more than an expectant interest in the other spouse's property has no legally cognizable property interest to devise. One cannot seek to devise property before the rights to that property vest in the testator. Of course, once a divorce decree is entered and an equitable division is made vesting the nontitle-holding spouse with an interest in the other spouse's property, he or she could then devise that interest.

A spouse's right to an equitable division does not survive the spouse. As

47. OFFICIAL CODE OF GA. ANN. § 23-2-96 (Michie 1982), GA. CODE ANN. § 37-408 (Harrison 1979).

48. See, e.g., *Yancey v. Grafton*, 197 Ga. 117, 121-22, 27 S.E.2d 857, 860 (1943).

49. See, e.g., *Henderson v. Collins*, 245 Ga. 776, 778, 267 S.E.2d 202, 205 (1980).

the court stated in *Segars*,⁵⁰ a *Stokes* claim is not inheritable. A wife who dies intestate before a divorce decree is entered has no surviving *Stokes* right or interest in the husband's property that could be subjected to the claims of the wife's estate. Thus, it appears that a title-holding spouse need not fear that the intestate death of his or her spouse will affect his or her testamentary distribution. Property that is otherwise separately owned would lose its separate characteristic and become subject to claims of the other spouse's estate only upon divorce. Until a divorce decree is entered and an equitable division made, a spouse is apparently free to sell, transfer, or otherwise encumber his separate property.

C. Anomalous Results

The expectancy rule can have 'anomalous' results.⁵¹ It has been suggested that the expectancy rule in effect encourages divorce because divorce is the means of ascertaining and protecting one's interest in the marital property.⁵² The right to an equitable share in the marital property, including property held solely in the name of one spouse, should exist throughout the marriage. Otherwise, a spouse is without a "lawful claim to enjoin waste prior to divorce."⁵³ Without standing to protect all of the marital assets, except by filing a divorce, one has to wonder how many divorces will be sought even though reconciliation might have been likely otherwise.

IV. THE NEED FOR LEGISLATION

Although the *Stokes* decision and its progeny granted marital partners a much needed equitable interest in the marital assets, the halls of the legislature and not the chambers of the supreme court are the appropriate forum for writing legislation. As noted by Justice Bowles in his dissent in *Stokes*, "the duty of [the] court is to determine what the law is, not to legislate . . ."⁵⁴ Justice Marshall, who joined Justice Bowles in the *Stokes* dissent, has expressed his view that the *Stokes* majority made "an unjustified intrusion into the realm of legislative authority."⁵⁵ Judicial fiat necessarily breeds initial uncertainty that is remedied only by subsequent judicial decisions that must act in effect as "implementing

50. See *supra* text accompanying notes 23-31.

51. Bennett, *supra* note 18, at 136.

52. *Id.*

53. *Id.*

54. 246 Ga. at 773, 273 S.E.2d at 175 (Bowles, J., dissenting).

55. *Peters v. Peters*, 248 Ga. 490, 492, 283 S.E.2d 454, 455 (1981) (Marshall, J., concurring specially).

legislation."⁵⁶ The flurry of confusion surrounding *Stokes* has just begun to be settled by cases like *Segars* and *Owens*. One has to wonder if the nature of the rights created by *Stokes* would not have been more clearly defined and readily apparent if the legislature and not the judiciary had been the promulgating body.

A. *The New York Statute*

Before offering suggestions about what steps the legislature should take in order to reassert its authority in this area, it is helpful to look at similar recent developments in New York. In July, 1980, the New York Legislature effected sweeping reforms in that state's domestic relations law when it instituted a system of equitable distribution of property upon divorce.⁵⁷ Section 236 of the New York Domestic Relations Law provides that the courts shall make an equitable division between spouses of property accumulated during the marriage relationship.⁵⁸ The new law consciously departed from the former practice of awarding property to each spouse based solely on who held title to the various property.⁵⁹ Instead, section 236 mandates an equitable distribution of the couple's marital assets at the time of divorce, regardless of who holds title to the property.⁶⁰ Apparently recognizing a marriage as an economic partnership, New York's equitable distribution law defines the marital property as "all property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held . . ."⁶¹ Marital property does not include a spouse's separate property, which is defined as property acquired prior to marriage or acquired by bequest or gift.⁶²

Part B of section 236 enumerates ten factors that a court is required to consider when distributing the marital property. These factors include the liquidity or illiquidity of all the marital property, the probable future financial circumstances of the parties, and the age and health of each party.⁶³ The most salient factor to be considered is not really a 'factor' at all. The statute provides that the court shall consider any other factor that the court finds just and proper.⁶⁴ This final factor in effect endows the court with substantial discretion in making the equitable distribution.

56. *Moore v. Moore*, 249 Ga. 27, 29-30, 287 S.E.2d 185, 187 (1982) (Marshall, J., concurring).

57. N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1981-1982).

58. *Id.* § 236 Part B(5).

59. Note, *New York's Equitable Distribution Law*, *supra* note 45, at 70.

60. N.Y. DOM. REL. LAW § 236 Part B(1)(c), (5)(c) (McKinney Supp. 1981-1982).

61. *Id.* § 236 Part B(1)(c).

62. *Id.* § 236 Part B(1)(d)(1).

63. *Id.* § 236 Part B(5)(d).

64. *Id.* § 236 Part B(5)(d)(10).

B. A Suggested Approach to Legislation

In writing Georgia's equitable division legislation, the legislature should first define marital property. The definition should be consistent with the treatment of separate property in the Georgia Code⁶⁵ and should allow written agreements between the parties to supplement the definition of marital property. By defining marital property, the assets that are available for distribution are readily identifiable.

Once the marital assets are defined, the legislature should then set out the criteria on which the court must base its division. Among the factors that should be included are the duration of the marriage, any award of alimony under the divorce decree, the income of each partner, direct or indirect contribution to the acquisition of marital assets by the spouse not holding title, the career or career potential of the parties, and the economic impact of interfering with or dividing a particular asset. In addition, the court should be required to enumerate expressly all factors considered and the weight that the court placed upon each factor in reaching its decision. This procedural safeguard should help prevent abuse of discretion.

V. CONCLUSION

The concept of equitable division of marital property regardless of who holds title to the property and independent of a claim for alimony, resulting trust, or fraud, remains in its incipiency in Georgia. A creation of the judiciary, this equitable interest in the accumulated marital property is only slightly more defined than when the interest was first created in *Stokes* in 1980, although the supreme court has attempted to hang definitive parameters on the *Stokes* skeleton. It seems clear that this equitable interest is no more than an expectancy, unassertable prior to the entry of a divorce decree. The death of a spouse prior to divorce results in the death of the right to claim an equitable division. The Georgia General Assembly, however, must see fit to assert its power in this area and fill the remaining gaps created by *Stokes* with precise legislation.

RANDY WARNER

65. OFFICIAL CODE OF GA. ANN. § 19-3-9 (Michie 1982), GA. CODE ANN. § 53-502 (Harrison 1982) (editorial changes only). See *supra* note 19.

