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Student Note

MARRIAGE IS BETWEEN A MAN AND A WOMAN AND . . . : LATEST
EVOLUTION OF MARITAL RESIDENCE REGIME IN CONTEMPORARY CHINA

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Introduction

Imagine yourself in the position of an urban Chinese young man. You recently graduated from college and are earning about \$10,000 a year.¹ You are in a happy relationship with your college sweetheart, and you two are seriously thinking about getting married. You ask your fiancée to arrange a dinner with her parents and talk about the planned marriage. At the dinner, the long-dreaded question comes from your future mother-in-law: “Do you have a place where my daughter can live with you comfortably?”

You saw the question coming. After all, this is part of the gauntlet that every to-be-married young man in China has to run. But you have no satisfactory answer. You know that with your income, you will never be able to afford an apartment, which costs around \$320 per square *1014 foot.² So you turn to the only answer that you can offer: “I will get a place with my parents' help.”

It is quite likely that you are the only child of your parents, since the one-child policy has been in place for about thirty years. Your parents may have a house that they obtained for relatively cheap long before the advent of the urban real estate market, when houses were still allocated based on seniority at a job; or they may have a nest egg that can go a long way towards the down payment for an apartment. For whom are they keeping these properties, if not you?

Your mother-in-law is satisfied and you get married to your sweetheart. Your parents put your name on the title of their house, or use their nest egg for the down payment of a new apartment titled under your name, and as you expected, they do not ask for compensation. But either intentionally or not, they do not put your new wife's name on the title.

Years pass, and unfortunately your marriage goes sour. You are now talking about a divorce. Your wife believes that the house is marital property and that she is thus entitled to a share, and you are aghast at her impudence. Why should she, who (in your mind) ignored household duties and instead continued with her partying lifestyle outside, now ask for a share of this house, which, after all, was obtained through your parents' life savings and titled under your name only?

Now put yourself on the other side of the equation. Imagine that you are an urban Chinese young woman, and you have met the prince of your dreams. He is handsome, well mannered, and the only scion of a rich family. His

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parents are willing to bestow a big house on him upon his marriage. And he loves you. You cannot believe your luck, and when he asks for your hand, you accept. You move into the big house with him and do not ask in whose name it is titled (and of course, it is titled under his name only).

Then you find that his parents are overbearing and are treating you as a child-rearing machine. They want you to resign from your job so that you can devote your whole time to the family. They want you to obey them in every way and show them the kind of respect that is *1015 more appropriate from a medieval serf to her lord. What's worse, your husband has lost interest in you and is openly living with his trophy mistresses elsewhere.

You talk about divorce, and your husband's family laughs at your demand for a share of the marital house. After all, they paid for it all and it is titled in your husband's name only, what basis do you have for the demand?

Under Chinese law--that is, the most recent Judicial Interpretation on the Marriage Law from the Supreme People's Court of China--there is now a simple formula to decide both these hypothetical cases. The wife has no valid claim to the house, because she is not on its title and the funding came from the husband's parents.

But is this the right outcome? And is the Chinese law in this contentious area going in the right direction? This paper will examine these questions from a historical and comparative viewpoint, and will conclude that the new title-based scheme is not an equitable solution for the problem of distribution of marital residence. A fact-intensive approach that takes into account all the circumstances--in particular the non-financial contribution of each party to the marriage--would be a more equitable one.

The first section of this paper will describe the historical development of laws of marital property distribution in China. The second section will provide a comparative study on how the contemporary U.S. law treats similar problems. The third and last section will then discuss the merits and problems of the new development in Chinese law, and suggest possible improvements.

I. Historical Development of Laws of Marital Property Distribution in China

A. Marriage, Divorce and Marital Property in Imperial China

The reader might wonder why, in both hypothetical cases, the woman seems to invest so little financially in the marital residence³ *1016 and the husband's parents seem to be so closely integrated into the life of the married couple. To answer these questions, we need to turn to the history and traditions of Chinese society.

In the traditional Chinese society, family obligations, rather than individual autonomy, controlled every person. There was no "personal property," only family property, under the management and control of the paterfamilias.⁴ The paterfamilias further held despotic power over the life and property of everyone in his (generational) family, and there was no concept of emancipation as in Roman law.⁵ As such, generational families, rather than kernel families, were the preferred structure.⁶

Families were further organized into extended family groups, with strict hierarchy and an oftwritten "Family Code," under which the head of a family group could impose various rulings and punishments (including capital punishments in certain cases) to members of the group, and to which the law generally gave great deference.⁷ In

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fact, the whole traditional Chinese society was organized like a huge extended family group, with the Emperor as the paterfamilias for all.

*1017 In such a society, marriage was naturally a union between two families, not between two individuals.⁸ This is a very different emphasis from the Western tradition, where marriage has long been defined as a *coniunctio maris et feminae et consortium omnis vitae* (“the joining together of a male and a woman, and a partnership for life in all areas of life”).⁹ Accordingly, consent by the parties was never a prerequisite for marriage in China, but consent by the parties' parents was.¹⁰ This is also distinctively different from the Western tradition, where consent by the parties was essential,¹¹ and consent by the parents was not always required.¹²

Moreover, the purpose of the marriage was to extend the family of the husband, by taking in the wife as a new family member and by producing offspring for the future.¹³ Thus women were always placed in a subservient position.¹⁴ The law sometimes says that a woman is in a *1018 semi-filial position with regards to her husband,¹⁵ or that her status is similar to that of a child.¹⁶ The inequality is most visible from the law's vastly different treatments of husband and wife in domestic violence cases.¹⁷

More importantly, the wife was, by the marriage, transferred into the power of her husband's parents and was supposed to obey and serve them.¹⁸ She could not possess any private property, but had to receive everything, including necessities, from them as a “reward.”¹⁹ If she kept anything for her private use, this would be equivalent to “theft” from the husband's family and would be grounds for divorce.²⁰

Even below the status of wives was the status of concubines. The traditional Chinese society was a heavily polygynous one, with each man allowed to have an unlimited number of concubines.²¹ The purpose of such an institution was to facilitate the production of male issues for the husband's family.²² As the law stated, “concubines are similar to merchandise, and are far below the rank of a wife.”²³ But even concubines may not be enough to satisfy the need for male issue, and the law permitted men to obtain sexual services from female servants.²⁴ These servants were considered “of servile kind” and further below the concubines in status.²⁵

*1019 In all, this is a system with few parallels in the Western tradition, one of lawful polygyny, of complete subordination of women, and of patriarchal power over generational families.²⁶ A further difference from the Western tradition is its permissive attitude towards divorces. The law recognized consent-based²⁷ and fault-based divorces, with the faults all on the woman's side.²⁸ Moreover, since a marriage was a union between two families, certain conflicts between the families (also bearing more harshly on women than on men) would result in statutory divorce.²⁹ In practice, most divorces happened through consent because of the social stigma associated with fault-based divorces. The husband would write a divorce letter, which may or may not list out the reasons for the divorce, and negotiate with the wife's family for a financial settlement.³⁰

Overall, it was easy for the husband and his parents to obtain a divorce, but very difficult for the wife to do so.³¹ Even divorce by consent required a divorce letter by the husband, which meant great leverage *1020 for the husband in negotiating the terms.³² Furthermore, the concept of divorce was to adjust the relationship between

a husband and his wife, not his concubines or female servants. Those were little more than chattels of the man, and could be disposed at will.

B. Early evolution of marriage and marital property regime in the modern era.

Starting from the late 19th century, the laws of China began to modernize. In September 1911, Da Qing Min Lü Cao'an (<<unknown characters>>) (Draft of the Civil Code of Qing Dynasty), the first attempt at a modern Civil Code of China, was completed.³³ However, this draft never really went into effect, as the Qing Dynasty was overthrown in 1912.

With regards to the institution of marriage, it was more of a reiteration of the traditional Chinese family law than an adoption of the European Civil Law tradition.³⁴ Generational family was still preferred to kernel family.³⁵ Consent of parents, not of parties, was still required for marriage.³⁶ Polygyny was still allowed.³⁷ Generally, a wife still had no management and control over any property.³⁸

This draft, however, changed the law of divorce. The fault grounds for divorce were overhauled so that they bore more equally on the two parties, and some ancient grounds (such as mere disrespect to the *1021 husband's parents or talkativeness) were gone.³⁹ Moreover, the draft recognized that the wife was entitled to her separate property (but only that) in a divorce.⁴⁰ This was still a huge improvement from the days when a wife who kept separate property would be divorced solely on that ground. The draft also introduced the concept of alimony (based solely on the fault of the husband) into Chinese law.⁴¹

In 1915, the Department of Justice of the Republic of China made its own draft of a Civil Code called Minguo Min Lü Cao'an (<<unknown characters>>) (Draft of the Civil Code of the Republic of China).⁴² The Congress never formally adopted the draft but courts did apply it.⁴³ This draft was substantially the same as Da Qing Min Lü Cao'an with regards to family law⁴⁴ and in particular the marital property regime.⁴⁵ However, there was one difference in organization: the draft grouped the provisions under a section named “statutory marital property regime.”⁴⁶ This showed some conscious effort in dealing with this aspect of family law.

The new draft also introduced some improvements in the details.⁴⁷ In particular, personal items for exclusive use by the wife would be her separate property and would be under her management and control.⁴⁸ This was the first mention in Chinese law of the husband not having full management and control over every property related to the marriage. Award of alimony was liberalized to cover the situations where one party was at fault, or where an innocent party would become destitute because of the divorce.⁴⁹

*1022 In 1929, the new government of the Republic of China started drafting a new Civil Code.⁵⁰ The drafters drew from the existing drafts but also sought to bring the code in line with the trend of Civil Law in the world.⁵¹ Article 4 (Kinship) of the code was promulgated on Dec. 26, 1930 and became the first modern family law of China.⁵²

Compared to the two previous drafts, the new code was truly revolutionary. Consent of parties, not of parents, became the requirement for a valid marriage.⁵³ The implicit recognition for concubines was gone. Also gone was

the requirement that consent of parents was needed for the establishment of a separate household.⁵⁴ With these changes, kernel monogamous family became the preferred family structure in Chinese law.

The default statutory marital property regime was essentially unchanged.⁵⁵ However, the code introduced an “opt-in” property regime that couples could choose for themselves through explicit contract.⁵⁶ It was a true community property regime, with every non-separate property owned in community by the husband and the wife together, and with provision for equal division in divorce or at death.⁵⁷ While the code vested the management and control over the community property in the husband, it also stipulated that mutual agreement was necessary for any non-routine disposition.⁵⁸

Thus did the concept of community property first make its inroad into Chinese law, but it would still take some time before this new regime took root and became established as the default statutory marital property regime. Moreover, revolutionary as the new code was, it had little effect on the reality of Chinese marriage. The Republic of China era was marked by political turmoil, civil wars, and the ruinous Japanese invasion, which took 10 to 20 million lives. Even during the relatively peaceful years, the laws never effectively reached the rural societies, and traditional family structure persisted there.

C. Marriage Laws of the People's Republic of China⁵⁹

On May 1, 1950, *Zhonghua Renmin Gongheguo Hunyin Fa* (<<unknown characters>>) [[Marriage Law of the People's Republic of China] was promulgated.⁶⁰ This was the very first law promulgated by the new government.⁶¹ The law aimed to break up completely “[t]he feudal marriage system which is based on arbitrary and compulsory arrangements and the superiority of man over woman and ignores the children's interests.”⁶² It flatly outlawed the institution of concubines.⁶³ Consent of parties became the absolute prerequisite for marriage, and interference from any third party (including the parents) was forbidden.⁶⁴ The law pronounced the husband and wife as completely equal parties, and bestowed on both of them the right to keep their own family names.⁶⁵

The law gave the marital property regime cursory treatment. It gave “equal rights in the possession and management of family property” to both the husband and wife, but did not define in detail what is included in the family property.⁶⁶ In the scenario of divorce, the parties were to negotiate on the division of all properties except the pre-marital properties of the wife.⁶⁷ If the negotiation should fail, the People's Court was to divide such properties after “taking into consideration the actual state of the family property, the interests of the wife and *1024 the child or children, and the principle of benefiting the development of production.”⁶⁸ Thus the system was one of unitary community property and discretionary division.

This was a radical turn from both the traditional separate property regime (with all the marital properties under the title of the husband) and the opt-in community property regime under the Civil Code of the Republic of China (which recognized separate property for both parties and stipulated for equal division). The root of this turn lay in the Soviet law tradition that looked down on private property ownership.⁶⁹ If there will ultimately be public sharing of all property, why not start with sharing in a family, where it seems most appropriate?

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Over the next thirty years, the government of People's Republic of China engaged in various social experiments which culminated in the Great Cultural Revolution of 1966-1976. The concepts of private property and rule of law were denounced as “capitalistic legalism,” and the legislative and judicial systems languished. However, the new government did succeed where its predecessors had failed: it broke up the traditional patriarchal family structure, and brought the private life of everyone under the regulation of government (instead of control of the family group). Accordingly, the concepts of true monogamy and equal status in marriage finally reached everyone in China and took root.⁷⁰

Starting from 1978, the policy of the People's Republic of China took an abrupt turn. Private property and rule of law gradually came back in favor, and the government embarked on an unprecedented bout of lawmaking activity. In 1980, a new Marriage Law supplanted the Marriage Law of 1950.

While keeping most of the provisions of the 1950 law intact, the new law formally introduced a marital property regime.⁷¹ Under this regime, absent an agreement between the parties, the husband and the wife jointly owned all properties acquired during the marriage, in *1025 which they shared equal management and control.⁷² In a divorce, such properties would be subject to division, preferably through a negotiation, but if that should fail, then through court action after “taking into consideration the actual state of the property and the interests of the wife and the child or children.”⁷³ Thus, the law retained the discretionary division principle, but limited the scope of jointly possessed property such that the overall scheme became more similar to the community property model in the United States.⁷⁴ The law also re-established the rights of the parties to dispose of marital property through agreement, and opened the door for marriage contracts.⁷⁵

The law was still too cursory on what constituted jointly possessed property. There was no discussion of rent, issue or profit, no discussion of inheritance and gift, and no discussion of transmutation and tracing. In all, it still took a simplistic view of marital property and put most properties into the pot.⁷⁶ This probably would not be so much a surprise if one realizes that in 1980 the recognition of personal property rights was still a novel idea in the People's Republic of China, and most families had little disposable property.⁷⁷ However, the direction of change is clear: the portion of property subject to division at a divorce was shrinking, and with a limited alimony scheme,⁷⁸ titles would play a more important role in divorce proceedings.

The next two decades saw the drastic urbanization of Chinese society and privatization of Chinese economy. The egalitarian principles of the government gave way to economic development, and individual *1026 ism rapidly replaced collectivism as the “fashionable” school of thought. The government receded from its extensive regulations of private life, and new attitudes towards sexual behavior and divorce changed the family law landscape. With the divorce rate on rapid rise and more property to divide, the proper delineation of separate property and marital property became a prominent problem.⁷⁹

Accordingly, on November 3, 1993, the Supreme People's Court published a judicial opinion on the extent of marital property during divorce proceedings.⁸⁰ It started by listing certain properties that should be marital, which included “any gift or inheritance to one or both parties” during marriage.⁸¹ Then it gave detailed treatment for several specific kinds of properties, such as marital residences. It provided a transmutation doctrine for the residence:

Houses . . . that were personal property of one party before the marriage but were under common use, management and control by both parties during the marriage may be characterized as marital property if the duration of the marriage exceeds eight years.⁸²

Communal repairs and improvements during the marriage to the house do not by themselves transmute a house into jointly possessed property.⁸³ However, the other party is entitled for a part of appreciation.⁸⁴ Additions to the house during marriage are jointly possessed property.⁸⁵ The opinion also provided detailed operative instructions on dividing the house.⁸⁶

***1027** Such detailed provision for marital residences reflected the new importance of real estate in a marriage. Under the 1982 Constitution, all urban land belonged to the government, and no person or organization could transfer such land in any way.⁸⁷ The urban residences were leased at very low rents to individuals by the government, and the individuals were not responsible for maintenance expenses.⁸⁸ However, such a system inevitably resulted in overly low supply and overly high demand.⁸⁹

Starting from 1982, the government gradually reformed the urban real estate system.⁹⁰ Through the 1988 Amendment to the Constitution, the legal right to transfer the use of land (but not the land itself) was established.⁹¹ On May 19, 1990, the State Council published a regulation on the transfer of such rights.⁹² This effectively established the urban real estate market in China. At the same time, the government aggressively transferred the residential use rights to individuals, and individually-owned rights of use became the predominant format of urban real property in China.⁹³

Now that individuals started to own and transfer property rights in residences, the problem of distribution of marital residences arose. In accordance with the still-existing preference of shared ownership in China, the Judicial Opinion of 1993 still favored transmutation of such residences, at least in long marriages. However, emphasis on protection of individual private ownership and individual autonomy soon became the catchword in the legal society of China, and a corresponding change in the law was not slow to come.⁹⁴

***1028** On April 28, 2001, the Marriage Law of 1980 was revised.⁹⁵ The revision continued in the direction of limiting the reach of jointly possessed property, and specified that certain properties, even if acquired after marriage, would be separate.⁹⁶ In particular, gifts explicitly made solely to one party would be separate property.⁹⁷ The revision was silent on the treatment of marital residences, but with the direction where the law was going, it was conceivable that transmutation was now disfavored.

The revision also reformed divorce in many aspects. The law now formally recognizes the contribution of homemakers in the fields of “childcare, elderly care, and support for the spouse’s job,” and allows for compensation thereof.⁹⁸ However, this only applies when there is a written agreement between the parties to keep properties acquired during the marriage as separately owned.⁹⁹ This restriction makes some sense because when there is no such agreement, then the properties are to be divided through negotiation or discretionary court action,¹⁰⁰ and such contribution will presumably be taken into consideration in the process.¹⁰¹ Certain faults will warrant

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an award of *1029 damage to the innocent party.¹⁰² Dissipation or fraudulent concealment of marital property may (but not “must”) be countered by a reduction in the share of properties.¹⁰³ One aspect remains unchanged, though: alimony is still only awarded on consideration of hardship.¹⁰⁴

Overall, the financial settlement at divorce is still heavily based on mandatory negotiation and judicial discretion. However, there is a much clearer delineation of separate and marital properties, while the reach of damage and alimony is kept limited. Thus, the characterization of property, and in particular the title under which property is held, has taken on a more important role than before.

D. Judicial interpretations on the revised Marriage Law of 2001

The Supreme Court issued its first Judicial Interpretation on the revised Marriage Law on December 25, 2001.¹⁰⁵ The most important provision in this interpretation, both in principle and in practice, is that separate property would be completely protected from transmutation into jointly possessed property in the absence of explicit agreement.¹⁰⁶ This firmly established the new preference for individual ownership over any form of shared ownership.

The second Interpretation was issued on Dec. 4, 2003.¹⁰⁷ Under this interpretation, absent explicit expression of donor’s intent, funds provided by parents of one party before marriage towards the purchase of real property would be characterized as a gift to that party *1030 only, but similar funds provided during marriage would be characterized as a gift to the couple and thus jointly possessed property.¹⁰⁸

The detailed treatment of housing gifts from parents is again a reflection of developments in the society. By this time, real estate has become the biggest piece of property in many urban Chinese families.¹⁰⁹ It is also one of the most fast-appreciating pieces of property.¹¹⁰ Moreover, it is a property that few people can afford with their salaries alone.¹¹¹ Yet, most Chinese couples desire the purchase of a residence as a prerequisite of marriage.¹¹² In addition, the husband is generally supposed to shoulder most of the expense.¹¹³ But how can he do it on his own? Very frequently, his parents will come in and invest their *1031 whole life savings as a “gift.”¹¹⁴ As this is a very common pattern, the Second Interpretation sought to clarify the characterization of such housing gifts, and the approach it took was one based on the timing of purchase, rather than on the form of title.¹¹⁵

Then came the third and most recent Interpretation on August 9, 2011 (effective August 13, 2011).¹¹⁶ This interpretation, in two articles, completely changed the way marital real property would be categorized by elevating the form of title to a determinative position.¹¹⁷ Article 7 says:

When the parents of one party provided the funding during the marriage for the purchase of real property, and the deed of such real property is recorded under the name of that party, such gift may be categorized as a gift solely to that party within the meanings of Section 18(3) of the Marriage Law, and such real property shall be categorized as the separate property of that party.

When the parents of both parties provided the funding for the purchase of real property, and the deed of such real property is recorded under the name of one party only, such real property may be categorized as under a

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proportional common ownership of the parties, the proportion being that between the amount of funding from *1032 their respective parents, unless the parties have agreed otherwise. [118](#)

And Article 10 says:

When, prior to the marriage, one party entered into a contract to purchase real property, and paid for the down payment out of his or her separate property, and applied for a mortgage, and then during the marriage jointly possessed property was applied towards the mortgage payments, but the deed of the real property is still recorded under the name of the party that paid for the down payment, then the property shall be disposed through negotiation in the scenario of divorce.

However, if no agreement can be reached through negotiation under this provision, then the People's Court may distribute the real property to the party under whose name the deed of the real property was recorded, and categorize the remaining balance on the mortgage as the separate liability of that party. The party under whose name the deed was recorded shall, in accordance with the principles contained in Section 39(1) of the Marriage Law, make compensations to the other party with regards to the mortgage payments made during the marriage by both parties and with regards to the appreciations corresponding to such joint payments. [119](#)

Thus, under these two Articles, no matter whether the parents of a party provide house or funding for house to that party, and no matter whether the gift is before or during marriage, as long as the house is titled under that party's name only, the resulting marital residence will be separate property and not subject to discretionary distribution. The most that the other party can get with regarding to the house is compensation for that party's financial contribution to the house during the marriage. [120](#) Moreover, it is not even clear that all financial contributions will be compensable. [121](#) The enforcement of such compensation, especially when the house dominates the marital property, [122](#) may also be problematic. [123](#) In all, the new rule, together with the traditionally limited reach of alimony and damage, elevates title to a predominating position in the distribution of the residence - the single biggest piece of marital property.

Societal uproar immediately followed. The interpretation was denounced as a method to deny women of their contribution to the family and deprive them of their fair share in the property. [124](#) Everywhere in China, people have rushed to change the deed of real properties and make sure both spouses' names are on the deed. [125](#) Some people also added their parents to the title, to assure a better financial outcome in case of divorce. [126](#) The volume of such deed changes was so big that the Ministry of Finance suspended the stamp tax charge for adding a *1034 spouse's name on August 31, 2011 under great pressure from the society. [127](#)

During an interview on August 15, 2011, a speaker from the Supreme People's Court justified the new interpretation with the special circumstances of “abnormally high real property price” and “rapid increase in divorces.” [128](#) The speaker believed that the new interpretation gave an objective standard for the determination of donor's intent and would promote uniformity in results. [129](#) Moreover, the speaker believed that the new interpretation was equitable because it took into consideration the interests of the married couple and of the parents alike. [130](#)

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The Chinese legal community is largely divided over the new interpretation. Some praised it as an emphasis on the contractual nature of the marriage, and believed that it would help improve the social mores by promoting the “contractual principles” of fair dealing and good faith.¹³¹ Some denounced it as emphasizing the individual nature of property ownership over the community nature of family life, and believed that that such law would “encourage meanness of people” and *1035 promote intra-family strife.¹³² One scholar believed that while implementing property-based principles in a marriage law could be a right approach, the current interpretation was a formulaic and mechanical application of such property theories.¹³³ In his opinion, the categorization of real property under mortgage as separate property under Article 10 was the foremost example of such mechanical application.¹³⁴ He thought that since the property rights to such real property were not yet absolute (because of the potential claim from the mortgagor), it did not make sense to talk about whether it was separately or jointly possessed.¹³⁵

In sum, the new interpretation, instead of giving a satisfactory solution to the marital residence problem, has caused considerable controversy in China. The sarcastic-sounding words of a Chinese lawyer well epitomize the society's view of the new interpretation:

The Supreme People's Court has continued on its glorious tradition of administering Justice for the People, and given a precise solution to this mess [of the marital residence issue]. For the married parties and their parents who are faced with the question of how to treat investment in a marital house, the Court has pointed out a path to them that rationally protects the rights of investors. A marriage is *1036 now not just a union of the two families, in fact, it is a joint venture in real estate investment, with a marriage thrown in as an extra! . . . How can one party believe the house to be jointly possessed property solely because he or she has joined in the effort to repay the mortgage or because the title was acquired during marriage? That would be a shameless logic designed to promote fights over real property!¹³⁶

II. Distribution of Marital Residence in U.S. Law

Inevitably, the discussion on the new interpretation draws in a comparison with the laws of other countries. Some (mostly detractors of the new interpretation) generally characterize the change as “an introduction of the Western individual property system” against the spirit of Chinese marriage.¹³⁷ A more fact-oriented comparison appeared in an article from the Xinhua News Agency.¹³⁸ It states that the Western marriage laws, as opposed to the new interpretation, tend to favor women in property distribution.¹³⁹ For example, it cites the Uniform Marital Property Act of 1983,¹⁴⁰ the California Family Code,¹⁴¹ and an Illinois case¹⁴² to show that courts in the United States generally distribute equally all properties acquired during the marriage. But such generalization is not a completely accurate summary of the law in the United States.

Most states in the United States maintain some distinction between marital property and separate property because of “a widespread consensus that marriage alone should not affect the ownership interest that each spouse has over property possessed prior to the *1037 marriage or received after the marriage by gift or inheritance.”¹⁴³ In comparison, fifteen states allow the court to divide all properties, marital or separate, equitably in a divorce.¹⁴⁴ However, even in these states, since the source of property is generally taken into consideration, the result is not necessarily much different from that in a state where separate property is not subject to distribution.¹⁴⁵

A gift to one party is generally considered separate property.¹⁴⁶ Even in the “hotchpot” states that “in principle appl[y] the same equitable-distribution principles to all property,”¹⁴⁷ such gifts are often given special treatment.¹⁴⁸ Problems arise when “there is a dispute as to whether the third party's gift was made to one spouse or to both jointly.”¹⁴⁹ In such cases, “the title used in transferring the property is not dispositive on the question of whether it is marital or separate, even though it is relevant evidence.”¹⁵⁰ Moreover, “the burden of proof is on the spouse asserting that the gift was to an individual.”¹⁵¹ Thus, the courts in the United States tend to use a fact-based case-by-case approach to this question, rather than a bright-line rule based on title.¹⁵²

In certain states, property that started out as separate, such as gifts, may be transmuted into marital property by commingling.¹⁵³ Under such a principle, a marital interest may appear in marital residences that started as separate because of marital contribution to mortgage payment,¹⁵⁴ because of upkeep and improvement from marital property or labor,¹⁵⁵ or simply because of usage for the party's common benefit.¹⁵⁶ Such transmutation not only allows the residence to be divided in a divorce, but also allows the marital estate to share in the passive appreciation of the property.¹⁵⁷ Other states do not allow such transmutation.¹⁵⁸ Instead, they recognize a reimbursement claim from the community estate, which may preclude the community's sharing in the subsequent passive appreciation of the house value.¹⁵⁹

The 1990 revision to the Uniform Probate Code created a new concept of “accrual-type” marital property.¹⁶⁰ Under this scheme, marital property is a portion of the whole “augmented estate,” and the portion grows from 3% for a marriage that lasted less than 1 year to 100% for a marriage that lasted 15 years or more, based on a formula.¹⁶¹ Thus, separate property can transmute into marital property solely based on passage of time. Principles of the Law of Family Dissolution adopted the same idea and recommended that “a portion of the separate property” be “recharacterized at dissolution as marital property” based on “the duration of the marriage.”¹⁶² Under this provision, a separately gifted house will then be partially or wholly subject to division in a divorce after a not-too-short marriage, even if the other spouse contributed nothing to the house. However, no state has yet adopted this rule, and there is a strong criticism against destruction of separate property rights without any evidence of intent.¹⁶³

*1040 Another factor that may affect the distribution of marital residence, especially in long marriages, is alimony. In the United States, alimony has a broader reach than in China, and aims to compensate financial losses from marriage rather than to aid the needy.¹⁶⁴ Such loss can be from “[homemakers]' sacrifice in financial independence arising from their focus on homemaking tasks.”¹⁶⁵ It can also include “the less affluent spouse's loss of his or her expectation of continuing to enjoy a standard of living that has been sustained by the other spouse's income.”¹⁶⁶ Because of such broad reach of alimony, the categorization of a property as separate or marital does not carry as much importance as it would have in China.

In all, while the distinction between separate and marital property, the separate nature of gift, and the reimbursement for joint contributions can all find their counterparts in the laws of the United States, when it comes to actual cases involving housing gifts from parents of one party, the outcome tends to depend more heavily on factual inquiry and equitable concerns. Some cases hinged on the determination of the intent of the donor (parents).¹⁶⁷ Some cases involved a determination of marital contribution and how that transmuted the

house.¹⁶⁸ Some other cases involved the situation where the interest of the parents was never totally extinguished, and in these cases the courts tend to favor the protection of such interest, since the parents were not a party to the divorce.¹⁶⁹

III. The Ideal and the Reality

Thus, it seems that both sides in the Chinese debate are wrong about the state of law in the United States. There is no clear-cut rule favoring property rights, but neither is there a rule to always divide everything equally. Cases are decided on factual details, not by a bright-line rule. So why did the Chinese law move towards a title-based bright-line rule?¹⁷⁰

***1042 A. The development reflects the current ideal of protection of individual property rights in Chinese law**

Changes in law always reflect changes in the society. The rapid urbanization¹⁷¹ and expansion of market economy¹⁷² of the recent years gave rise to new developments in legal thoughts and practices in areas such as jurisprudence,¹⁷³ criminal law¹⁷⁴ and civil law.¹⁷⁵ In the civil law area, the prominent issue is the protection of property rights as a way to promote a social environment more conducive to economic development.¹⁷⁶ To achieve this, lawmakers look to jurisprudence in developed countries for guidance.¹⁷⁷ In particular, the growing interest in a more clearly delineated scheme of property rights has led to a renewed emphasis on title and third-party rights in marital property. Such emphasis was present since the very beginning of modern Chinese civil law.¹⁷⁸ The emphasis remained even after the introduction of ***1043** community property.¹⁷⁹ The new Property Rights Law of 2007 further affirmed the importance of title registration¹⁸⁰ and rights of bona fide third parties (such as mortgagors) in dealings over commonly owned properties.¹⁸¹

Thus, it should not be a surprise that the new Interpretation adopted a heavily title-based view on marital property. After all, the marital ownership scheme governs not only property division on divorce, but also the relationship between the couple and third parties during the marriage.¹⁸² When we are dealing with the transactions between a third party and the couple such as mortgage agreements, instead of with dissolution of a marriage, an easy-to-apply title-based rule that puts the third party on clear notice does have its advantages.¹⁸³

As such, the new Interpretation is simply a re-emphasis on the distinction between jointly possessed property and separate property, and a re-implementation of the “classic” inception-of-title rule of community property.¹⁸⁴ The strict preservation of the separate nature of the house in Article 10 is also in line with the situation of many community property states in the United States.¹⁸⁵ It even adopted a similar ***1044** compensation claim scheme to these states.¹⁸⁶ Therefore, the movement seems reasonable from both a historical and a comparative view. But this does not mean it will be popular, nor does this mean that it leads to the appropriate means of adjudicating rights to marital houses in China today.

B. The ideal is not fully compatible with the ideal of equity and fairness in a marriage dissolution setting

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First, the ideal behind the movement--that of strong protection of individual property rights and personal autonomy--is not necessarily compatible with the ideal of equity and fairness in a property distribution proceeding.¹⁸⁷ The objective of a distribution regime should be to “respect both spousal ownership rights in their property and the equitable claims that each spouse has on the property in consequence of their marital relationship.”¹⁸⁸ Yet the current rule seems to give too much attention to the former and not enough attention to the latter.¹⁸⁹

Marriage is, after all, not a purely economic decision.¹⁹⁰ It necessarily involves much sharing of property and disregard of formal title.¹⁹¹ Furthermore, it encourages “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,”¹⁹² which are seldom in the choice-maker's best economic interest when viewed retrospectively at the point of divorce.

The non-economic nature of marriage is the driving force behind the adoption of partnership principles in distribution of marital property in the United States.¹⁹³ “[U]nder equitable distribution theory, a marriage is viewed as a partnership to some extent, with each partner entitled to a share in the property of the enterprise.”¹⁹⁴ While there *1045 remain criticisms that the partnership theory does not sufficiently compensate the disparate positions in the absence of sufficient marital property,¹⁹⁵ no one seriously wants to go back to the pure title theory that was in force before the promulgation of Uniform Marriage and Divorce Act.

Yet the new Chinese rule is going in exactly that direction and threatening to “nullify the marital property system long adhered to by [[Chinese] Marriage Law, that is, a marital property system based on joint possession by the spouses.”¹⁹⁶ Instead of a more equitable view of property distribution based on partnership and sharing principles, we see more and more emphases on title and individual contribution. Instead of a more equitable view of alimony as compensating for economic losses from the marriage, we see a strict adherence to the idea of alimony as a semi-charitable award to the needy. With the reintroduction of fault as basis for property claim¹⁹⁷ and of the doctrine of recrimination in the same context,¹⁹⁸ we might say that the Chinese law is going back towards the old American system before the advent of no-fault and equitable distribution. Furthermore, under the old American system, there was an implicit lifelong obligation of support from men towards “faultless” women after a divorce.¹⁹⁹ We don't see that in the Chinese law, understandably, with its emphasis on individual autonomy.

In particular, marital residence, as discussed above,²⁰⁰ constitutes the predominant part of marital property.²⁰¹ Restoring title theory *1046 with regards to this one piece of property almost makes title theory the default marital property regime, with the jointly possessed property system an add-on.²⁰² Before the change, the couples did not have to pay much attention to forms of title during the marriage, as they would not matter much even in a divorce, when properties are subject to a discretionary distribution on equitable considerations.²⁰³ Now, forms of title will matter in a divorce, and the party that does not pay enough attention will potentially be “punished.” Such encouragement for awareness of forms of title undermines the sense of sharing and trust that should accompany a marriage.²⁰⁴

Proponents of the new rule may point out that the new rule in China is in essence the same rule as in, for example, Texas, where marital residence is either separate or community depending on the time of the inception of title,

and community contributions to separate marital residence only create a claim for compensation. However, such similarity is misleading. First, more Texas couples buy their marital residence during marriage than Chinese couples, where the practice of a husband buying residence before the marriage or of husband's parents gifting the residence to the couple is widespread.²⁰⁵ Second, Texas also explicitly recognizes a claim out of labor contributions to the separate property.²⁰⁶ The Chinese counterpart is at best ambiguous and at worst non-existent.²⁰⁷ Lastly, the extremely limited reach of alimony in Chinese law,²⁰⁸ as opposed to that in the law of Texas (and most other states in the United States),²⁰⁹ means that even if the property distribution schemes were exactly the same, the result would still be more inequitable under Chinese law. For example, a party that did not bring a separate residence to the marriage but instead contributed much as *1047 homemaker can at least hope to get some alimony after a long marriage in Texas. In contrast, such a party in China will not be able to entertain the same hope, and will probably leave the marriage with no meaningful property award. This seems quite incompatible with the supposed objective of the new rule to discourage short marriages.²¹⁰

Proponents of the new rule may also argue that even in the United States, there is a renewed emphasis on clear delineation between separate and marital property, and a strong tendency against transmutation of separate property without manifest intent.²¹¹ However, this trend, when applied to marital homes, likely has a less inequitable impact in the United States, where homes are generally acquired over a long time during marriage through marital efforts and frequently held in joint title.²¹²

Moreover, there is another, maybe even more important, trend in the United States, that of the enlargement of the scope of "property" to include non-conventional properties such as retirement benefits and goodwill,²¹³ and of compensating for economic losses in marriage (such as contributions to the other spouse's earning capacity) through alimony.²¹⁴ In a sense, these properties and compensations may be more valuable than any conventional property, marital home included, in a divorce.²¹⁵ Thus, the latter trend may more than "cancel out" the effect of strict characterization of marital home. Given the widespread employment discrimination in China,²¹⁶ the recognition of contribution to future earning capacity as creating a marital interest in such capacity would probably be a more equitable trend to follow.

***1048 C. The new rules fails both in advancing the ideal of personal autonomy, and in adjusting to the realities of marriage in China**

Second, a deep divide between the ideal of personal autonomy and the realities of marriage in China makes the new rule inequitable.²¹⁷

Marriage in China has always been a transaction between families, not a union of individuals. In the patriarchal and polygynous society that was Imperial China, a marriage was essentially a purchase of a new family member (in general the daughter-in-law) to perform services (most importantly, child bearing) for the family. The payment would be the bridal gifts and the implicit lifelong support.

With the Marriage Law of 1950, that system came to an end. The Western concept of marriage as a union of individuals seems to have prevailed over the tradition. The new system builds upon a preference for nuclear families over generational families, unitary marital property, and liberal divorce grants that in principle favor women.²¹⁸

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However, with diminished governmental ideology in everyday life, traditional family notions and practices gradually resurfaced. Generational families made a comeback.²¹⁹ Interest in genealogical compilation, traditionally related to huge multigenerational family groups, surged.²²⁰ Lavish bridal gifts, a hidden “bridal price,” have become so widespread that the Second Judicial Interpretation dedicated one article to this practice.²²¹ Polygyny, although still illegal, is now widely practiced - and even widely tolerated - under the names of “<<unknown characters>>” (second wife) and “<<unknown characters>>” (third party).²²² A survey showed that in one single city there were 200 complaints rising from open cohabitation with “second wives” in 1998, and the number of complaints is still growing.²²³ Moreover, such cohabitation is more and more open, with even governmental officials openly engaging in such practice.²²⁴ Curiously, courts have shown a remarkable restraint in financially regulating such behavior. In an interesting case, the husband bought a house for his “second wife” and put the title under her name, and then lived there openly with his wife, “second wife” and four children from both “wives” for four years.²²⁵ While the husband and the “second wife” eventually received criminal penalties for bigamy, the wife's civil suit against the husband for a compensation from the dissipation of jointly possessed property failed, as the court concluded that there was no evidence that the husband paid for the house (even though the “second wife” never had any fixed job or income).²²⁶

Underlying these developments is a revival of the view of women as merchandise²²⁷ --though an expensive piece of merchandise--probably out of reach of most men of suitable age in China.²²⁸ And there is a reason for such high price: the massive imbalance between the numbers of men and women of suitable age in China. Based on the 2010 census, the proportion between newborn boys and girls over the last 10 years is 1.1806:1, and it is predicted that by 2020 there will be 30 million more men between the ages 20 and 45 than women of similar ages.²²⁹ Moreover, the practice by the rich and powerful of keeping “second wives” further drained the supply of suitable women (and provided a “referential price” for women seeking financial commitment from their mates).

In addition, the high inflationary pressure and perceived high risk of other investments,²³⁰ as well as the tradition of men providing houses for women,²³¹ have made housing the “payment of choice” for a wife. The saying is that “without a passable marital house, the marriage has to be postponed.”²³² This compelled the involvement of the men's parents in the financial aspects of marriages. Even the Supreme People's Court now acknowledges that the practice of parents (in most of cases, the husband's parents²³³) buying the marital residence is prevalent in China.²³⁴ And they would want to see their “investment” protected, maybe in the form of a long marriage, or maybe in the form of some kind of repayment in service.²³⁵ Thus it might be said that marriage in China is now no longer simply between a man and a woman, but between a man and a woman and (often) the man's parents.²³⁶

This development appears the very antic of the ideal of personal autonomy underlying the title view of marital property, yet the new rule does nothing to counter it. Rather to the opposite, the Supreme People's Court has explained that the aim of the new rule is the protection of the investing family.²³⁷ Apparently, the realities of marriage in China have prevailed over the ideal and led to a rule that “takes into consideration the relationship between rights of all members of the whole family.”²³⁸

But the new rule does not adjust itself to the realities very well, either. While its objective is to protect the investing family, it is unlikely to achieve this in an equitable manner. If the husband's family is rich and powerful, then it is in the upper-hand position in the marriage “trade,” and can resist the wife's request to add her name to the

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title, thus the protection from the new rule is unnecessary. On the other hand, if the husband's family is not so rich, then the wife is generally in the upper-hand position because of the overall scarcity of suitable women, and she will be able to force the family to add her to the title, thus defeating the new rule's protection. This means that the new rule only protects a family when that family is relatively powerful in the marriage "trade." This can hardly be considered equitable.

One may argue that this is not as inequitable as it seems, since the under-supply of suitable women on the marital "market" puts women in a good bargaining position, and they will make sure that their names are added to the title. As one persisting equitable consideration in Chinese divorce law is that of "the interest[] of the wife,"²³⁹ the end-result of the new rule seems to fit perfectly with that principle. The response of the society to the new rule, that of people rushing to add their wives to the titles of the houses,²⁴⁰ seems to support this conclusion.

However, there are several flaws in that conclusion. First, such bargaining power does not protect women in existing marriages very well, as they have missed their crucial opportunity (at the inception of marriage, when their bargaining power was strongest) to ensure that their names appear on the titles. Instead of adding them to the titles, their husbands may choose to divorce them and keep the houses as "payments" for their new wives. Second, while the overall bargaining power of women may be good, this is not necessarily the case for each individual woman. A woman who wants to marry a rich and powerful man or a woman well past her prime will not draw any consolation *1052 from the fact that other women can force their husbands to add them to the titles. At the very extremes, the bargaining power may protect an attractive gold-digger interested only in taking away half of the life savings of her husband's parents; yet may not protect a plain woman who has nothing to show but her devotion to the family.

Last and more importantly, an equitable distribution scheme that favors women should do so as a "remedial treatment," and should be "developed to achieve equality of result, with the historic and contemporary disadvantages associated with gender given important consideration."²⁴¹ Such disadvantages as "traditional family role expectations"²⁴² and "existing institutional structures [of workplaces] and their historical inadequacies in incorporating women"²⁴³ affect the life of women during and after a marriage and cause gender-neutral rules to have inequitable results, and therefore warrant remedial treatment.²⁴⁴ In contrast, bargaining power in the marital "market" before a marriage, advantageous or not, does not fit into this equitable framework and should not be a valid concern in a divorce.

Proponents of the new rule may also argue that the powerful side could have achieved whatever they wanted anyway, even without this rule. For example, they can use prenuptial contracts.²⁴⁵ The powerful parents can also keep the house under their names and only rent out the house to the couple,²⁴⁶ or they can make a conditional gift to the couple instead of an absolute gift.²⁴⁷ The powerful wife can also force the parents to transfer the house under her name (or the couple's names) outright. Thus, the proponents would argue that the new rule *1053 only affects situations where neither side is too comparatively powerful, and can reach equitable results in these cases.

However, this argument is also flawed. On one hand, it presumes that a powerful party, in the absence of the new rule, will go the extra length at the inception of marriage to ensure a favorable outcome at a divorce, but is that really the case? After all, contemplations of marital life, not contemplations of divorce outcomes, fit the occasion. The slow adoption of prenuptial contracts reflects the prevalent social opinion against such negotiations.²⁴⁸ In addition, when the result of such prenuptial negotiations would not be determinative of the outcome in a divorce,

there is a further disincentive for the extra effort. On the other hand, even if neither side is too comparatively powerful, the new rule changes “the basic dynamics of the marital game,” and encourages--even forces--the sides to engage in a prenuptial match of strengths.²⁴⁹ Even if the sides are able to work the problem out amicably, such an encouragement for awareness of the distinction between forms of title does little to promote harmony in the marital life.²⁵⁰

D. The new rule is overly rigid and mechanical

Finally, the rule emphasizes ease of operation²⁵¹ over fairness, and as such promotes inequitable results in divorce proceedings. Property division at divorce is naturally a fact-intensive inquiry. We have seen how important a role details play in the United States cases. In China, the Marriage Law has always provided for discretionary division based on specific situations of each marriage and equitable considerations of outcome.²⁵² Yet, the new Interpretation, by possibly excluding the most valuable property from the division, greatly impaired the discretionary power.²⁵³

As an American court states, “[t]here are many reasons it may make good business sense for spouses to create joint title that have *1054 nothing to do with any intent to create community property.”²⁵⁴ Conversely, there are also many reasons it may make sense for spouses to hold houses under a sole title, or for parents to gift the house into sole title, that have nothing to do with any intent to exclude the house from distribution. In fact, “[t]itle is frequently placed in the name of one spouse or the other for reasons of convenience or even for no discernible reason at all.”²⁵⁵ A title-based bright-line rule is admittedly easy to administer, but, just like the pure title theory that has been abandoned in the United States, it is not “fair”.²⁵⁶

Instead of the bright-line rule, the Supreme People's Court could have created a presumption based on title, similar to the “form of title” presumption in California.²⁵⁷ This is not even in conflict with the Property Rights Law framework, as that statute only says that the deed is evidence of ownership, not conclusive evidence.²⁵⁸ The statute further provides that a contract regarding transfer of real property is effective regardless of registration.²⁵⁹ Thus the parties may be able to prove that there is an oral or implied contract to transfer such property into joint possession.²⁶⁰ Therefore, the current statutes do support the use of title to create a rebuttable presumption as opposed to an absolute rule. Such a presumption will give more flexibility to the courts and achieve more equitable results.

It might be argued that the current Interpretation is just such a presumption, because it does not absolutely require the courts to exclusively use title for the classification.²⁶¹ However, this is certainly not how the society views it.²⁶² If it were the intention of the drafters to create a presumption only, it would be much better if they had worded it in a way clear to everyone. The current wording of the rule, instead, shows a clear and predominant preference for form of title. In the very least, this is sending a signal, not only to the lower courts, but also to the whole society, that legal formalities and operative ease, instead of equity and fairness, should be the guideline in divorce proceedings. Such a signal will by itself have profound impact on the realities of divorce.²⁶³

Conclusion

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This analysis of the merits of the new rule has thus led us to conclude that it is not quite as good as its drafters would think. So what would be a better rule?

First, Chinese law should abandon the rigid form-of-title rule. It should recognize that the form of title only creates a presumption of ownership, and is one important piece of evidence in the classification of the marital residence, but does not have determinative weight.

Second, Chinese law should explicitly take into consideration the non-financial contributions of each party to the marriage, and create a pro tanto interest in separate assets (including the marital residence) on account of such contributions. The interest can take the form either of a partial transmutation of the asset, or of an equitable right to reimbursement that shares in passive appreciations. This could even be implemented with the number-of-years formula adopted in Uniform Probate Code and ALI Principles.²⁶⁴ In fact, there is already a precedent for such a formula in Chinese law regarding the treatment of military discharge payments.²⁶⁵

***1056** Lastly, Chinese law should re-emphasize the discretionary and equitable power of courts in divorce proceedings over mechanical rules and party autonomy, and recognize that no bright-line rule would perfectly fit the fact-intensive nature of divorce proceedings.

None of these changes will be incompatible with the legal framework already in place in China. In fact, there is an argument that the marital property system in Marriage Law is not exactly the same as the common ownership system in Property Rights Law, and rules for the purpose of divorce do not need to be governed by Property Rights Law principles, such as the determinative weight of title as evidence.²⁶⁶ One interesting example is that Property Rights Law requires a unanimous decision to dispose of commonly owned real property under the common ownership scheme,²⁶⁷ but Marriage Law only says the two parties have “equal power of disposition” over the marital property (including real property).²⁶⁸ In fact, each party can carry out “dispositions for routine life requirements” regarding the marital property.²⁶⁹ Thus, the marital property system, even during marriage, is not necessarily the same as the system under Property Rights Law.²⁷⁰

Moreover, Marriage Law governs the dissolution of common ownership. It can be argued that at the time of divorce the common ownership already disappeared, and Property Rights Law no longer applies, especially since concerns about third-party rights are of less importance at this time.²⁷¹ Thus it is entirely possible to come up with a different set of rules for the purposes of Marriage Law only. Such different rules exist in the United States. Washington uses community property system during the marriage, but adopted the all-property version of United Marriage and Divorce Act for the purpose of property distribution at divorce.²⁷² Wisconsin has one definition for marital property during marriage and another for property subject to division at divorce.²⁷³ All the common law states apply the classification of marital and separate properties only for the purpose of equitable division at divorce, and not during the marriage. So, why cannot Chinese law do the same? ***1057**

And, such changes do not require complex legislative process. The prohibition against transmutation and the title-based classification are both creations of the Supreme People's Court, not formal legislations. Judicial interpretations, after all, overrule previous interpretations all the time, and it will not be too onerous a task to change these rules.

Finally, even with regards to the problem of classifying parent-paid marital residence in a divorce proceeding (the very problem behind the adoption of the new rule), the proposed changes allow more equitable results. The new rule aims to protect both individual autonomy and family relationship, but fails to recognize a fundamental clash between the two, and ends up only vindicating the bargaining power of the parties. The proposed changes, on the other ground, would take into consideration the unique situation of each case, and focus on what happened within the marriage, instead of how everyone was situated before the marriage.

In all, the new rule is just a part of the broader movement in Chinese law towards more clearly delineated private property rights. This might be a laudable target overall, but it is not necessarily desirable in the context of marriage. Marriage is, after all, an institution of community and sharing, not an institution of separation and calculation. Only when the law truly recognizes this principle can we truly have a “contemporary” marriage institution in China.

Footnotes

- ¹ According to 2010 Nian Shanghaishi Biyesheng Gongzi Zhidao Jiawei (2010 <<unknown characters>>) [Reference Salary of 2010 for New Graduates in Shanghai Area], Shanghai Rencai Shichang Wang (<<unknown characters>>) [[Shanghai Market of Human Resources] (Mar. 22, 2011), <http://www.001hr.com/new/2011-3-22/201132214738.htm> (China), the median monthly salary for an accounting analyst is roughly 3870CNY (Chinese yuan), that for a software developer is roughly 3640CNY, and that for a chemical engineer is about 3731CNY. If we round these salaries up to 4000CNY, then at an exchange rate of 6.1915 CNY/USD (the reported exchange rate on April 15, 2013, Yahoo! Finance, <http://finance.yahoo.com/q?s=USDCNY%3DX&q1=1> (last visited April 15, 2013)), it is equivalent to an annual salary of \$7752.56. Author should update exchange rate. Taking a rather liberal estimation of bonuses and non-monetary perks (which can be quite generous for government employees or high-level executives, but not nearly as good for normal technical workers), I reached the hypothetical annual income of \$10,000. Please keep in mind that a salary of 4000CNY/month is for the rather technical jobs, if the young man is working as a secretary, typist or mechanic, he will be earning probably half that amount. Also, if the young man is working in a provincial city rather than Shanghai, the salary will be lower. (According to Table 4-16 (Average Wage of Employed Persons in Urban Units by Sector and Region) in China Statistical Yearbook 2001, the average annual salary of an employee in the information transmission, computer service and software industry in Shanghai metropolitan area is 105560CNYq \$16661. Zhongguo Tongji Nianjian-2001 (<<unknown characters>> - 2001) [China Statistical Yearbook 2001], Zhonghua Renmin Gongheguo Guojia Tongjiju (<<unknown characters>>) [National Bureau of Statistics of China], <http://www.stats.gov.cn/tjsj/ndsj/2011/indexch.htm> (last visited Apr. 5, 2013) (China). However, this includes all personnel employed in the industry, regardless of seniority or position, and therefore would be a rather high estimate for the income of a new graduate. Therefore I chose to use the estimate above.)
- ² According to Shanghai Fangjia Zoushi Tu (<<unknown characters>>) [[Graph of Historical Housing Prices in Shanghai], Fangjia Wang (<<unknown characters>>) [Housing Price Network], <http://sh.fangjia.com/zoushi/> (last visited Apr. 5, 2013) (China), the average housing price in Shanghai for May 2012 is 21744 CNY per square meter, which is roughly equivalent to \$318.84 per square feet. This already represents a significant drop from the housing price around Aug. 2011 (the issuance date of the Third Judicial Interpretation on the Marriage Law which started the controversy discussed in this paper), which exceeded 24000 CNY per square meter (around \$350 per square feet).
- ³ It is a common enough practice for the woman and her family to pay for the decorations and improvements of the newly purchased marital residence, and to pay for the furniture. Housing improvement projects generally cost around 10% of the house price. See Zhang Xu (<<unknown characters>>), Gao'ang Zhuangxiu Feiyong Rang Yangbanjian Nan Cheng Yangban (<<unknown characters>>) [[The High Decoration Cost Renders Model Units Unsuitable as “Models”] (Jun. 18, 2009), <http://house.people.com.cn/GB/98388/100320/9497612.html> (China). Thus, the bulk of the investment is still from the man's family. Some commentators mention that the total investment from the woman's family can be “of roughly equal value” as the house itself. Taisu Zhang, [The Pragmatic Court: Reinterpreting the Supreme People's](#)

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[Court of China, 25 Colum. J. Asian L. 1, 39-40 \(2012\)](#). However, such a high investment in improvements (high even for professional stagers of model units for sale) is likely not the norm. See Zhang Xu, *supra* (real estate companies may spend 1/3 of the house price on decorations and improvements of the model units, and some companies spend as much as the house price itself).

[4](#) It was a crime punishable by three years' penal labor (in Tang Dynasty, 618-907 A.D.) or 100 canings (in Qing Dynasty, 1644-1912 A.D.) to set up a separate family unit or to possess legally separate property during the lifetime of one's parents or grandparents. See Tang Lü Shu Yi (<<unknown characters>>) [Code of Tang Dynasty] § 155, <http://zh.wikisource.org/zh/> (<<unknown characters>>) (last visited Apr. 5, 2013) (China); Da Qing Lü Li (<<unknown characters>>) [Code of Qing Dynasty] § 87, available at <http://zh.wikisource.org/wiki/> (<<unknown characters>>) (last visited Apr. 5, 2013) (China).

[5](#) Under the law, if a parent or grandparent killed a disobedient (in any way) child or grandchild, the punishment was one and half years' penal labor. Tang Lü Shu Yi § 329. Even if the killing was absolutely without cause, the punishment was still only two years' penal labor. *Id.* Moreover, any child or grandchild who insulted the parent or grandparent was punishable by strangulation. *Id.* This means that the paterfamilias could in practice kill with impunity. As for property, it was a crime for a person to use the family property without approval from a more senior member of the family. *Id.* at § 162; Da Qing Lü Li § 88. The influence of the paterfamilias extended even beyond his death, officially for three years, as every man was required to mourn his father for three years and to keep following his father's ways during this period, see Lun Yu (<<unknown characters>>) [Analects], §§ 1, 17, <http://www.confucius2000.com/confucius/lunyu.htm> (last visited Apr. 5, 2013) (China). The *ius vitae necisque* (right of life and death) of a Roman paterfamilias is similar to the power that a Chinese parent has, but “by the [Roman] imperial period it seems a paterfamilias would utilize his ‘right of life and death,’ if at all, only in deciding whether or not to rear a newborn child.” Judith Evans Grubbs, *Women and the Law in the Roman Empire: a Sourcebook on Marriage, Divorce and Widowhood* 20 (2002). In contrast, the full power remained available to the Chinese parent throughout the imperial era, to the end of the 19th century.

[6](#) See generally Xu Yangjie (<<unknown characters>>), *Zhongguo Jiazu Zhidu Shi* (<<unknown characters>>) [A History of the Institution of Family-Group in China] 369-80 (1992) (China).

[7](#) See generally *id.* at 314-20.

[8](#) See Li Ji (<<unknown characters>>) [Classic of Rites] § 44, available at <http://www.guoxue.com/jinbu/13jing/liji/lijimpl.htm> (last visited Apr. 5, 2013). (China) (“The institution of marriage is to unite the two families, to give service to their ancient temples, and to produce offspring for the future.”)

[9](#) Justinian Digest § 23.2.1 (Modestinus), translation provided in Susan Treggiari, *Roman Marriage: Iusti Coniuges From the Time of Cicero to the Time of Ulpian* 9 (1991). Admittedly, this definition reflects not just the ancient Greco-Roman tradition, but also “the Christian concepts of Justinian's time.” *Id.* But even that is a quite ancient and influential tradition. Moreover, the ideas of intrinsic moral equality between sexes, equal partnership in marriage, and kernel family instead of generational family as basic household unit have been long present in the Greco-Roman tradition, going back to Plato and Xenophon and possibly Pythagoras. *Id.* at 185-86, 192-94, 202. Even Aristotle, who advocated that women's moral qualities were different from men's, viewed marriage as a man and a woman “help[ing] each other by throwing their peculiar gifts into the common stock,” a distinctively partnership view. *Id.* at 188. By the time of Cicero, the idea that family life is about “societas and the common ownership of goods” and “love of children and wife” was quite mainstream in Roman society. *Id.* at 208-09.

[10](#) Chen Guyuan (<<unknown characters>>), *Zhongguo Hunyin Shi* (<<unknown characters>>) [A History of Chinese Marriage] 90-91 (1936) (China); Da Qing Lü Li § 101.01.

[11](#) Treggiari, *supra* note 9, at 146-47.

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- [12](#) It is true that ancient Greek and Jewish marriages were generally contracted between the bride's father and the groom. Sarah B. Pomeroy, *Families in Classical and Hellenistic Greece: Representations and Realities* 33, 36 (1997); Michael L. Satlow, *Jewish Marriage in Antiquity* 111-12 (2001). Also, early Roman marriages usually required consent from *patres familias* of both families. Grubbs, *supra* note 5, at 89. However, Roman law in imperial era recognized marriages contracted without such consent. *Id.* at 90. In any event, marriages without paternal consent were long recognized under the doctrine of ritualized rape and magic in these societies. See Satlow, *supra* at 124-25, 130.
- [13](#) Chen Guyuan, *supra* note 10, at 7-8. Poor men may agree to become a member of his wife's family instead, and produce offspring for the wife's family. Such men were always looked down on and sometimes treated as semi-criminals, but the practice survived throughout the Imperial era.
- [14](#) A canonical text of Confucian principles stated that “a woman obeys her father before her marriage, then obeys her husband during the marriage, then obeys her eldest son during her widowhood; a woman cannot have autonomy in her doings, but must obey others.” Guliang Zhuan Yingong Er Nian (<<unknown characters>>) [Commentary of Guliang to the Spring and Autumn Annals, Year of 721 B.C.], http://www.chinakongzi.org/rjwh/ljsjd/cqglz/200904/t20090401_4385725.htm (last accessed Apr. 3, 2013) (China).
- [15](#) See Zhangjiashan Han Jian Zou Xian Shu (<<unknown characters>>) [[Judicial Rescripts from Bamboo Documents Unearthed in Western Han-Era Tombs of Zhangjiashan] § 21, <http://www.xinfajia.net/6488.html> (last visited Apr. 5, 2013) (China). This collection of documents was unearthed during 1983-1984 from three tombs of early Western Han Dynasty (202B.C.-9A.D.), and consists of judicial rescripts from the Supreme Justice's Office in answer to legal questions from local government officials.
- [16](#) Tang Lü Shu Yi § 325.
- [17](#) Under the Code of Tang Dynasty, if a husband intentionally injured his wife, he would be sentenced to 40 lashes. Tang Lü Shu Yi §§ 1-2, 302, 325. (The sentence under the statute was to be two degrees below the sentence if he intentionally injured an unrelated person. The sentence for injuring an unrelated person was 60 canings. Two degrees lighter would be 40 lashes.) However, if a wife intentionally hit her husband (with or without injury), she would be sentenced to one year's penal labor, which was seven degrees higher than the regular sentence for hitting an unrelated person without injury (40 lashes). *Id.* at §§ 1, 3, 302, 326.
- [18](#) Chen Guyuan, *supra* note 10, at 187-88, 199.
- [19](#) *Id.* at 195.
- [20](#) *Id.*
- [21](#) *Id.* at 54-55; Ren Yinhu (<<unknown characters>>), *Zhonguo Gudai De Hunyin* (<<unknown characters>>) [Marriage in Ancient China] 125-32 (1996) (China). The law sometimes imposed restrictions on the number of concubines of non-magistrates, but such restrictions were not strictly enforced. *Id.* at 130.
- [22](#) *Id.* at 125-26.
- [23](#) Tang Lü Shu Yi § 178.
- [24](#) Ren Yinhu, *supra* note 21, at 131-32.
- [25](#) Tang Lü Shu Yi § 178.
- [26](#) “[M]arriage in early Rome was usually accompanied by *manus*.” Treggiari, *supra* note 9, at 16. This means that women would not be independent (*sui juris*, “of their own right”) but would become subject to the spousal right (*manus*, “control”) of her husband through marriage. *Id.* at 16-17. However, the subordination of women in an early Roman marriage was still far less severe than that in a traditional Chinese marriage. She might be *filiae loco* (“in the position

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of a daughter”) for the purposes of inheritance and civil liability, but her husband would have no power of physical discipline over her. *Id.* at 29-30. In any case, by Cicero's time, marriages with *manus* had become uncommon, and a husband generally had no inherent power to give orders to his wife. *Id.* at 30, 209-10. (All references to *manus* were finally edited out of Roman law when Justinian Code was compiled. *Id.* at 32.) Instead, women came into marriages as *uxores* (“mere wives”) and as women *sui juris*. *Id.* at 32. They would not be entering into the *manus* of their husbands, and would have independent rights to acquire property after marriage and to dispose of them. *Id.*

[27](#) Tang Lü Shu Yi § 190.

[28](#) *Id.* at § 189. There were seven faults (all on the woman's side) that warranted a divorce: failure to produce a male issue by the age of 50, adulterous behavior, disrespect to the husband's parents, talkativeness, theft, jealousy towards other sexual companions of the husband, and loathsome disease. *Id.* When the fault was neither adultery nor loathsome disease, there were three possible defenses: the marriage having lasted through the three-year mourning period of either parent of the husband; the husband having risen in fortune; and the divorced wife having no family to return to. *Id.*

[29](#) Such conflicts included: battery by the husband against direct ancestors of the wife, murder by the husband of close relatives of the wife, murder by close relatives of one party of close relatives of another party, battery or verbal insult by the wife against direct ancestors of the husband, battery by the wife against close relatives of the husband, adultery between the wife and a close relative of the husband, adultery between the husband and his mother-in-law, and attempts at the husband's life by the wife. *Id.* Failure to obtain a divorce under such circumstances is itself a crime punishable by one year's penal labor. *Id.* at § 190.

[30](#) Since the wife had no property at all in a marriage, in theory she was entitled to nothing in a divorce. In fact, the financial settlement frequently results in a “ransom” paid to the husband by the wife's family for the divorce. See Tai Yen-hui, *Divorce in Traditional Chinese Law*, in *Chinese Family Law and Social Change: In Historical and Comparative Perspective* 75, 100-02 (David C. Buxbaum ed., 1978).

[31](#) Chen Guyuan, *supra* note 10, at 245; Ren Yinhu, *supra* note 21, at 162-63.

[32](#) See Ren Yinhu, *supra* note 21, at 163-64.

[33](#) Ma Zhibing (<<unknown characters>>), *Zhongguo Fazhi Shi* (<<unknown characters>>) [History of Legal Institutions of China], Chapter 10, available at <http://wenku.baidu.com/view/07724c29b4daa58da0114a52.html> (last visited Apr. 15, 2013) (China).

[34](#) *Id.*

[35](#) The draft still required consent of parents for setting up a separate household, and it squarely put the governance of a household under the power of “the eldest in the household.” *Da Qing Min Lü Cao'an* §§ 1323, 1327. The code is quoted from *Da Qing Min Lü Cao'an-Minguo Min Lü Cao'an* (<<unknown characters>>) [Draft of the Civil Code of Qing Dynasty & Draft of the Civil Code of the Republic of China] 170 (Yang Lixin (<<unknown characters>>) ed., 2002) (China).

[36](#) *Da Qing Min Lü Cao'an* § 1338, Yang Lixin, *supra* note 35, at 171.

[37](#) The draft required monogamy. *Da Qing Min Lü Cao'an* § 1335, Yang Lixin, *supra* note 35, at 171. However, it tacitly recognized the institution of concubines as it provided for the status of “sons from other than wife.” *Da Qing Min Lü Cao'an* §§ 1387-89, Yang Lixin, *supra* note 35, at 177. (This did not mean an illegitimate son, as there is a separate chapter devoted to illegitimate sons.) In this way, it simply re-validated the traditional one-wife-multi-concubine institution.

[38](#) An exception would be when there were prenuptial agreements with regards to marital property. *Da Qing Min Lü Cao'an* § 1357, Yang Lixin, *supra* note 35, at 173. In the absence of such agreements, there was a separate property interest of the wife in the properties that she owned before marriage and the properties that she acquired by herself

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during marriage, but the husband was in management and control of even these separate properties (except when a court of competent jurisdiction puts the wife in management and control at the wife's demonstration that the husband would impair the property). Da Qing Min Lü Cao'an § 1358, Yang Lixin, supra note 35, at 173.

- [39](#) Da Qing Min Lü Cao'an § 1362, Yang Lixin, supra note 35, at 174.
- [40](#) Da Qing Min Lü Cao'an §§ 1368, 1369, Yang Lixin, supra note 35, at 175.
- [41](#) Da Qing Min Lü Cao'an § 1369, Yang Lixin, supra note 35, at 175.
- [42](#) Ma Zhibing, supra note 33, at Chapter 11.
- [43](#) Id.
- [44](#) Minguo Min Lü Cao'an §§ 1063, 1073, Yang Lixin, supra note 35, at 345-46 (preference for generational families); Minguo Min Lü Cao'an § 1105, Yang Lixin, supra note 35, at 350-51 (consent by parents or grandparents essential for marriage for persons below the age of 30); Minguo Min Lü Cao'an §§ 1196-1198, Yang Lixin, supra note 35, at 362 (tacit recognition of concubines).
- [45](#) Minguo Min Lü Cao'an §§ 1135-1137, Yang Lixin, supra note 35, at 355 (no provision of any common ownership, but instead dividing the properties into “his” and “hers”, and vesting the power of management and control in the husband).
- [46](#) Minguo Min Lü Cao'an §§ 1130 et seq, Yang Lixin, supra note 35, at 354. In contrast, Da Qing Min Lü Cao'an provided the elements of a property regime, but did not call it a regime.
- [47](#) Minguo Min Lü Cao'an § 1138, Yang Lixin, supra note 35, at 355 (husband to render periodic accountings to wife with regards to management and control over her separate property); Minguo Min Lü Cao'an § 1158, Yang Lixin, supra note 35, at 358 (in a divorce proceeding, husband is liable to wife for damages to her separate property from his mismanagement).
- [48](#) Minguo Min Lü Cao'an §§ 1136-1137, Yang Lixin, supra note 35, at 355.
- [49](#) Minguo Min Lü Cao'an §§ 1155-1156, Yang Lixin, supra note 35, at 357-58.
- [50](#) Ma Zhibing, supra note 33, at Chapter 12; Li Xiuqing (<<unknown characters>>), 20 Shiji Qianqi Minfa Xin Chaoliu Yu “Zhonghua Minguo Minfa” (20 <<unknown characters>>) [The Trends of Civil Law in Early 20th Century and the Civil Code of the Republic of China], http://www.lw23.com/paper_65438101/ (last visited Apr. 5, 2013) (China).
- [51](#) Li Xiuqing, supra note 50.
- [52](#) Id.
- [53](#) Zhonghua Minguo Minfa (<<unknown characters>>) [Civil Code of the Republic of China] § 972 (1930), available at http://zh.wikisource.org/wiki/<<unknown_characters>>#.E7.AC.AC.E4.B8.89.E7.AB.A0_.E7.88.B6.E6.AF.8D.E5.AD.90.E5.A5.B3 (last visited Apr. 5, 2013) (China).
- [54](#) Id. at § 1127.
- [55](#) Id. at §§ 1013, 1016 et seq.
- [56](#) Id. at § 1004.
- [57](#) Id. at §§ 1031 et seq.
- [58](#) Id. at §§ 1032-1033.

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- [59](#) For a historical overview of the development of the Marriage Law of the People's Republic of China up to the 2001 revision, see generally Xiaoqing Feng, [A Review of the Development of Marriage Law in the People's Republic of China](#), 79 U. Det. Mercy L. Rev. 331 (2002).
- [60](#) Zhonghua Renmin Gongheguo Da Shi Ji (<<unknown characters>>) [[Important Events of the People's Republic of China], Zhonghua Renmin Gongheguo Zhongyang Renmin Zhengfu (<<unknown characters>>) [the Central People's Government of the People's Republic of China] (Oct. 9, 2009), [http:// www.gov.cn/test/2009-10/09/content_1434234.htm](http://www.gov.cn/test/2009-10/09/content_1434234.htm) (China).
- [61](#) Id.
- [62](#) Hunyin Fa (<<unknown characters>>) [Marriage Law] (promulgated by the Central People's Government Committee, May 1, 1950, effective May 1, 1950) § 1, available at http://www.law-lib.com/law/law_view.asp?id=43205 (last visited Apr. 5, 2013) (China). The translation is from Marinus J. Meijer, Marriage Law and Policy in the People's Republic of China, in Chinese Family Law and Social Change 436, 478 (David C. Buxbaum ed., 1978).
- [63](#) Id. at § 2.
- [64](#) Id. at § 3.
- [65](#) Id. at §§ 7, 11. The right to use one's own family name is a revolutionary change from the traditional practice, where wives generally take on their husbands' family names. See Zhonghua Minguo Minfa § 1000 (1930).
- [66](#) Hunyin Fa § 10 (1950).
- [67](#) Id. at § 23.
- [68](#) Id. (Translation from Meijer, supra note 62, at 482).
- [69](#) “The statutory regulation of marital property in both the Soviet Russia and the People's Republic of China--as societies not based upon private ownership--consists only of a clear expression that legislation should merely be granted a secluded role in this area.” W. Müller-Freienfels, Soviet Family Law and Comparative Chinese Developments, in Chinese Family Law and Social Change 323, 378 (David C. Buxbaum ed. 1978).
- [70](#) For an overview on the government's effort in implementing the new marriage law, see Meijer, supra note 62, at 451-53.
- [71](#) Hunyin Fa (<<unknown characters>>) [Marriage Law] (promulgated by the Standing Comm. Natl' People's Cong., Sept. 10, 1980, effective Jan. 1, 1981) § 13, available at http://zh.wikisource.org/zh/%E4%B8%AD%E5%8D%C8E%CE4%CBA%CBA%CE6%CB0%C91%CE5%e%B1%E5%C92%C8C%CE5%C9B%BD%E5%CA9%C9A%CE5%CA7%CBB%CE6%CB3%95_%281980%E5%CB9%CB4%# (last visited April 15, 2013) (China).
- [72](#) Id. I will use the translated term “jointly possessed property system” from Feng, supra note 59, to refer to this marital property system in specific.
- [73](#) Id. at § 31. The translation is mine, modeled on the translation of the corresponding item in the Marriage Law of 1950 in Meijer, supra note 62, at 482.
- [74](#) As opposed to the Roman-Dutch unitary community property regime. See Robert L. Mennell, Community Property in a Nutshell 12 (1982).
- [75](#) See Chen Huaiyu & Guo Jie (<<unknown characters>>), Zhongguo Dangdai Fuqi Caichan Zhi De Fazhan Qushi Ji Yuanin (<<unknown characters>>) [General Trends and Underlying Rationale in the Development of Contemporary Marital Property System in China] (Aug. 22, 2011), [http:// www.jsfy.gov.cn/llyj/xslw/2011/08/22170101046.html](http://www.jsfy.gov.cn/llyj/xslw/2011/08/22170101046.html) (China) (summarizing the new system as “mainly a statutory marital property system, but with a in-marriage common

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ownership scheme instead of unitary community property system, and allowing for contractual disposition between the parties.”); Feng, *supra* note 59, at 362-63 (the law is “regarded as the early form of the contracting property system in China.”).

[76](#) Huaiyu & Jie, *supra* note 75.

[77](#) See *id.* (identifying the growth in disposable property in the recent years as one driving force behind the 2001 revision of the Marriage Law). The Constitution of 1978 introduced protection of private ownership rights, but still put the bulk of “production materials” under public or collective ownership. Xianfa (<<unknown characters>>) [[Constitution](#)] art. 1, §§ 5, 9 (1978), available at <http://zh.wikisource.org/zh/<<unknown characters>>> (last visited Apr. 5, 2013) (China).

[78](#) Alimony was still only awarded on consideration of hardship. Hunyin Fa § 33 (1980).

[79](#) The divorce rate of China was 0.3% in 1979, 0.7% in 1990, and 1.0% in 2000. Minzhengbu: Zhongguo Lihun Lü Lianxu 30 Nian Shangsheng (<<unknown characters>>) [According to the Ministry of Civil Affairs, the Divorce Rate of China Has Been Continuously Rising for 30 Years] (Oct. 3, 2010), <http://news.163.com/10/1003/13/612T8NPB0001124J.html> (China). The rise in divorce rate was further accelerated after 2003, when the registration for divorce was simplified. *Id.*

[80](#) Guanyu Renmin Fayuan Shenli Lihun Anjian Chuli Caichan Fenge Wenti De Ruogan Juti Yijian (<<unknown characters>>) [Several Practical Opinions with Regards to the Disposition of Property Distribution Issues During Divorce Proceedings Before the People's Courts] (promulgated by the Sup. People's Ct., Nov. 3, 1993, effective Nov. 3, 1993), <http://china.findlaw.cn/info/hy/hunyinfagui/sifajieshi/61450.html> (last visited Apr. 5, 2013) (China).

[81](#) *Id.* at § 2(2).

[82](#) *Id.* at § 6.

[83](#) *Id.* at § 12.

[84](#) *Id.* The opinion did not provide a criterion as to how big this part would be, nor was it clear on whether the appreciation included passive appreciation in addition to appreciation resulting from communal effort.

[85](#) *Id.*

[86](#) The physical house would be awarded to the more “meritorious” party, and half of the monetary value to the other party. *Id.* at § 13. If both parties were equally “meritorious,” the physical house would go to the wife. *Id.* If the party that did not get the physical house could not find a residence, the court may award a temporary tenancy (not exceeding two years) right to that party, or a lump-sum monetary award to help with a new rental. *Id.* at § 14.

[87](#) Xianfa art. 1, § 10 (1982), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=1457> (last visited Apr. 5, 2013) (China).

[88](#) Bao Zonghua (<<unknown characters>>), Zhongguo “Fanggai” 30 Nian (<<unknown characters>>) [Thirty Years of Housing Reformation in China] (Apr. 15, 2010), <http://money.jrj.com.cn/2010/04/1507337297060.shtml> (China).

[89](#) *Id.*

[90](#) *Id.*

[91](#) Xianfa art. 1, § 10(4) (1988), available at http://www.law-lib.com/law/law_view.asp?id=204 (last visited Apr. 5, 2013) (China).

[92](#) Zhonghua Renmin Gongheguo Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zaxing Tiaoli (<<unknown characters>>) [Temporary Regulations on Transfers of Use of Urban Land Owned by the People's

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Republic of China] (promulgated by the St. Council, May 19, 1990, effective May 19, 1990), [http:// www.mlr.gov.cn/zwgk/flfg/tdglflfg/200601/t20060119_642175.htm](http://www.mlr.gov.cn/zwgk/flfg/tdglflfg/200601/t20060119_642175.htm) (last visited Apr. 5, 2013) (China).

- [93](#) The low-rent system was abolished in 1998. Bao Zonghua, *supra* note 88.
- [94](#) See Feng, *supra* note 59, at 354-57 (listing concerns behind the reduction in scope of jointly possessed property by the 2001 revision of Marriage Law, which are mostly about the protection of individual ownership of property); see also Chen & Guo, *supra* note 75; see also generally Chen Su (<<unknown characters>>), Yu Jingji Tizhi Gaige Tongxing: Gongmin Caichan Quanli Baohu Jizhi De Buduan Wanshan (<<unknown characters>>) [Together with the Reformation of the Economic Institutions, the Continuing Perfection of the Protection Mechanisms for the Property Rights of Citizens] (2001), [http:// www.iolaw.org.cn/showarticle.asp?id=486](http://www.iolaw.org.cn/showarticle.asp?id=486) (China).
- [95](#) This also rendered obsolete all the existing judicial opinions and interpretations on the Marriage Law. See Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Yi) (<<unknown characters>>) [First Judicial Interpretation by the Supreme People’s Court on Several Questions Regarding the Application of “Marriage Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Dec. 25, 2001, effective Dec. 27, 2001) § 33, http://www.law-lib.com/law/law_view.asp?id=16795 (last visited Apr. 5, 2013) (China).
- [96](#) Hunyin Fa (<<unknown characters>>) [Marriage Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 28, 2001, effective Apr. 28, 2001) § 18, http://www.gov.cn/banshi/2005-08/21/content_25037.htm (last visited Apr. 5, 2013) (China).
- [97](#) *Id.* at §§ 17(4), 18(3).
- [98](#) *Id.* at § 40.
- [99](#) *Id.*; Tang Yujian (<<unknown characters>>) & Pan Zhenfei (<<unknown characters>>), Xi Lihun Caichan Fen’ge Zhong De Bangzhu, Buchang Ji Guocuo Sunhai Peichang (<<unknown characters>>) [An Analysis on the Assistance, Compensation and Fault-Based Damage Schemes in Distribution of Property in Divorce Cases] (Nov. 10, 2009), [http:// www.dffy.com/sifashijian/sw/200911/20091110161110.htm](http://www.dffy.com/sifashijian/sw/200911/20091110161110.htm) (China); Xia Yinlan (<<unknown characters>>), Minfa Qinshubian Lihun Zhidu Zhi Tanta (<<unknown characters>>) [Excerpt of the Exploration of Divorce System in the Volume of Kinship of the Civil Code], [http:// www.so100.cn/html/lunwen/falvlunwen/minfa/2006-3/18/2006063180207429164731055.htm](http://www.so100.cn/html/lunwen/falvlunwen/minfa/2006-3/18/2006063180207429164731055.htm) (last visited Apr. 5, 2013) (China); Feng, *supra* note 59, at 382-83.
- [100](#) Hunyin Fa § 39 (2001).
- [101](#) See Falü Dui Lihun Buchang You Naxie Guiding (<<unknown characters>>) [What Are the Provisions of the Law About Compensations in Divorce?], Lihun Falü Wang (<<unknown characters>>) [Laws of Divorce] [http:// www.lihun66.com/lhlaw/lihunzx/100615.html](http://www.lihun66.com/lhlaw/lihunzx/100615.html) (last visited Apr. 5, 2013) (China).
- [102](#) The faults are bigamy, extramarital cohabitation, domestic violence, cruelty and desertion. *Id.* at § 46. In practice, because of evidentiary problems, the fault-and-damage system is seldom brought into force. See Mao Jingjing (<<unknown characters>>), Dui Zhongguo Hunyinfa Zhong Sunhai Peichang Youguan Qingxing De Sikao (<<unknown characters>>) [Thoughts on Situations of Damage and Compensation in the Marriage Law of China] (July 12, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=61406 (China). According to this article, a survey by the Law Society of China in 2003 revealed that only 24 out of 100 appellate divorce proceedings in the city of Harbin involved damage claims, none of which was awarded; and only 4 out of 400 trial divorce proceedings in the city of Xiamen involved damage claims, only 1 of which was awarded.
- [103](#) Hunyin Fa § 47 (2001).
- [104](#) *Id.* at § 42.

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- [105](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Yi), supra note 95.
- [106](#) Id. at § 19.
- [107](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) (<<unknown characters>>) [Second Judicial Interpretation by the Supreme People's Court on Several Questions Regarding the Application of “Marriage Law of the People's Republic of China”] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective Apr. 1, 2004), <http://sfsk.net/sf/cyfgk/msfg/37.htm> (last visited Apr. 5, 2013) (China).
- [108](#) Id. at § 22. One curious issue is that this article only mentioned the fund, not the real property itself. See Xue Ninglan (<<unknown characters>>), “Hunyinfafa Sifa Jieshi (San)” Caichanxing Guiding Jiedu (<<unknown characters>>) [Interpretations on the Property Regulations in “the Third Judicial Interpretation on the Marriage Law”] (Aug. 16, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63623 (China). But since the article expressly mentioned gift, a reading that this is about a characterization of liability does not seem well supported. Thus, it seems likely that the article intended to characterize the real property itself.
- [109](#) According to a survey in Sichuan Province in 2002, real estate constituted 48.7% of family property in urban families. Yun Yuan (<<unknown characters>>) & Luo Xiangming (<<unknown characters>>), Sichuan Chengshi Jiating Caifu Baogao (<<unknown characters>>) [A Report on Family Properties in Sichuan Province] (Nov. 24, 2002), http://www.phoer.net/history/dangdai/people_07.htm (China). By 2009, the proportion has grown to 62.7%. Fangchan Zhan Woguo Jiating Zichan Bili Wei 62.7% (<<unknown characters>> 62.7%) [Real Estate Constitutes 62.7% of Family Properties in China] (Sept. 28, 2009), <http://news.dichan.sina.com.cn/2009/09/28/69068.html> (China).
- [110](#) The mean price of new housing rose by 18% in 2004. This appreciation would be dwarfed by the appreciation in 2009, which was 24%. Liu Xiuhao (<<unknown characters>>), Zhongguo Qunian Fangjia Zhangfu 15 Nian Lai Zui Da Gongying Duanque Jiang Chixu (<<unknown characters>>) [The Rise in Housing Price Last Year Was the Biggest in 15 Years, and the Shortage in Supply Will Persist] (Jan. 20, 2010), <http://www.tcfdc.net/view.aspx?Id=269> (China).
- [111](#) The calculations in notes 1 and 2 illustrate this point.
- [112](#) See Fu Na (<<unknown characters>>) & Yao Jingdan (<<unknown characters>>), Diaocha: Liucheng Qinglü Bu Maifang Bu Kaolü Jiehun Chao Yiban Xiwang Hunqian Maifang (<<unknown characters>>) [A Survey Shows That 60% of Couples in Relationship Will Not Consider Marriage Without Purchase of a House, More Than Half Wanting to Purchase the House Before Marriage] (Mar. 22, 2011), <http://gz.focus.cn/news/2011-03-22/1237128.html> (China).
- [113](#) See Yang Weihai (<<unknown characters>>), Zhou Ning (<<unknown characters>>) & Tu Ming (<<unknown characters>>), Wo De Hunyin Shui Zuozhu - Jiedu “Hunyinfafa Sifa Jieshi (San)” Liu Da Jiaodian (<<unknown characters>>) [[Who Will Be the Master of My Marriage? - An Interpretation of Six Hotly Contended Items in “the Third Judicial Interpretation on the Marriage Law”] (Aug. 15, 2011), http://www.xinddy.com/html/third/art3_9994.html (China); Fang Fei (<<unknown characters>>), Fumu Gei Erzi Maifang Jiehun, Xifu Meiyoudi, Zheshe De Daodi Shi Shenme? (<<unknown characters>>) [What is Really Reflected by the Fact That When Parents Buy a House for Their Son's Marriage, the Daughter-in-law Gets Nothing?] (Aug. 19, 2011), <http://www.fdc0739.com/news/html/110819/08Z5711819084308.html> (China). The former is written by reporters of governmental news agency and the latter by a leftist author who denounces “the joint robbery by the governmental officers and by the rich against the Chinese populace” through high house price, but they agree on the prevalence of the situation where husbands buy houses for the marriage.
- [114](#) This is at least how the legal community in China views the situation. See Liu Guannan (<<unknown characters>>) & Li Qiang (<<unknown characters>>), Hunyinfafa Biancheng Lihunfa: Hunyin Bushi Yichang Hehuo Touzi De Jiaoyi (<<unknown characters>>) [The Transformation of Marriage Law Into Divorce Law: Marriage is Not a Joint Investment Venture] (Aug. 13, 2011), <http://finance.ifeng.com/money/wealth/consume/20110813/4389700.shtml> (China). For a more solid example, see Chen Hongyan (<<unknown characters>>), Chen Xiaofen (<<unknown

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characters>>), Liu Huichan (<<unknown characters>>) & Zhou Yu (<<unknown characters>>), Sancheng Daxue Biyesheng Maifang Kao Fumu Jin 15% Neng Duli Maifang (<<unknown characters>>) [30% of College Graduates Rely on Their Parents for Purchase of House, Only 15% Can Purchase on Their own] (Oct. 25, 2011), <http://house.qq.com/a/20111025/000018.htm> (China). This is a news report about a scholarly survey that compiled the numbers.

[115](#) Cf. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er), § 19 (houses leased by one party before marriage but purchased with jointly possessed funds during marriage shall be characterized as jointly possessed property regardless of title).

[116](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) (<<unknown characters>>) [Third Judicial Interpretation by the Supreme People's Court on Several Questions Regarding the Application of “Marriage Law of the People's Republic of China”] (promulgated by the Sup. People's Ct., Aug. 9, 2011, effective Aug. 13, 2011), http://www.court.gov.cn/qwfb/sfjs/201108/t20110815_159794.htm (last visited Apr. 5, 2013) (China).

[117](#) Some commentators do not think this is the case, and point out that the second interpretation characterized the funds while the third interpretation characterized the property itself, so there may be no real conflict or change. Xue Ninglan, *supra* note 108. However, this is probably paying too much attention to the specific words used.

[118](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 7 (emphasis added).

[119](#) *Id.* at § 10 (emphasis added). The “principles contained in Section 39(1) of the Marriage Law” mean the considerations of “the actual state of the property and the interests of the wife and the child or children.” Hunyin Fa § 39(1) (2001). However, the new rule does not mention contribution of marital labor. One can say that presumably falls under “profit from productivity” in §17(2) of Marriage Law, but that is not explicitly supported in the rule. Also, it is not clear whether passive appreciation is included in the compensation, since Article 5 of the new Interpretation in general excluded passive appreciation of separate properties from jointly possessed property. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) §5. For an example of compensation for joint mortgage payments in action (where the court included passive appreciation in the compensation), see Qin Fa (<<unknown characters>>) & Luo Shuangjiang (<<unknown characters>>), Hunqian Fangchan Zengzhi 90 Wan Fayuan An Huankuan Bili Fenge Gei Fuqi (<<unknown characters>>) [A Court Divided the 900,000 RMB Appreciation in Pre-Marital Real Estate Proportionally Between the Couple According to Mortgage Payments] (Aug. 30 2011), <http://www.dc2000.cn/news/5794.html> (China).

[120](#) See *supra* note 119.

[121](#) The rule only mentions the contribution to mortgage payments. It is unclear how financial contributions to home improvements will be handled. Some scholars think that it is compensable. See Zhuanjia Jiedu Hunyinfa Xin Jieshi Mingque Jingshenchuhu Fang “Shanhun” (<<unknown characters>>) [Scholars Explain the New Interpretation on the Marriage Law, Clarify the Concept of “Getting Divorced with Nothing Left” as Only a Deterrence Against “Flash Marriage”] (Sept. 6, 2011), <http://news.sohu.com/20110906/n318458245.shtml> (China). One scholar, however, thinks that decorations may count as “removable additions” and as such are not compensable. Minfa Zhuanjia: Nufang Zhuangxiukuan Yiding Yao Jiru Goufangkuan Bing Jiaming (<<unknown characters>>) [According to a Civil Law Expert, the Best Practice for Women is to Count Their Decoration Contributions Into Housing Payments and to Add Their Names Onto the Titles] (Oct. 17, 2011), http://house.ifeng.com/zhiyezhan/detail_2011_10/17/9904853_0.shtml (China).

[122](#) See *supra* notes 109-111.

[123](#) Under Chinese law, judicial sale of a marital residence is only appropriate when neither side claims the house itself. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) §

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20(3). Thus, when there is not enough other marital property, compensation becomes a monetary judgment on the other party, and this gives rise to enforcement problems. See Wang Yong (<<unknown characters>>), Falü, Qing Buyao Lijian Women De Hunlian (<<unknown characters>>) [Law, Please Don't Come Between Us in Our Marriage and Love] (Aug. 22, 2011), [http:// wangyong.blog.caixin.cn/archives/23674](http://wangyong.blog.caixin.cn/archives/23674) (China).

[124](#) For a representative view, see Wang Yong (<<unknown characters>>), supra note 123. The article focuses mostly on Article 10 instead of Article 7 of the new Interpretation, but its main criticisms (the new emphasis on title of marital house, the predominant piece of marital property, impairs the jointly possessed property system and bears unfairly upon women, and the compensation system is not adequate because of evidentiary and enforcement problems) apply equally to the scenarios covered in Article 7. Moreover, Article 7, on its face, does not even provide a compensation system as in Article 10.

[125](#) See “Hunyinfa Xin Jie” Yin NüFang Jingshen Chuhu Danyou, Huo Zhi Fangchan Zengming Re (<<unknown characters>>) [The New Interpretation on the Marriage Law Raises Concerns in the Women about the Possibilities of “Divorced with Nothing Left”, and may Cause a Rush to Change the Titles] (Aug. 19, 2011), http://www.china.com.cn/news/2011-08/19/content_23245051.htm (China).

[126](#) Id.

[127](#) Guanyu Fangwu Tudi Quanshu You Fuqi Yifang Suoyou Biangeng Wei Fuqi Shuangfang Suoyou Qishui Zhengce De Tongzhi(<<unknown characters>>) [Notice Regarding the Stamp Tax Charges When Ownership of House or Land is Changed from Single Ownership by One of a Married Couple to Common Ownership by the Couple] (promulgated by the Ministry of Finance, Aug. 31, 2011, effective Aug. 31, 2011), http://szs.mof.gov.cn/zhengwuxinxi/zhengcefabu/201109/t20110901_591326.html (last visited Apr. 5, 2013) (China). Curiously, it did not suspend the stamp tax for other title changes within family.

[128](#) Zuigao Renmin Fayuan Min Yi Ting Fuzeren Jiu “Guanyu Shiyong ‘Zhonghua Renmin Gongheguo Hunyin Fa’ Ruogan Wenti De Jieshi (San)” Da Jizhe Wen (<<unknown characters>>) [Interview of Head of the First Civil Division of Supreme People's Court Regarding the Third Judicial Interpretation by the Supreme People's Court on Several Questions Regarding the Application of “Marriage Law of the People's Republic of China”] (Aug. 15, 2011), [http:// www.law-lib.com/fzdt/newshtml/21/20110815094825.htm](http://www.law-lib.com/fzdt/newshtml/21/20110815094825.htm) (China) (hereinafter Interview Regarding the Interpretation).

[129](#) Id.

[130](#) Id.

[131](#) See Zeng Zhihui (<<unknown characters>>), Dui Hunyinfa Sifa Jieshi San De Qiyue Jingshen Jiedu (<<unknown characters>>) [A Reading of the Contractual Principles in the Third Judicial Interpretation on the Marriage Law] (Aug. 22, 2011), http://article.chinalawinfo.com/Article_Detail.asp? ArticleID=62429 (China). This author, however, also thinks that the new interpretation is overly emphatic on the contractual nature of marital property but insufficiently emphatic on the contractual nature of marriage itself. Also, whether contract theory is really a good “fit” for marriage is debatable. See Ira Mark Ellman, [The Theory of Alimony, 77 Cal. L. Rev. 1, 24 \(1989\)](#) (“Because contract is designed to aid the party whose losses result from another's broken promise, it is useless where we cannot reliably define the promise.”).

[132](#) See Zhao Xiaoli (<<unknown characters>>), Fanbu Moshi Yu Hunyin Fa (<<unknown characters>>) [The “Reverse-Feed” Model and the Marriage Law] (Aug. 29, 2011), http://article.chinalawinfo.com/Article_Detail.asp? ArticleID=62628 (China). “Reverse-feed” is an ancient Chinese saying that refers in general to the elderly care by the young generation. This author believes that the traditional Chinese family model, with its emphasis on shared property ownership and family-based welfare, is superior to the “non-sustainable” European model of kernel family and self-paid retirement, and believes that the new development is a despicable attempt to impose the European model in China and destroy the “self-evident concepts formed through thousands of years of tradition, which will last longer than any law.”

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He believes that the parents' payment for children's marital property is a superior institution of intra-family welfare that promotes family harmony. For an opposite view, see Hu Bo (<<unknown characters>>), Wo Wei Hunyinfa Jieshi San Gu Yu Hu (<<unknown characters>>) (I Advocate for the Third Judicial Interpretation on the Marriage Law) (Sept. 2, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=62773 (China). This author commends the new interpretation as a “resolute step of the law militating against a morally questionable social tradition.” He denounces the parents' payment for children's marital property as a result of extortion from lazy and greedy children.

[133](#) Wang Liren (<<unknown characters>>), Zhong Caichan Qin Shenfen - Zhujiu “Hunyinfa” Jieshi (San) San Da Quexian (<<unknown characters>>) [The Over-Emphasis on Property and the Under-Emphasis on Personhood - Sources of the Three Great Defects in the Third Judicial Interpretation on the Marriage Law] (Sept. 15, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63079 (China). See also Wang Yong, supra note 123.

[134](#) Wang Liren, supra note 133.

[135](#) Id.; see also Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 21 (when the title to real estate is not yet absolute, a division of such property in a divorce is inappropriate). However, to the extent this provision might conflict with the new interpretation, it is preempted by the new interpretation. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 19.

[136](#) Qi Jingzhi (<<unknown characters>>), Hunyinfa Sifa Jieshi (San) Qi Qingzhi Lüshi Quanwei Jiedu (<<unknown characters>>) [Authoritative Reading by Qi Jingzhi, Attorney at Law, of the Third Judicial Interpretation on the Marriage Law] (Aug. 15, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=62268 (China).

[137](#) Fufumen, Xingdong Qilai, Baohu Women De Jiating: Qianglie Jianyi Feizhi Xin Hunyinfa (<<unknown characters>>) [Husbands and Wives, Act to Protect Our Families! A Strong Recommendation for the Abolition of the New Marriage Law] (Aug. 31, 2011), <http://tieba.baidu.com/p/1195651361> (China); see also Zhao Xiaoli, supra note 132; Zhang Xu, supra note 3, at 39.

[138](#) Xu Qian (<<unknown characters>>) (ed.), Lihun Caichan Zenme Fen Kan Waiguo Hunyinfa Za Jiejue? (<<unknown characters>>) [How Do the Other Countries Handle Property Distribution in a Divorce Under Their Marriage Laws?] (Aug. 28 2011), http://news.xinhuanet.com/world/2011-08/28/c_121914387_9.htm (China).

[139](#) Id.

[140](#) Id. (citing [Unif. Marital Property Act §§ 4\(a\), 17\(3\)](#) (1983)).

[141](#) Id. (citing [Cal. Fam. Code §§ 760, 2550](#) (West 2013)).

[142](#) Id. (citing [In re Marriage of Polsky, 899 N.E.2d 454 \(Ill. App. 1st Dist. 2008\)](#), appeal denied sub nom. [Polsky v. Polsky, 904 N.E.2d 986 \(Ill. 2009\)](#) (Table)).

[143](#) Principles of the Law of Family Dissolution § 4.03 comment a (2002) (hereinafter Principles of Family Dissolution). For a list of states, see Brett R. Turner, *Equitable Distribution of Property* (3d ed. 2010), § 2:9 n.3.

[144](#) Turner, supra note 143, at § 2:8 n.7.

[145](#) Id. at § 2:10.

[146](#) Principles of Family Dissolution, supra note 143, at §§ 4.03(2), 4.03 comment b; Turner, supra note 143, at § 5:31.

[147](#) Principles of Family Dissolution, supra note 143.

[148](#) Alabama and Iowa expressly exclude such gifts from distribution. Alabama Code excludes all gifts from division unless it “has been used regularly for the common benefit of the parties during their marriage.” [Ala. Code § 30-2-51\(a\)](#) (West

2013); see [Harmon v. Harmon](#), 928 So. 2d 295, 300 (Ala. Civ. App. 2005) (trial court did not abuse its discretion in awarding business interest completely to the husband on evidence that such interest is a gift from husband's father). Iowa Code excludes all gifts unless "refusal to divide [the gift] is inequitable to the other party or to the children of the marriage." [Iowa Code § 598.21\(6\)](#) (West 2013); see [In re Marriage of Goodwin](#), 606 N.W.2d 315, 319, 321 (Iowa 2000) ("no inequity in setting aside" the assets purchased with deceased son's life insurance proceeds to wife, which is classified as a gift or inheritance to her). But see [In re Marriage of Muelhaupt](#), 439 N.W.2d 656, 660 (Iowa 1989) (common stock given to husband by his family before marriage is included in the division because it would be inequitable to do otherwise). Indiana, Montana, New Hampshire and Oregon give such gifts some special treatment. Indiana Code prescribes a presumption of equal division being "just and reasonable," but allows that presumption to be rebutted by "[t]he extent to which the property was acquired by each spouse... through inheritance or gift." [Ind. Code § 31-15-7-5](#) (West 2013). Montana Code requires consideration on the other party's contribution when dividing gifts. [Mont. Code Ann. § 40-4-202\(1\)](#) (West 2013). New Hampshire Statute is similar to Indiana Code. [N.H. Rev. Stat. Ann. § 458:16-a\(II\)](#) (West 2013). Oregon statute made the presumption of equal contribution inapplicable to gifts. [Or. Rev. Stat. § 107.105\(1\)\(f\)\(D\)](#) (West 2013). However, such treatment does not necessarily amount to an automatic award of the gift to the receiving party. [Eye v. Eye](#), 849 N.E.2d 698, 702 (Ind. Ct. App. 2006) (whether the property was acquired by gift was a factor in division, but not the "sole factor."); [Wallace v. Wallace](#), 714 N.E.2d 774, 781 (Ind. Ct. App. 1999) (trial court abused its discretion by "systematically exclud[ing] from the marital estate those assets that were attributable to gifts or inheritance from [the husband's] family."); [In re Marriage of Funk](#), 270 P.3d 39, 44 (Mont. 2012) (while court must consider the factors set forth in the statute, "they are not limitations on the court's obligation and authority to equitably apportion all assets and property of either or both spouses, based upon the unique factors of each case."); [In re Harvey](#), 899 A.2d 258, 269 (N.H. 2006), overruled on other grounds, [In re Chamberlin](#), 918 A.2d 1 (N.H. 2007) (assets acquired by gift during the marriage shall be included in marital property and distribution). Connecticut, Hawaii, Kansas, Massachusetts, North Dakota, South Dakota, Vermont, Washington and Wyoming do not provide any special treatment for gifts. See generally [Conn. Gen. Stat. § 46b-81\(a\)](#) (West 2013); [Haw. Rev. Stat. § 580-47\(a\)\(3\)](#) (West 2013); [Kan. Stat. Ann. § 60-1610\(b\)\(1\)](#) (Lexis 2013); Mass. Gen. Laws Ann. § 208-34 (West 2013); N.D. Cent. Code Ann. § 14-05-24(1) (West 2013); [S.D. Codified Laws § 25-4-44](#) (West 2013); Vt. Stat. Ann. § 15-11-6-751 (West 2013); [Wash. Rev. Code Ann. § 26.09.080](#) (West 2013); [Wyo. Stat. Ann. § 20-2-114](#) (West 2013). In these states, gifts may be characterized as separate but can still be subject to distribution. See e.g., [Schiller v. Schiller](#), 205 P.3d 548, 574-76 (Haw. Ct. App. 2009) (finding a partnership interest to be gift from husband's mother to husband hence separate property, but still subject to distribution); [Rice v. Rice](#), 361 N.E.2d 1305, 1306-07 (Mass. 1977) (gifts from husband's father to husband are separate property but the court has authority to transfer it to wife). However, even in these states, the nature of gift may still influence the distribution. See e.g., [Williams v. Massa](#), 728 N.E.2d 932, 938-39 (Mass. 2000) (characterizing as part of the marital estate husband's stocks and bonds which he received as gift from his parents, yet refusing to assign any of them to wife).

[149](#) Principles of Family Dissolution, supra note 143, at § 4.03 comment b (reporter's notes).

[150](#) Id. (citing cases).

[151](#) Id. (citing cases).

[152](#) For common law states, see Turner, supra note 143, at §§ 5:6, 5:40, 5:70. For community property states, see [15B Am. Jur. 2d Community Property § 19](#) (2012); see also e.g. [In re Marriage of Smith](#), 2008 WL 3919359, *1 (Ariz. Ct. App. Aug. 26, 2008) (when a party purchases property with separate fund but the title is held jointly, there is a rebuttable presumption that the property was taken in trust for the paying party); [Kircher v. Kircher](#), 117 Cal. Rptr. 3d 254, 261 (Cal. Ct. App. 2010) ("The characterization of property as community or separate is not dependent on the form in which title is taken."); [Pemelton v. Pemelton](#), 809 S.W.2d 642, 647- 48 (Tex. App. 1991) (presumption of separate gift rising from deed from wife's parents to wife is rebutted by other evidence), rev'd on other grounds sub nom. [Heggen v. Pemelton](#), 836 S.W.2d 145 (Tex. 1992).

[153](#) Turner, supra note 143, at § 5:65.

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- [154](#) California holds such contribution creates a pro tanto interest in the house, and there are some indications that Nevada and New Mexico may be following the same approach, see Elizabeth Barker Brandt, [The Treatment of Community Contributions to Mortgage Payments \(Including Principal and Interest\) on Separate Property](#), 30 Idaho L. Rev. 697, 699-703 (1994). In most common-law states, the source-of-fund rule reaches the same result. Turner, supra note 143, at §§ 5:21, 5:23.
- [155](#) E.g. [Wis. Stat. Ann. § 766.63\(2\)](#) (West 2013); [In re Marriage of Sanfratello](#), 913 N.E.2d 1077, 1087 (Ill. App. Ct. 2009), appeal denied sub nom. [Sanfratello v. Sanfratello](#), 920 N.E.2d 1081 (Ill. 2009); [In re Marriage of Bartsch](#), 162 P.3d 72, 77 (Mont. 2007).
- [156](#) [Ala. Code § 30-2-51\(a\)](#); [Green v. Green](#), 29 P.3d 854, 858 (Alaska 2001) (“marital effort and use” can transmute a house completely into marital property); [In re Marriage of Hoffman](#), 493 N.W.2d 84, 89 (Iowa Ct. App. 1992) (eighteen years of marriage is sufficient to transmuted a gift into marital property); [Bowen v. Bowen](#), 982 So. 2d 385, 395 (Miss. 2008) (because husband and wife lived and worked on the marina which was husband's separate property, the marina is transmuted into marital property); [Stewart v. Stewart](#), 2 So. 3d 770, 773 (Miss. Ct. App. 2009) (“prolonged use as... family home” for either three, five or seven years is sufficient to transmute the house; and the homemaker contribution by the wife counts towards transmutation)
- [157](#) David R. Knauss, [What Part of Yours Is Mine?: The Creation of A Marital Property Ownership Interest by Improving Nonmarital Property Under Wisconsin's Marital Property Law](#), 2005 Wis. L. Rev. 855, 862 (2005).
- [158](#) See [15B Am. Jur. 2d Community Property § 30](#); Knauss, supra note 157, at 862.
- [159](#) Knauss, supra note 157, at 862. See e.g. [Krielow v. Krielow](#), 635 So. 2d 180, 188 (La. 1994) (reimbursement is appropriate if community labor substantially enhanced the value of separate property); [In re Marriage of Johnson](#), 625 P.2d 720, 722 (Wash. Ct. App. 1981) (reimbursement for increased value of separate property resulting from community investment is appropriate, but inflationary increase in value is not community property).
- [160](#) Lawrence W. Waggoner, [The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code](#), 76 Iowa L. Rev. 223, 247 (1991). This revision is currently adopted in nine states. J. Thomas Oldham, [You Can't Take It with You, and Maybe You Can't Even Give It Away: The Case of Elizabeth Baldwin Rice](#), 41 U. Mem. L. Rev. 95, 105 n.48 (2010). However, some of these states adopted the formula but rejected the inclusion of separate property in the augmented estate, thus exhibiting a disagreement with the automatic transmutation. See Terry S. Kogan & Michael F. Thomson, [Piercing the Facade of Utah's "Improved" Elective Share Statute](#), 1999 Utah L. Rev. 677, 688 (1999).
- [161](#) [Unif. Probate Code § 2-203\(b\)](#) (2008).
- [162](#) Principles of Family Dissolution, supra note 143, at § 4.12.
- [163](#) For a strong criticism, see Turner, supra note 143, at § 5:71.
- [164](#) Principles of Family Dissolution, supra note 143, at §§ 5.02, 5.02 comment a (reporter's notes) (citing cases).
- [165](#) Id. at § 5.05 comment a (reporter's notes) (citing cases).
- [166](#) Id. at §§ 5.04 comment a, 5.04 comment a (reporter's notes) (citing cases).
- [167](#) E.g. [Martin v. Martin](#), 2011 WL 2937403, *7-8 (Ala. Civ. App. July 22, 2011) (a gift from husband's parents intention “for the parties to use only as a marital home” was one to the couple, not to the husband); [L.H. v. B.A.](#), 2008 WL 1948470, *1-2, 4 (Del. Fam. Ct. Mar. 10, 2008) (when husband's parents deeded a house to husband and his father for \$1, and later husband's father transferred his 50% share to husband for \$10.00, the deed only shows husband's name, but on the next day of the latter transfer, husband took out a loan for \$207,400, paid off \$157,164.64, and gave his father \$50,235.36 in cash, the 50% share from the mother was indeed a gift to husband only, but the 50% share from the father was not a gift and was marital property); [In re Marriage of Sanfratello](#), 913 N.E.2d 1077, 1087 (Ill. App.

[Ct. 2009](#)) (house was from husband's parents to husband in contemplation of marriage and therefore was a gift to the marital estate); [In re Marriage of Beilke, 2002 WL 31757475, *2-3 \(Iowa Ct. App. Dec. 11, 2002\)](#) (since husband testified that a \$8,000 gift for deck construction was for "us", it was a gift to the marital estate); [In re Marriage of Fulton, 147 P.3d 163, *2 \(Kan. Ct. App. 2006\)](#) (Table) (house was gift from wife's parents to wife only and not subject to distribution); [Arenson v. Arenson, 2003 WL 1389057, *9-11 \(N.Y. Sup. Ct. Feb. 13, 2003\)](#) (although wife's parents paid for the house with \$160,000 in cash and the title was in wife's name alone, because husband testified that he chose the form of title to protect the house from other liabilities and because wife's credibility was at issue, the house was still marital property); [Bechara v. Essad, 2004 WL 1325636, *1, 13-14 \(Ohio Ct. App. June 11, 2004\)](#) (wife's parents gave the couple \$30,000 for down payment towards the house and wife's father testified that the gift was to wife alone, but a document listed both the couple as recipients of the gift, and wife's father sometimes testified the gift as to "them" or "him", therefore the gift was marital property); [Kainrad v. Kainrad, 2002 WL 1049704, *1-3 \(Ohio Ct. App. May 24, 2002\)](#) (when husband and his father both testified that \$25,000 of the house price was a gift from the father to the husband alone, the gift was separate property).

[168](#) E.g. [Viele v. Viele, 2007 WL 2916557, *7-8 \(Minn. Ct. App. Oct. 9, 2007\)](#) (when the land was a gift from husband's parents and the construction of the house was 90% completed before the marriage, but wife's family contributed substantially to the construction, the house might be marital property but husband has a nonmarital interest in it); [Fields v. Fields, 931 N.E.2d 1039, 1041-42, 1044-45 \(N.Y. 2010\)](#) (when husband's grandparents provided the down payment and husband and his mother signed the mortgage, but husband sometimes commingled marital funds into the account from which mortgage payment was made, husband did not overcome the statutory assumption of marital property), reargument denied, [934 N.E.2d 885 \(N.Y. 2010\)](#); [Owens v. Owens, 241 S.W.3d 478, 486 \(Tenn. Ct. App. 2007\)](#) (when husband was the owner of record of a house that he argued was a gift to him from his parents, but he used marital fund for mortgage payments for twenty years, the house is marital property).

[169](#) E.g. [In re Marriage of Clickard, 2002 WL 1801771, *2, 4, 9-11 \(Cal. Ct. App. Aug. 6, 2002\)](#) (when wife's parents gave the couple \$20,000 for down payment towards a house, and then moved into the condominium titled under the couple's name, lived there, and paid off the mortgage on the condominium, and the couple intended to transfer the title of the condominium to wife's parents but did not do so, there is a valid and enforceable oral agreement to transfer the title of the condominium to the parents); [Nicevski v. Nicevski, 909 N.E.2d 446, 447-50 \(Ind. Ct. App. 2009\)](#) (when the title to the house was held in the name of husband's parents and the couple was effectively renting from the parents, the trial court had no power to "adjudicate the issue of the ownership of that property."), transfer denied, [919 N.E.2d 553 \(Ind. 2009\)](#); [Ver Brycke v. Ver Brycke, 843 A.2d 758, 762-64, 776-77 \(Md. 2004\)](#) (the gift from the parents in the form of fund towards purchase of a house was conditional on the couple moving into the house, and since the move did not happen, the parents could recover the fund and recover a pro tanto share in the profits from the sale of the house).

[170](#) Some commentators would consider the new rule not so "bright-line" in nature. See e.g., Donald C. Clarke, New Supreme People's Court Judicial Interpretation on the Marriage Law (Aug. 22, 2011), http://lawprofessors.typepad.com/china_law_prof_blog/2011/08/new-supreme-peoples-court-judicial-interpretation-on-the-marriage-law.html (pointing out that the new interpretation used the word "may" and courts are allowed some flexibility in treatment of the property). However, the Supreme People's Court speaker has expressed the intent of the new interpretation as to promote uniformity in judgments. Interview Regarding the Interpretation, supra note 128. This seems to mean that the Supreme People's Court intended the rule to be a bright-line one. Moreover, given the authoritative weight of the interpretation, lower courts will tend to err on the side of blindly following the letter of the rule, thus rendering the rule a bright-line one.

[171](#) Urban population comprised of 7.3% of total Chinese population in 1949 (the official founding year of the People's Republic of China), 11.8% in 1978 (the official year when the Economic Reform started), and 36.09% in 2000. Zhu Tiezhen (<<unknown characters>>), Zhongguo Chengshihua De Lishi Jingcheng (<<unknown characters>>) [Historical Progress of Urbanization in China] (Mar. 29, 2010), <http://www.chinacity.org.cn/cstj/zjwz/53974.html> (China).

- [172](#) The Chinese government officially adopted market economy as the governing economic policy in 1993, before that, the Chinese economy was mainly planned. See Wu Jixue (<<unknown characters>>), Huiwang Shehuizhuyi Shichang Jingji De Quzhe Lujing (<<unknown characters>>) [Retrospective on the Tortuous Progress of Socialistic Market Economy] (Jul. 15, 2006), <http://theory.people.com.cn/GB/49154/49155/4594081.html> (China).
- [173](#) See Ji Weidong (<<unknown characters>>), Zhongguo Sifa Gaige Disan Bo Yu Fa Shehui Xue Yanjiu - Xianzhi Shenpan Cailiangquan De Keguanhua Jizhi De Tanqiu (<<unknown characters>>) [The Third Wave of Legal Reform in China and Research on Legal-Sociology - A Search for an Objective Mechanism to Restrict the Discretionary Power in Justice Administration] (Sept. 14, 2009), <http://www.dffy.com/faxuejieti/zh/200909/20090914150826.htm> (China).
- [174](#) See Chen Xingliang (<<unknown characters>>), Mianxiang 21 Shiji De Xingshi Sifa Linian (<<unknown characters>>) [New Criminal Law Principles for the Twenty-First Century] (May 30, 2011), <http://china.findlaw.cn/info/lunwen/xingfalw/301601.html> (China).
- [175](#) See Yang Lixin (<<unknown characters>>), 21 Shiji Zhongguo Minfa Fazhan Zhanwang (21 <<unknown characters>>) [Prospective on the Development of Chinese Civil Law in the Twenty-First Century] (Mar. 30, 2010), <http://www.civillaw.com.cn/article/default.asp?id=48557> (China); Wang Jiafu (<<unknown characters>>), 21 Shiji Yu Zhongguo Minfa De Fazhan (21 <<unknown characters>>) [the Twenty-First Century and the Development of Chinese Civil Law] (Apr. 2003), <http://www.iolaw.org.cn/showArticle.asp?id=1149> (China).
- [176](#) Wang Jiafu, supra note 175.
- [177](#) See Liang Huixing (<<unknown characters>>), “Zhonghua Renmin Gongheguo Hetongfa” Lifa Fang'an (<<unknown characters>>) [Roadmap to the Drafting of “Contract Law of the People's Republic of China”] § 1 (Jan. 7, 1994), <http://www.iolaw.org.cn/shownews.asp?id=447> (China). This is the official roadmap, not just a scholarly opinion.
- [178](#) See Da Qing Min Lü Cao'an § 1358, Yang Lixin, supra note 35, at 173 (clearly delineated separate property); Mingguo Min Lü Cao'an §§ 1135-1136, Yang Lixin, supra note 35, at 355 (same); Zhonghua Mingguo Minfa § 1017 (1929) (same); Da Qing Min Lü Cao'an § 1355, Yang Lixin, supra note 35, at 173 (third-party rights with regard to marital property); Mingguo Min Lü Cao'an § 1123, Yang Lixin, supra note 35, at 353 (same); Zhonghua Mingguo Minfa § 1020 (1929) (same).
- [179](#) Zhonghua Mingguo Minfa §§ 1031 (clearly delineated separate property), 1033 (third-party rights) (1929).
- [180](#) Wuquan Fa (<<unknown characters>>) [Property Rights Law] (promulgated by Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) §§ 9, 16, 17 (importance of deeds with regard to real property), available at http://www.gov.cn/flfg/2007-03/19/content_554452.htm (last visited Apr. 5, 2013) (China).
- [181](#) Id. at §§ 102 (common owners jointly liable to third party for liability rising from commonly owned property), 106 (bona fide third party purchasers who have registered the deed are protected against claims from rightful owners); see also Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Yi) § 17(2) (protection of bona fide third party in dealings over marital property); Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 11(1) (protection of bona fide third party in unilateral sales of marital residence).
- [182](#) The ownership scheme presumably falls under the common ownership scheme called <<unknown characters>> in Chinese law, which is a per my et per tout ownership scheme that in general requires unanimity of owners in any disposition. See Wuquan Fa §§ 93 (two types of common ownership), 103 (presumption of <<unknown characters>> in common ownership between family members).
- [183](#) See Turner, supra note 143, at §§ 2:5, 5:21; but see Wang Yong, supra note 123 (arguing that Property Rights Law should only affect the relationships between the couple and a third party, not the division between the couple themselves).

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- [184](#) Under the Property Rights Law, the property rights to real property are established through title registration. Wuquan Fa [§9](#). This, together with the provisions under Marriage Law regarding the scope of jointly possessed property, establishes an inception-of-title rule with regards to classification of real property. Hunyin Fa §§ 17-18 (2001). A “classic” inception of title theory treats the character of property as acquired and fixed at the time of “inception of title.” *Mennell*, supra note 74, at 153-55.
- [185](#) See [15B Am. Jur. 2d Community Property § 30](#).
- [186](#) See *id.* (But the situation regarding reimbursement for “community time, talent and labor” is not clear in China).
- [187](#) See *Turner*, supra note 143, at § 2:2.
- [188](#) Principles of Family Dissolution, supra note 143, at § 4.02.
- [189](#) Wang Yong, supra note 123; Zeng Zhihui, supra note 131.
- [190](#) See Herma Hill Kay, Beyond No-Fault, in *Divorce Reform at the Crossroads* 6, 30-31 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).
- [191](#) *Turner*, supra note 143, at § 1:5.
- [192](#) Bea Ann Smith, [The Partnership Theory of Marriage: A Borrowed Solution Fails](#), 68 *Tex. L. Rev.* 689, 739 (1990)
- [193](#) See generally Judith T. Younger, [Marital Regimes: A Story of Compromise and Demoralization. Together with Criticism and Suggestions for Reform](#), 67 *Cornell L. Rev.* 45 (1981)
- [194](#) [41 A.L.R. 4th 481](#) § 3 (1985) (citing cases).
- [195](#) *Smith*, supra note 192, at 730-39.
- [196](#) Wang Yong, supra note 123.
- [197](#) Hunyin Fa § 46 (2001).
- [198](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) [§ 17](#). This is not a complete doctrine of recrimination, as mutual fault does not prevent divorce itself but only prevents fault-based property claims.
- [199](#) See Lenore J. Weitzman, *The Divorce Revolution: the Unexpected Social and Economic Consequences for Women and Children in America* 4, 145-46 (1985).
- [200](#) See supra note 109.
- [201](#) Wang Yong, supra note 123. Also, Chinese Marriage Law does not recognize non-conventional properties such as future earning power, future retirement benefit or personal injury compensations as marital property. See Hunyin Fa § 18(2) (2001) (personal injury compensations are not marital property); Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 11 (payments from the pay-as-you-go-type retirement insurance--similar to 401(k) plan in the United States--that are actually acquired or vested during the marriage would be marital property, but there is no mention of defined-benefit retirement plan, or of future payments from retirement insurance after divorce); Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 13 (only the escrow amounts resulting from payments into retirement insurance during marriage, not the future insurance benefits, are subject to division if the insurance beneficiary is not yet retired at the divorce).
- [202](#) Wang Yong, supra note 123.

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- [203](#) Hunyin Fa § 39 (2001).
- [204](#) Wang Yong, *supra* note 123.
- [205](#) See *supra* notes 112-114.
- [206](#) [Jensen v. Jensen, 665 S.W.2d 107, 110 \(Tex. 1984\).](#)
- [207](#) See *supra* notes 119-121; see also Falü Dui Lihun Buchang You Naxie Guiding, *supra* note 101 (Chinese divorce law traditionally pays more attention to financial contributions than to labor contributions).
- [208](#) Hunhin Fa § 42 (2001); Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Yi), § 27.
- [209](#) For example, in marriage that lasted for more than 10 years, a party is entitled to alimony in consideration of such factors as “the contribution... to the education, training, or increased earning power of the other spouse” or “the contribution... as homemaker.” [Tex. Fam. Code § 8.052 \(West 2013\)](#). While there is a prerequisite of not being able to meet “minimum reasonable needs,” such a standard is a fact-specific and case-by-case one. [Tex. Fam. Code § 8.051; In re Marriage of Hale, 975 S.W.2d 694, 698 \(Tex. App. 1998\)](#) (federal minimum wage does not necessarily establish the standard).
- [210](#) Zhuanjia Jiedu Hunyinfa Xin Jieshi Mingque Jingshenchuhu Fang “Shanhun”, *supra* note 121.
- [211](#) See Turner, *supra* note 143, at § 1:5.
- [212](#) See *id.* at § 6:84.
- [213](#) See *id.* at §§ 6:21, 6:60, 6:62, 6:71.
- [214](#) Principles of Family Dissolution, *supra* note 143, at § 5.02; see also Kay, *supra* note 190, at 31-32 (discussing the “degree dilemma” and advocating a flexible approach based on “loss incurred by the supporting spouse”).
- [215](#) Weitzman, *supra* note 199, at 59-61.
- [216](#) The Anti Employment Discrimination Law is still in drafting stage in China, and discrimination is rampant. An egregious example is the requirement from a governmental office (among all employers) for all female applicants to have “well-developed secondary sexual characteristics, and symmetric breasts without lumps.” Gongwuyuan Tijian Biaozhun Qishi Guiding Duo Yao Nüxing “Rufang Duicheng” (<<unknown characters>>) [There is Much Discrimination in the Physical Standards for Governmental Workers, with One Asking for “Symmetric Breasts” in Women] (Feb. 19 2004), <http://bbs.zz18.com/thread-18365-1-1.html> (China). A party that contributed to the marriage instead of to his or her own earning capacity will likely face severe discrimination (such as discrimination based on age, gender prototype, and family status) when he or she tries to find a job again after the divorce.
- [217](#) See Beijing Daxue Fazhi Yanjiu Zhongxin (<<unknown characters>>) [[Peking Univ. Research Center on the Rule of Law], “Dangdai Zhongguo de Jiating Guannian yu Hunyin Anquan” Yantaohui Zongshu (<<unknown characters>>) [Summary of the Seminar on the “The Concept of Family and the Security of Marriage in Contemporary China”], <http://www.93576.com/search.php?q=%B5%CB1%CB4%CFA%CD6%CD0%CB9%CFA%CB5%CC4%CB%K%CD%A5%CB9%CDB%CC4%CEE%CD3%CEB%CB%CE9%CD2%CF6%CB0%CB2%CC8%CB%CD1%CD0%CCC%CD6%CB%CE1%CD7%CDB%CCA%6> (last visited Apr. 5, 2013) (China) (“The newly minted Third Judicial Interpretation is no more than a response to the realities of the societal problems. Starting from the marriage model of 1939, up to today’s marriage model, there is a continuous descent from the ideal.”).
- [218](#) Hunyin Fa §§ 1, 10, 23 (1950).

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- [219](#) From 1990 to 2000, the percentage of kernel families in all family forms decreased by 5.65% to 68.15% and that of generational families increased by 3.25% to 22.30%. Wang Yuesheng (<<unknown characters>>), Dangdai Zhongguo Jiating Jiegou Biandong Fenxi (<<unknown characters>>) [Analysis on Contemporary Changes of Chinese Family Structure] (2006), [http:// www.sociology.cass.cn/shxw/jtyxbyj/P020060615298201097203.pdf](http://www.sociology.cass.cn/shxw/jtyxbyj/P020060615298201097203.pdf) (China). The numbers are calculated from Table 5 in the paper by direct subtraction between the percentage numbers, and are not the same as the relative percentage change between the percentage numbers reported in the paper.
- [220](#) See Dushiren Re Xiu Xiandai Jiapu “Jiapu Re” Qiaoran Xingqi (<<unknown characters>>) [Urban Dwellers Are Very Interested in Compiling Modern Genealogical Records, an “Interest in Genealogy” Quietly Appears] (Mar. 1, 2006), http://news.xinhuanet.com/society/2006-03/01/content_4243362.htm (China).
- [221](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 10 (China).
- [222](#) See “Ernai” Wu Cuo? Cuoze Zai Shui? (<<unknown characters>>) [The “Second Wife” is Without Fault? Who is at Fault?] (Jul. 3, 2010), [http:// www.fabao365.com/news/talk/40.html](http://www.fabao365.com/news/talk/40.html) (China).
- [223](#) Dui Guangdong Sheng Bao “Ernai” Xianxiang De Diaocha (<<unknown characters>>) [A Survey Regarding the “Second Wife” Situation in Guangdong Province], http://www.china001.com/show_hdr.php?xname=PPDDMV0&dname=ETLGF41&xpos=22 (last visited Apr. 5, 2013) (China).
- [224](#) Id.
- [225](#) Lü Jing (<<unknown characters>>), Nanzi Qiqie Tongzhu Xie Zinü Tongju 4 Nian (<<unknown characters>>) [A Man Lives Together with His Wife and Concubine, and Even with Children, for 4 Years] (Sept. 21, 2011), [http:// i.ifeng.com/news/society/wanxiang/news?aid=23517434&mid=9mis66&vt=2&p=1](http://i.ifeng.com/news/society/wanxiang/news?aid=23517434&mid=9mis66&vt=2&p=1) (China).
- [226](#) Id. (In the end, the parties settled, the “second wife” paid the wife a sum of 35K CNY and the wife moved out.)
- [227](#) See Qingdao Nūhai Dinghun Jiehun De Xiangxi Jiamu Biao (<<unknown characters>>) [A Detailed Price Sheet for Engagement and Marriage with a Girl in Qingdao City] (Aug. 3, 2007), [http:// www.tianya.cn/publicforum/content/develop/1/124561.shtml](http://www.tianya.cn/publicforum/content/develop/1/124561.shtml) (China). The “price sheet” shows that the husband generally will spend around 100,000RMB for a marriage, not counting the purchase of a house. The discussions following the “price sheet” show a strong feeling that the woman is some kind of merchandise.
- [228](#) See id.
- [229](#) 20 Ge Shengfen Nannü Bili Shiheng 10 Nian Hou Qianwang Nanzi Huo Quqi Nan (<<unknown characters>>) [The Male-Female Proportion Is Unbalanced in 20 Provinces, Tens of Millions of Men May Have Trouble Finding Spouse 10 Years From Now] (Aug. 22, 2011), <http://msn.yinet.com/3.1/1108/22/6113851.html> (China). The report suggests that the problem rises from illegal but widely-practiced sexual selection procedures.
- [230](#) The Chinese stock market has been very volatile in the past decade, like the rest of the world.
- [231](#) The tradition is strong enough that even detractors of the new rule believe men in general should provide houses to women, instead of the couple working together for the house. See Wang Yong, *supra* note 123.
- [232](#) Xinfu Zhangdan Jiehun Chengben 30 Nian Baozeng 4 Qian Bei (<<unknown characters>>) [A Bill for Happiness: the Cost of Marriage Rose by 4000 Times in 30 Years] (Sept. 29, 2011), [http:// finance.people.com.cn/money/GB/15786946.html](http://finance.people.com.cn/money/GB/15786946.html) (China).
- [233](#) See *supra* notes 113, 231; see also Zhao Ningning (<<unknown characters>>), Wo Zai Lǔxie Nǚ Lǔshi Yantaohui de Fayan Tigang (<<unknown characters>>) [Synopsis of a Talk on Conference of Female Lawyers Hosted by Shanghai Bar Association] (Sept. 14, 2011), [http:// www.9ask.cn/blog/user/claudia/archives/2011/279481.html](http://www.9ask.cn/blog/user/claudia/archives/2011/279481.html) (China).

- [234](#) See Interview Regarding the Interpretation, *supra* note 128.
- [235](#) See Zhao Xiaoli, *supra* note 132. Cf. Jicheng Fa (<<unknown characters>>) [Probate Law] (promulgated by Nat'l People's Cong., Apr. 10, 1985, effective Oct. 1, 1985), § 12 (a widowed child-in-law is first in inheritance order of a parent-in-law if the child-in-law has satisfied the "obligation of support" to the parent-in-law), http://news.xinhuanet.com/st/2001-12/04/content_146596.htm (last visited Apr. 5, 2013) (China).
- [236](#) This saying has been circulating on the internet for a while, but the author cannot find the original source.
- [237](#) See Interview Regarding the Interpretation, *supra* note 128.
- [238](#) Zhao Ningning, *supra* note 233.
- [239](#) Hunyin Fa § 39(1) (2001).
- [240](#) See *supra* note 123.
- [241](#) Martha Albertson Fineman, *The Illusion of Equality: the Rhetoric and Reality of Divorce Reform* 21-22 (1991).
- [242](#) *Id.* at 25.
- [243](#) *Id.* at 22.
- [244](#) *Id.* at 20-22.
- [245](#) Hunyin Fa § 19 (2001). But the law specifically requires consideration of homemaker contributions when a prenuptial contract is involved in a divorce proceeding. *Id.* at § 40.
- [246](#) Cf. *Nicevski v. Nicevski*, 909 N.E.2d 446, 447-48 (Ind. Ct. App. 2009). Under Chinese law, even when the couple intended to buy a house from one party's parents and made joint payments for that house, if that house was directly acquired from the government during the housing reform, and if the deed of the house is still under the parents' names, then the house is still treated as the parents' property in a divorce. Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Hunyin Fa" Ruogan Wenti De Jieshi (San) § 12.
- [247](#) Cf. *Ver Brycke v. Ver Brycke*, 843 A.2d 669, 761 (Md. 2004). Conditional gift is valid under the Chinese Contract Law. Hetong Fa (<<unknown characters>>) [Contract Law] (promulgated by Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) §§ 190, 192, <http://www.dffy.com/faguixiazai/msf/200311/20031110211955.htm> (Nov. 10 2003) (China). One may argue that the house can be viewed as a gift implicitly conditioned upon the wife rendering some services to the parents, such as support during old ages.
- [248](#) Xia Yinlan, *supra* note 99 (about 2.7% of urban families and 1.1% of rural families approve of separate property ownership based on contracts); Huang Baoshu (<<unknown characters>>), Qianyi Hunqian Caichan Xieyi Gongzheng (<<unknown characters>>) [On Notarized Prenuptial Property Agreements] (Mar. 31, 2011), <http://falvlunwen.com/mf/ShowArticle.asp?ArticleID=104> (China).
- [249](#) Wang Yong, *supra* note 123.
- [250](#) Turner, *supra* note 143, at § 1:5; Wang Yong, *supra* note 123.
- [251](#) Zhang, *supra* note 3, at 42 ("There is... considerable reason to believe that the SPC's primary objective in pushing forth the new marriage law interpretations was the pursuit of doctrinal simplicity and judicial efficiency.")
- [252](#) Hunyin Fa § 39 (2001).
- [253](#) Wang Yong, *supra* note 123.

- [254](#) [In re Estate of Borghi, 219 P.3d 932, 937 \(Wash. 2009\).](#)
- [255](#) Turner, *supra* note 143, at § 2:3.
- [256](#) Cf. *id.* at §§ 2:2, 2:3.
- [257](#) [Cal. Evid. Code. § 662 \(West 2013\).](#)
- [258](#) Wuquan Fa [§ 17](#).
- [259](#) *Id.* at § 15.
- [260](#) The Chinese law requires written contracts for real property transfers. Chengshi Fangdichan Guanli Fa (<<unknown characters>>) [Urban Real Property Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jul, 5, 1994, effective Jan. 1, 1995) § 41, http://www.gov.cn/flfg/2007-08/30/content_732595.htm (last visited Apr. 5, 2013) (China). However, substantial performance can overcome this requirement. Hetong Fa § 36. The Contract Law also governs gifts. *Id.* at §§ 185-195. Moreover, promise can be inferred from course of dealing and practice of trade. *Id.* at § 22. Practice of trade can be such practice that is often applied in the locus of contract and is known or should be known by the parties. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hetong Fa” Ruogan Wenti De Jieshi (Er) (<< unknown characters>>) [Second Judicial Interpretation by the Supreme People's Court on Several Questions Regarding the Application of “Contract Law of the People's Republic of China”] (promulgated by the Sup. People's Ct., Apr. 24, 2009, effective May 13, 2009), §7(1), http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1051.htm (last visited Apr. 5, 2013) (China). Thus, the parties may contend such a contract exists based on substantial performance or practice of trade.
- [261](#) Cf. Clarke, *supra* note 170 (arguing that the interpretation uses the word “may” so it allows but does not require the courts to give house to one party and give compensation to another, and some flexibility still exists).
- [262](#) See *supra* notes 125, 1311-1366.
- [263](#) See Marsha Garrison, The Economics of Divorce: Changing Rules, Changing Results, in *Divorce Reform at the Crossroads* 75, 78, 90-92 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (judicial perception of the new rule, “underlying entitlement rules” and legislative actions, more than changes in negotiation power, affected the financial outcomes of divorces).
- [264](#) See *supra* notes 160-162.
- [265](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 14.
- [266](#) Wang Yong, *supra* note 123; Wang Liren, *supra* note 133.
- [267](#) Wuquan Fa § 97.
- [268](#) Hunyin Fa [§ 17](#) (2001).
- [269](#) Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Yi) [§ 17\(1\)](#).
- [270](#) See also Wang Yong, *supra* note 123 (the division scheme in the new Judicial Interpretation is at odds with the division scheme for commonly owned property in Property Rights Law).
- [271](#) *Id.*
- [272](#) [Wash. Rev. Code Ann. §§ 26.09.080, 26.16.030.](#)

MARRIAGE IS BETWEEN A MAN AND A WOMAN AND, 88 Chi.-Kent L. Rev....

[273](#) [Wis. Stat. Ann. §§ 766.31, 767.61.](#)

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