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## Commentary

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## COMMENTARY

*G. Oliver Koppell\**

I would like to give my thoughts in response to Professor Garrison's work, and comment tangentially on some of the other commentators' points as well. First, I'm not sure that Professor Garrison's overall conclusion that equitable distribution is a failure is fair. It is fair to say that her study shows that the current system of distribution of property and support of ex-spouses and children isn't working very well. But such a conclusion does not necessarily mean that equitable distribution is a failure, especially considering that her study, interestingly enough, shows that equitable distribution is largely irrelevant to the issue of how parties live after divorce. That, perhaps, is the most surprising outcome. For the vast majority of men, women and children, the whole issue is essentially irrelevant because there is not enough property to really make a difference. What she also shows is that where there is enough property to make a difference, the results are not very consistent. I don't think Professor Garrison has been able to show—because I don't think any study *could* show—that in individual instances shifting away from a title-based system did not allow for more flexibility and therefore more fairness.

I suggest that there are many cases, maybe not statistically significant but certainly significant to the participants in those cases, where equitable distribution helped to achieve a better result than would a title-based system. And I don't think Professor Garrison would counsel going back to a title-based system to cure the problems of equitable distribution. I doubt there are many people around who would say we should go back to that system, even though, according to the research, under that system the results were not very different than the results *after* the system. Her study points out that equitable distribution does not solve basic fairness problems, and as a result of the enactment of equitable distribution we made other changes in the di-

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orce law, particularly with respect to permanent alimony or maintenance, that not only didn't help the situation, but perhaps in many instances made it worse. On that point though, I might suggest that changes in societal attitudes about the capabilities and role of women had as much to do with what happened in the courts with respect to alimony and maintenance as the change in the law, and we might well have changed the law with respect to alimony or maintenance even if we hadn't enacted equitable distribution.

So going back to the question of whether we should or should not have passed the equitable distribution law or that part of the law which dealt with abolishing title, I don't think the report suggests that passing the law was a bad idea. Rather, we should recognize that by adopting equitable distribution we didn't solve many problems some people thought would be solved. If Professor Garrison's research had been available in 1979, those disappointed with the equitable distribution law would have known to begin with that it wouldn't have solved the problems, because the money just wasn't there. Unfortunately, we in the legislature didn't take the time to determine how few people equitable distribution would affect. Now, looking at the effect of the equitable distribution law, the question arises where should we go from here, where should we go as a legislature?

First of all, let me say that some of us in the legislature, even before Professor Garrison's study, have understood that there are problems with the system that equitable distribution has not been able to solve and that therefore still need to be changed. First of all, certainly, many of us from the very beginning believed that the distribution of property should be equal, not equitable, or at least there should be a presumption of equality. I know that was my position way back when and the position of many others. Equitable was essentially the result of a compromise with those members who opposed any change. It was my view that we should have a more predictable standard: that the standard should be a presumption of equal. Even today, I'm not sure we shouldn't move further toward the California model, which is based on community property.

Many of us from the very beginning believed, and I still believe, that we ought to have at least a presumption of equal. I don't mind tinkering with the presumption in the ways that Professor Garrison suggests, in terms of providing more than equal

where that's appropriate, especially in low-income families or low-asset families, and in dealing with the issue of occupancy and control of the marital residence. Many of us also recognize that we should further modify the law, although it is true that since 1984, when Professor Garrison's study was done, there has been a modification of the law reminding judges that they can exercise their power to award permanent maintenance when necessary. We should go further. In legislation that I've proposed, we would have the judge look at the standard of living established during the marriage, and we would create a presumption of permanent maintenance or alimony in the case of the long-term marriage.

I also agree with Professor Garrison on the need for adequate counsel for the parties. Professor Garrison indicated that adequate counsel is one important predictor of a favorable outcome to the lower-income or lower-asset spouse (in most cases, the wife). Again, in legislation I've proposed, we would provide for a clearer mandate on judges to award counsel fees during the course of litigation and we would provide standards for the award of counsel fees that would look at the amounts paid by the "monied" spouse for counsel, when determining how much should be ordered to be paid by that spouse for the non-monied spouse's attorney. So, I think that her study suggests that the direction I and others in the legislature who have joined me are going is the proper one, if we are to correct some of the other problems suggested by the study.

Last, as discussed by Professors Garrison and Kay, is the question of whether a no-fault standard of divorce makes any difference in determining the financial outcome of the breakup of the marriage. Professor Garrison's studies, in which she points out that the vast majority of states in the United States are now no-fault states, do not indicate that the financial outcome results in New York are significantly different than the results reached in other states. So, the fact that we have a fault-based system in New York has not had the impact of awarding the economically weaker spouse higher amounts of property. There remains, however, a perception that fault-based systems help the weaker spouse, and this has engendered resistance to my proposals that it is time to eliminate fault as a necessary element in divorces where there is no consent. You can, of course, have a divorce on a no-fault basis in New York with consent. Professor Garrison's

study, and similar studies in other states, indicate that the fault requirement is not particularly protective for women, at least as a general matter. So, in the end I think that the study contributes to our understanding of what happens to people as a result of divorce. I think the study supports moving from a standard of equitable to a standard of equal. I think the study supports further modification of the standards judges should use when determining the award of maintenance or alimony. Maybe that can be done through case law, maybe it doesn't require a statutory change, but I would be happy to support such a statutory change. I think the study recognizes the importance of providing counsel to the parties. This issue is not limited to having the monied spouse pay for all attorneys' fees, but also involves the difficult problem of providing counsel when there is no money on either side, which is very often the case. Here, we have unfortunately gone backwards in the last few years by reducing legal aid to people who need or want a divorce. I also think that the study does not support those who are opposed to adding an irreconcilable differences standard to New York's grounds for divorce. Such are my thoughts.