PROTECTING THE RIGHT TO MARITAL PROPERTY: ENSURING A FULL EQUITABLE DISTRIBUTION AWARD WITH FRAUDULENT CONVEYANCE LAW

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INTRODUCTION

In almost every lawsuit there is the possibility that a litigant, anticipating defeat, will convey assets to a third party to prevent the eventual winner from receiving the full value of his judgment. Fraudulent conveyance laws were designed, in part, to minimize this risk by allowing the winning party to set aside conveyances that would otherwise prevent full satisfaction of his judgment. Divorce proceedings are one of the many contexts in which this is a significant concern. Experience shows that spouses who anticipate divorce or are in the midst of a divorce proceeding often convey or hide shared property to prevent their partners from receiving it after the divorce.

Before New York enacted equitable distribution in 1980, the courts did not divide shared property among the spouses upon divorce.1

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1 This Note specifically considers New York law; however, equitable distribution and fraudulent conveyance laws are relatively uniform so the ideas discussed here are relevant in other jurisdictions. A party seeking to recover fraudulently conveyed property—that is, property in which the party has rights superior to those of the transferee—must be a “creditor” of the transferor to have standing. “Creditor” is defined broadly under New York law as “a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” N.Y. DEBT. & CRED. LAW § 270 (McKinney 2008) (emphasis added). New York’s fraudulent conveyance law is based on the Uniform Fraudulent Conveyance Act, the predecessor of the Uniform Fraudulent Transfer Act, which has been adopted in a large majority of jurisdictions. The newer Act defines creditor in a similarly broad way. See UNIF. FRAUD. TRANS. ACT § 1(3), (5) (1984). For further discussion of fraudulent conveyance law see infra Part I.B.

New York judicial decisions over the past century have sometimes considered a spouse to be a creditor when necessary to protect rights arising from the marriage, but there is no reported decision to my knowledge that has considered a spouse to be a creditor based solely on the spouse’s right to equitable distribution. See discussion infra Part II.B. This Note argues that courts should expressly extend their historical protection of property rights arising from the marriage to account for the modern concept of equitable distribution.

2 1980 N.Y. Laws 434 (codified as amended at N.Y. DOM. REL. LAW § 236 (McKinney...}

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Instead, dependent spouses could seek alimony from their partner to help offset the hardship caused by the loss of support and the use of property that the couple formerly shared. The primary concern at the time was that a spouse from whom alimony was demanded would hide assets in the hope that the court would grant a smaller award based on the spouse’s deceptive lack of assets. Similarly, the spouse seeking alimony could squander assets to create the appearance of greater need so that the court might be compelled to grant a larger award.

Yet there was little concern during this time that one spouse could convey property during the marriage to prevent the other from getting it after divorce. The common law did not recognize the related concepts of marital property and equitable distribution—modern statutory constructs that allow both spouses, upon divorce, to receive a portion of property acquired by either spouse during the marriage. Except in limited circumstances, marriage under the former system had no effect on property rights. Consequently, each spouse retained separate property interests during and after the marriage. This meant that a title-holding spouse could convey shared property without infringing on the present property interests of the other spouse and without the

2008)). Equitable distribution drastically changed the way that the individual property rights of spouses are decided upon dissolution of the marriage. See generally 11 ALAN D. SCHEINKMAN, NEW YORK PRACTICE SERIES: NEW YORK LAW OF DOMESTIC RELATIONS § 14:1 (1996 & Supp. 2007). Prior to equitable distribution there was no concept of “marital property” and common law title theory left title to shared property in the hands of the spouse that held it during the marriage. See Kahn v. Kahn, 371 N.E.2d 809, 401 N.Y.S.2d 47 (1977). Property that was held by joint title during the marriage was divided into one-half interests upon divorce. See Mittman v. Mittman, 293 N.Y.S.2d 10 (App. Div. 1968), aff’d, 248 N.E.2d 593, 300 N.Y.S.2d 842 (1969). But if a spouse held title individually then he or she was entitled to sole ownership of the property upon divorce with the non-titled spouse receiving nothing. See McGuigan v. McGuigan, 359 N.Y.S.2d 842 (App. Div. 1974).

This system created a great hardship on dependent spouses, usually wives, because the husband normally would take property in their names only, causing the wife to take relatively nothing upon divorce and to be dependent upon alimony payments for support. SCHEINKMAN, supra, § 14:1. Equitable distribution was enacted in part as a response to the modern view of marriage as an economic partnership, where each spouse contributes in different ways to the value and success of the marriage. Id. The view of marriage as an economic partnership is the basis for requiring courts under equitable distribution to divide all property acquired by either spouse during the marriage based upon the individual needs and contributions of each spouse. See discussion infra Part I.A.

3 Alimony was the predecessor to what the law now innocuously calls “maintenance.” N.Y. DOM. REL. LAW § 236(B)(1)(a) (McKinney 2008). “Maintenance” refers to “payments provided for in a valid agreement between the parties or awarded by the court . . . to be paid at fixed intervals for a definite or indefinite period of time . . . .” Id. A maintenance award terminates upon the death of either spouse, the remarriage of one of the spouses, or an annulment made by the court. Id.


5 Id. Courts were allowed to look past these frauds when determining a just award based on the paying spouse’s true assets and the dependant spouse’s actual need. Id.

6 Common law property principles protected against conveyances of property to which the
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possibility that the conveyance would deprive the other spouse of property he or she would otherwise retain after divorce.7

Enactment of equitable distribution drastically affected the property rights of married individuals by making the legal form of title to property acquired by either spouse during the marriage irrelevant in determining the individual property rights of each spouse upon divorce. All property obtained by either spouse during the marriage becomes “marital property” unless the spouses have agreed in advance to keep certain interests separate. Upon divorce, the marital property is subject to equitable distribution by the court, which divides the property among the spouses after considering the needs and contributions of each spouse and the circumstances of the case.8

The accepted view is that during the marriage neither spouse has a vested interest in the marital property apart from interests accompanied by legal title.9 Consequently, common law property principles allow a title-holding spouse to convey marital property to a third party during the marriage without infringing on any present property interest of the other spouse.

This provides an incentive for a title-holding spouse who anticipates divorce to convey or hide marital property while still freely alienable so that it cannot be awarded to the non-titled spouse through equitable distribution. After it became clear that cunning spouses were effectively circumventing the allocation of property rights intended by equitable distribution, the legislature amended the law to aid courts in reducing the harm caused by such conveyances.10 As a result, once the divorce proceeding is initiated, courts have the discretion to proactively

other spouse held title. For instance, couples who acquired property jointly generally took title as tenants by the entirety just as they do today. See N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(b) (McKinney 2008) (“A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.”). A spouse attempting to convey jointly held property could therefore convey at most his or her one-half interest, but could not infringe on the other spouse’s one-half interest or destroy the right of survivorship.

7 This makes the assumption that the shared property was not held by the title-holding spouse in constructive trust for the partial benefit of the non-titled spouse. Prior to equitable distribution, the constructive fraud doctrine was sometimes relied upon to allow the imposition of a constructive trust in order to obtain an interest in shared property for a non-title holding spouse who would otherwise receive no property upon divorce. SCHEINKMAN, supra note 2, § 2:14; see also discussion supra note 2. Courts allow the imposition of a constructive trust where the circumstances of property acquisition indicate that the title-holder should not in good conscience retain all beneficial interest in the property. See Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 225 N.Y. 380 (1919). Equitable distribution has reduced the reliance on the constructive trust doctrine because marital property is now distributed without regard to how title is acquired or held during the marriage. SCHEINKMAN, supra, § 2:15; see also discussion infra Part I.A.

8 See discussion infra Part I.A.


10 For in depth treatment of these protections see the discussion infra Part II.A.
issue interim property restraints to prevent a spouse from conveying marital property until the court decides how to distribute the property.\textsuperscript{11} If, however, a spouse conveys marital property before the court can prevent it, the court must consider whether the conveyance constitutes economic misconduct—wasteful or fraudulent dissipation of marital assets—and if so, compensate for the loss by awarding the harmed spouse a greater share of the remaining property.\textsuperscript{12}

But these well-intentioned measures fall short in protecting a spouse’s right to receive his or her full share of the marital property. A restraint against the transfer of marital property is only effective once issued—any property already conveyed cannot be reclaimed for its rightful distribution because the court normally cannot disturb the title of third party transferees. Therefore, a cunning spouse need only convey marital property before the divorce petition is filed and the court has jurisdiction. This of course can be counteracted by adjustments in the final property distribution to compensate for the economic misconduct, but any adjustment is an empty gesture if there is no remaining property of sufficient value to offset the loss.

Therefore, while these protections may be adequate against conveyances made after the divorce petition is filed, they do little to protect against pre-petition conveyances that interfere with a spouse’s right to a full equitable distribution award—that is, the full value of property the spouse would have received had the property not been conveyed in anticipation of divorce. Marital property rights, no matter how contingent,\textsuperscript{13} must be protected at all times and not just post-petition. While valid prenuptial agreements that expressly provide for the distribution of marital property upon divorce provide the best protection of marital property rights, most couples do not enter into these agreements, and the courts must protect those who do not.

To protect interests in marital property guaranteed by equitable distribution, this Note proposes that a spouse should be considered a creditor—and thus have recourse to fraudulent conveyance law—for the limited purpose of setting aside conveyances that would otherwise prevent the spouse from receiving a full equitable distribution award. While courts have occasionally considered a spouse to be a creditor of his or her partner, these decisions have generally limited creditor

\textsuperscript{11} Interim property restraints allow a spouse to enjoin fraudulent transfers of marital property without meeting the more stringent requirements normally imposed when obtaining a preliminary injunction. \textit{See} discussion \textit{infra} Part II.A and note 88.

\textsuperscript{12} \textit{See} discussion \textit{infra} Part II.A and notes 68 and 69.

\textsuperscript{13} My use of the term “marital property rights” is not meant to imply that a spouse has a vested interest during the marriage in marital property to which he or she does not hold title. I am referring instead to the rights in marital property that equitable distribution guarantees upon divorce, but which during the marriage is still a contingent claim that will not mature unless the marriage is dissolved.
standing to dependent spouses who are or will be owed some kind of support by their former spouse—thus they likely do not protect a spouse that is capable of self-support. These decisions, like the interim property restraint and the court’s consideration of economic misconduct, fall short in offering every spouse adequate protection of marital property rights. One spouse should not be able to unilaterally bypass this elaborate statutory scheme upon which each spouse relies to guarantee future property rights simply because the courts have not fully modernized their jurisprudence to account for equitable distribution.

Part I of this Note briefly surveys the laws of equitable distribution and fraudulent conveyances—the two areas of law that intersect to form this Note’s proposal. Part II begins with a discussion of the current statutory safeguards against conveyances designed to deprive a spouse of marital property upon equitable distribution—property restraints and adjustments for economic misconduct—and why they are inadequate at fully protecting a spouse’s marital property rights. The limited cases where courts have allowed fraudulent conveyance actions to protect rights arising from the marriage are then considered. Part III of this Note argues that courts should clearly articulate a standard for considering a spouse to be a creditor when necessary to set aside fraudulent conveyances that would otherwise prevent the spouse from receiving a full equitable distribution award.

I. EQUITABLE DISTRIBUTION AND FRAUDULENT CONVEYANCE LAW

A. Marital Property Rights Provided by Equitable Distribution

Under New York law, marriage is a civil contract between two individuals who must legally consent to its formation. However, the

14 This duty of support is generally based on a contractual separation agreement between the spouses or a court order granting such relief, such as an order for maintenance (or alimony under the former system). For further discussion, see infra Part II.B.

15 See Scheinkman, supra note 4, § 3:57. This scenario is increasingly common in modern times where both spouses work. In this situation both spouses are earning a substantial income and both are contributing to the acquisition of marital property. What is troublesome is that the current case law allowing fraudulent conveyance actions may not protect these spouses, even though their contributions clearly warrant protection of their right to the marital property under equitable distribution. See discussion infra Part II.B.

16 While a few states have recently liberalized their marriage laws, the right to enter into a marriage contract in the state of New York is still limited to marriages between a man and a woman. Hernandez v. Robles, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006); see also Shields v. Madigan, 783 N.Y.S.2d 270 (Sup. Ct. 2004), aff’d, 820 N.Y.S.2d 890 (App. Div. 2006) (affirming on the basis of the Court of Appeals’ decision in Hernandez). The State’s definition of marriage comports with federal law, which does not recognize same-sex marriages:
State regulates marriage more than it does traditional civil contracts and imposes obligations on the parties and creates certain rights without their consent. Among the regulations imposed by law is a prohibition against husband and wife agreeing to alter or dissolve the marriage by private contract—they must go through the proper judicial procedure with all of its protections. The law also prohibits spouses from agreeing to relieve each other of liability for the support of the other if either spouse would become incapable of self-support as a result. This nonnegotiable duty of support is the basis for giving a spouse creditor standing in some cases to attack fraudulent conveyances that defeat his or her right to support.

The State’s stringent regulation of the marriage relationship is based on a longstanding, paternalistic policy aimed at protecting the general welfare and promoting successful marriages by ensuring that the fundamental needs of spouses are met. The modern trend in public

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2006); see also Defense of Marriage Act, Pub. L. No. 104-109, 110 Stat. 2419 (1996). In addition, despite the normal implications of the Full Faith and Credit clause, federal law declares that no state shall be required to recognize a same-sex marriage granted by the laws of another state or any right or claim arising from such a relationship. 28 U.S.C. § 1738C (2006); see also 28 U.S.C. § 1738 (2006).

17 N.Y. DOM. REL. LAW § 10 (McKinney 2008) (“Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential.”).

18 See SCHEINKMAN, supra note 2, § 5:1.

19 See N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 2008). To dissolve the marriage, the party seeking a divorce must establish one of several statutory grounds and follow the procedures laid out in the Domestic Relations law. See N.Y. DOM. REL. LAW § 170 (McKinney 2008); infra note 41 (listing these grounds). The prohibition against husband and wife contracting to alter or dissolve the marriage does not prevent the parties from entering into a separation agreement. A separation agreement is a written contract between a husband and wife who have decided to live apart. It documents the parties’ agreement on the manner in which marital obligations are to be performed while apart. SCHEINKMAN, supra note 2, § 6:1; see N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2008). A properly executed separation agreement can form the basis for obtaining a divorce if the parties have lived apart for at least one year and the spouse seeking divorce has substantially adhered to the terms of the agreement. N.Y. DOM. REL. LAW § 170(6) (McKinney 2008).

20 See N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 2008).

21 See discussion infra Part II.B.

22 See, e.g., Fearon v. Treanor, 5 N.E.2d 815, 272 N.Y. 268 (1936). The Court of Appeals in Fearon stated:

Marriage is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interests of society. It is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State. . . There are, in effect, three parties to every marriage, the man, the woman and the State. . . From time immemorial the State has exercised the fullest control over the marriage relation, justly believing that happy, successful marriages constitute the fundamental basis of the
policy, however, has been towards favoring that individuals privately resolve certain issues created by the marriage.\textsuperscript{23} One aspect of this policy is the ability of spouses to enter into agreements before and during the marriage that specify terms and conditions of the marriage and how matters will be handled in case of divorce. Such agreements can be made with regard to issues such as inheritance rights, property rights during and after the marriage, and spousal or child support.\textsuperscript{24} Thus, spouses can avoid having courts decide their respective marital property rights upon divorce by entering into a valid premarital agreement. Yet when the spouses have not agreed in advance on how property will be distributed upon divorce, the state assumes its traditional protective role. To that end it provides equitable distribution to give each spouse a fair share of the marital property, in part to ensure future support in place of maintenance, but also in recognition of each spouse’s contribution to the marriage partnership.

The common law viewed the wife as being dependent on her husband for support. Equitable distribution abandoned this antiquated notion and recognizes the modern view of marriage as an economic partnership, in which both spouses contribute to the success and wealth of the marriage, either financially or through time and effort.\textsuperscript{25} The fact that marriage is viewed as an economic partnership affects the way courts divide the assets upon divorce—when the marriage ends each

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\textsuperscript{23} See Matisoff v. Dobi, 681 N.E.2d 376, 378, 659 N.Y.S.2d 209, 211 (1997) (noting that spouses can “contract out of the elaborate statutory system” before and during the marriage to determine how issues created by the marriage will be resolved); SCHEINKMAN, supra note 2, § 6:1.

\textsuperscript{24} N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2008); N.Y. GEN. OBLIG. LAW § 3-303 (McKinney 2008) (“A contract made between persons in contemplation of marriage remains in full force after the marriage takes place.”); see also SCHEINKMAN, supra note 2, § 6:1. Such an agreement, when entered into before the marriage, is called an antenuptial agreement, premarital agreement, or prenuptial agreement and is known commonly as a “prenup.” The significant effect marriage has on property rights is perhaps the reason that the law requires such agreements to be “in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.” N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2008).


The concept of equitable distribution is a corollary of the principle that marriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial. The nonremunerated efforts of raising children, making a home, performing a myriad of personal services and providing physical and emotional support are, among other noneconomic ingredients of the marital relationship, at least as essential to its nature and maintenance as are the economic factors, and their worth is consequently entitled to substantial recognition. Thus, the extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance but, rather, by the whole complex of financial and nonfinancial components contributed.
spouse’s contribution to the marriage entitles him or her to a share of
property acquired by either spouse during the marriage without regard
to which spouse held title during the marriage.26 Divorce is a “winding
up of the parties’ economic affairs and a severance of their economic
relationship by an equitable distribution of the marital assets.”27 Unlike
alimony or maintenance, which are need-based, this share represents the
“capital product of what was essentially a partnership entity.”28

Equitable distribution considers all property acquired by either
spouse from the beginning of the marriage until separation or the filing
of a matrimonial action to be “marital property.”29 The legislature’s
choice to define marital property broadly recognizes the expectation that
each spouse has in the future use and ownership of the property
obtained by the partnership.30

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26 See N.Y. DOM. REL. LAW § 236(B)(5) (McKinney 2008); Wood v. Wood, 465 N.Y.S.2d
475, 476-77 (Sup. Ct. 1983).
28 This principle, which was cited approvingly by the landmark O’Brien decision, is:
[T]he function of equitable distribution is to recognize that when a marriage ends, each
of the spouses, based on the totality of the contributions made to it, has a stake in and
right to a share of the marital assets accumulated while it endured, not because that
share is needed, but because those assets represent the capital product of what was
essentially a partnership entity. The Legislature stated its intention to eliminate such
inequities by providing that a supporting spouse’s “direct or indirect contribution” be
recognized, considered and rewarded. Id. at 717-18, 498 N.Y.S.2d at 748-49 (citing Wood v. Wood, 465 N.Y.S.2d 475, 477 (Sup. Ct.
1983)).
29 N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 2008). The section states in full that:
The term “marital property” shall mean all property acquired by either or both spouses
during the marriage and before the execution of a separation agreement or the
commencement of a matrimonial action, regardless of the form in which title is held,
except as otherwise provided in [a valid] agreement [between the spouses]. Marital
property shall not include separate property . . . .
Id. “Separate property” is defined as:
(1) property acquired before marriage or property acquired by bequest, devise, or
descent, or gift from a party other than the spouse;
(2) compensation for personal injuries;
(3) property acquired in exchange for or the increase in value of separate property,
except to the extent that such appreciation is due in part to the contributions or efforts
of the other spouse;
(4) property described as separate property by [a valid] written agreement of the
parties . . . .
Id. § 236(B)(1)(d).
explained:
In identifying nothing less than “all property” acquired during the marriage as marital
property, this section evinces an unmistakable intent to provide each spouse with a fair
share of things of value that each helped to create and expects to enjoy at a future date.
There is, in fact, a presumption of marital property “premised on the contemporary
view of marriage as an economic partnership, crediting each party’s contributions,
whether monetary or not, to the growth and value of the marriage.” Thus, marital
property consists of “a wide range of intangible interests which in other contexts might
not be recognized as divisible property at all.”
This view was solidified by the Court of Appeals’ landmark decision in *O’Brien v. O’Brien*, a divorce case involving a husband whose wife worked to put him through medical school. The court rejected the husband’s argument that his medical license was not marital property and that his wife should only receive an amount equal to that expended by her to support him during the marriage while he earned his medical license.31 The court held that restricting the wife to compensation for out-of-pocket expenses would defeat the economic partnership concept and retain “the uncertain and inequitable economic ties of dependence that the Legislature sought to extinguish by equitable distribution.”32 *O’Brien* established that equitable distribution is about more than providing spouses with enough to ensure their support—it is intended to give spouses the fruit of their labor upon dissolution of the economic partnership.33 The intention to protect a spouse’s right to the

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32 Id. Even though the concept of marriage as an economic partnership was recognized in the decisions following the enactment of equitable distribution, many commentators expressed concerns that it was not being taken into consideration in the actual division of property. See Scheinkman, supra note 2, § 14:1. These concerns were supported by nationwide studies showing an immediate decline in the standard of living for women and children after divorce while men enjoyed an increased standard of living. Id. (citing Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981)). State investigations in the mid-1980s confirmed that equitable distribution was not materially benefiting economically dependent spouses and may have created additional unfairness and undue hardship. Id. The legislature has amended the law over the years in an attempt to remedy these inequities and insure that equitable distribution awards are just and effective. Id.
33 *O’Brien* is a well-known decision that reinforced the broad definition of marital property. See O’Brien v. O’Brien, 489 N.E.2d 712, 715, 498 N.Y.S.2d 743, 746 (1985) (“[T]he New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law [and intended marital property to include all] things of value arising out of the marital relationship . . . .”); see also Scheinkman, supra note 2, at § 14:15 (“In short, marital property is anything that has a provable economic worth which is the product of the efforts of either or both spouses during their economic partnership.”); Brooke Grossman, *The Evolution of Equitable Distribution in New York*, 62 N.Y.U. ANN. SURV. AM. L. 607, 632-35 (2007) (discussing *O’Brien’s* impact on equitable distribution). A narrow definition of marital property would not comport with the view of marriage as an economic partnership and would exclude valuable interests that both spouses would rely on if the marriage were not ending. The *O’Brien* court noted that:

"The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute’s economic partnership theory is intended to address than contributions toward one spouse’s acquisition of a professional license. . . . In this case, nearly all of the parties’ nine-year marriage was devoted to the acquisition of [the husband’s] medical license and [his wife] played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. *O’Brien*, 489 N.E.2d at 715, 498 N.Y.S.2d at 747. There are a broad range of property interests that the New York courts have since held to be marital property. See, e.g., Damon v. Damon, 823"
value created and obtained by the marriage partnership is the driving policy behind this Note’s proposal.

It is worth noting that equitable distribution is not the same thing as community property, which is a separate framework for marital property.\(^{34}\) Like equitable distribution, community property is a legal framework that departed from the common law title approach and is expressly provided for by statute in states where it is the law.\(^{35}\) Community property and equitable distribution differ in the way marital property interests are held during the marriage and divided upon divorce. In community property states, property obtained during the marriage becomes part of the “community,”\(^{36}\) regardless of how title is acquired and held, and each spouse has an equal and presently vested interest in the community property, unlike equitable distribution which relies on common law title principles during the marriage.\(^{37}\) In community property jurisdictions, divorce dissolves the community, completely severing legal title and freeing the portion to be awarded to each spouse from the claims and control of the other.\(^{38}\)

New York rejected the community property framework and instead

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\(^{34}\) See generally Lewis Becker, Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis, 52 OHIO ST. L.J. 95, 120-23 (1991) (discussing the community property framework and comparing its superior protection of marital property to equitable distribution frameworks, which are generally limited in their protections to adjustments in the final award for unreasonable dissipation of marital assets).

\(^{35}\) 15A AM. JUR. 2d Community Property § 1 (1981 & Supp. 2008). Like equitable distribution:

State community property law is more than a property regime; it is a commitment to the equality of husband and wife and reflects the real partnership inherent in a marital relationship. The basic concept of community property is that marriage is a partnership in which the spouses devote their particular talents, energies, and resources to their common good, and acquisitions and gains that are directly or indirectly attributable to community expenditures of labor and resources are shared equally by the community. The labor of the parties belongs to the community rather than to the individuals. Community property is a unitary concept of ownership and debt satisfaction.

\(^{36}\) Id. § 2.

Community property statutes tend to have a more restrictive definition of marital property; for instance, community property jurisdictions do not generally consider professional licenses to be community property. \(^{37}\) Id. § 3. Under the Uniform Marital Property Act, property is defined as “an interest, present or future, legal or equitable, vested or contingent, in real or personal property.” UNIF. MARITAL PROP. ACT § 1(15) (1983). Additionally, [P]roperty is “held” by a person only if a document of title to the property is registered, recorded, or filed in a public office in the name of the person or a writing that customarily operates as a document of title to the type of property is issued for the property in the person’s name.


\(^{38}\) Id. § 105. The community property is divided up into equitable and generally equal proportions, which is why these states are known commonly as “equal distribution states.” Id.
chose equitable distribution, where marital property is held according to ordinary title principles during the marriage and is not vested in a community.\footnote{See Leibowits v. Leibowits, 462 N.Y.S.2d 469, 474-76 (App. Div. 1983) (O'Connor, J., concurring).} Equitable distribution requires the matrimonial court to decide the respective rights of the spouses in the marital property upon final judgment in the divorce proceeding.\footnote{N.Y. DOM. REL. LAW § 236(B)(5)(a) (McKinney 2008). The statute provides:
Except where the parties have provided in an agreement for the disposition of their property . . . the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, . . . shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment. Id. Additionally:
In any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may (1) determine any question as to the title to property arising between the parties, and (2) make such direction, between the parties, concerning the possession of property, as in the court’s discretion justice requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and final judgment. Id. § 234.} In doing so, the court\footnote{In New York, the Supreme Court has exclusive jurisdiction over actions for divorce. N.Y. CONST. art. VI, § 13(b)(4); N.Y. DOM. REL. LAW §§ 236(B)(2), (B)(6), (B)(7), 240 (McKinney 2008). Because equitable distribution is only available in actions to dissolve the marriage, the Supreme Court also has exclusive jurisdiction over the equitable distribution of marital property. See id. § 236(B)(5)(a) (McKinney 2008). A spouse seeking a divorce must show that one of six statutory grounds exists. Id. § 170 (McKinney 2008). The first four grounds are what the courts have called “fault” grounds. See SCHEINKMAN, supra note 2, § 1:12. These include cruel and inhuman treatment, abandonment, a spouse’s confinement in prison, and adultery. N.Y. DOM. REL. LAW §§ 170(1)-(4) (McKinney 2008). The fifth ground, living apart on the basis of a judicial separation, implies that a separation was granted on the basis of a “fault” ground for separation. See SCHEINKMAN, supra, § 1:12; N.Y. DOM. REL. LAW § 170(5) (McKinney 2008); see also id. § 200 (setting forth the requirements for a judicial separation). The sixth ground, living apart on the basis of a separation agreement, is the closest ground that New York has to the no-fault “irreconcilable differences” ground available in other states. Id. § 170(6); SCHEINKMAN, supra, § 1:12.} “distribute[s] [marital property] equitably between the parties, considering the circumstances of the case and of the respective parties.”\footnote{N.Y. DOM. REL. LAW § 236(B)(5)(c) (McKinney 2008). The court shall consider:
(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
(2) the duration of the marriage and the age and health of both parties;
(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
(5) any award of maintenance under subdivision six of this part;
(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;}

Where the property cannot be divided in an equitable
manner, the court must give a “distributive award,” which is a payment to “supplement, facilitate or effectuate” a property distribution.\textsuperscript{43} This equitable reassignment of property rights is a marked departure from the former common law approach where, upon divorce, each spouse kept the property for which they already held title.\textsuperscript{44}

By enacting equitable distribution and abrogating the common law title approach, the legislature clearly intended that each spouse receive a share of the marital property when the marriage ends to recognize and compensate for his or her contribution to the economic partnership. The right to receive marital property, like any other property claim, requires protection from the courts. While the courts have the power to protect marital assets through property restraints once the divorce petition is filed and to adjust the final award for economic misconduct,\textsuperscript{45} a spouse must be able to recover marital property conveyed pre-petition if the conveyance would reduce the amount ultimately received through equitable distribution. Use of fraudulent conveyance law, described in the next section, would allow such a recovery when the statutory protections prove inadequate.

### B. Protection of Property Rights Through Fraudulent Conveyance Law

The purpose of fraudulent conveyance law\textsuperscript{46} is to allow a party to

\begin{itemize}
  \item[(7)] the liquid or non-liquid character of all marital property;
  \item[(8)] the probable future financial circumstances of each party;
  \item[(9)] the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
  \item[(10)] the tax consequences to each party;
  \item[(11)] the wasteful dissipation of assets by either spouse;
  \item[(12)] any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
  \item[(13)] any other factor which the court shall expressly find to be just and proper.
\end{itemize}

\textit{Id.} Factors eleven and twelve are especially worth noting because they show that the court must already consider the same type of conduct that courts must consider in a fraudulent conveyance action. \textit{See infra} Part II.B. Therefore, courts implementing this Note’s proposal would not have to do substantially more fact finding to determine whether there has been a fraudulent conveyance of marital property, but would have another tool to effectuate the law’s intention to provide full equitable distribution awards. These two factors are discussed in more depth \textit{infra} at Part II.A.

\textsuperscript{43} N.Y. DOM. REL. LAW § 236(B)(1)(b) (McKinney 2008). Distributive awards are favored in circumstances where a strict division of property interests would be impractical or burdensome, such as where dividing a business interest would effectively make the former spouses partners or where marital property is not liquid and liquidation would have adverse tax consequences. \textit{See} SCHEINKMAN, supra note 2, § 14:56. The term “equitable distribution award” is used throughout this Note to refer to both the physical division of property by the court and a distributive award.

\textsuperscript{44} \textit{See} discussion supra note 2.

\textsuperscript{45} \textit{See} discussion \textit{infra} Part II.A.

\textsuperscript{46} New York’s fraudulent conveyance laws are found in Article 10 of the Debtor and Creditor
recover assets conveyed adversely to its superior rights in the property. In order to bring a fraudulent conveyance claim, the party seeking to recover the conveyed property must be a "creditor." The term “creditor” is broadly defined as “a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” Once a party has obtained standing as a creditor, he or she must then establish that a particular conveyance is fraudulent, as described below, before the court will set aside the conveyance.

A creditor with a matured claim has the right to have a fraudulent conveyance immediately set aside at the creditor’s discretion, while a creditor with an unmatured claim is subject to the discretion of the court, which can set aside the conveyance if it deems it necessary to protect the creditor’s rights. A claim is mature when it “has become absolutely due without contingency, although not necessarily liquidated nor presently payable.” A contingent claim is one “which has not accrued and which is dependent on some future event that may never happen.”

In the context of a divorce proceeding, an equitable distribution claim has matured when the court has decided to grant the divorce—this contingency, which when met, requires the court to distribute the marital property among the spouses in the absence of a valid premarital

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47 See Hassett v. Goetzmann, 10 F. Supp. 2d 181, 192 (N.D.N.Y. 1998); Hearn 45 St. Corp. v. Jano, 27 N.E.2d 814, 817, 283 N.Y. 139, 143 (1940) ("The gravamen of an action [for fraudulent conveyance] is the right of the creditor to be paid out of assets to which he is actually entitled and to set aside the indicia of ownership which apparently contradict that right.").

48 N.Y. DEBT. & CRED. LAW §§ 278-279 (McKinney 2008). The transfer of property must also qualify as a “conveyance.” See Ostashko v. Ostashko, No. 00-cv-7162, 2002 U.S. Dist. LEXIS 27015, at *50-52 (E.D.N.Y. Dec. 12, 2002) (considering a consent judgment to be the “creation of any lien or incumbrance” and thus a conveyance within the meaning of the law), aff’d sub nom., Ostashko v. Zurrita-Teks, 79 F. App’x 492 (2d Cir. 2003); see also infra note 49 (defining "conveyance"). The Ostashko case, as discussed in Part II.B, is the closest decision to my knowledge that implements a form of this Note’s proposal.

49 Id. § 270 (emphasis added). “Conveyance” is also broadly defined as “every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.” Id. New York’s law is based on the Uniform Fraudulent Conveyance Act, but states that have adopted the newer Uniform Fraudulent Transfer Act have substantially similar definitions. See discussion supra note 1.

50 N.Y. DEBT. & CRED. LAW §§ 278-79 (McKinney 2008). When a creditor is successful in a fraudulent conveyance action, the court is said to “set aside” (rescind) the conveyance—the creditor is not awarded money damages from the third party to whom the property was conveyed. See, e.g., Hassett v. Goetzmann, 10 F. Supp. 2d 181 (N.D.N.Y. 1998). But see David Gray Carlson, The Logical Structure of Fraudulent Transfers and Equitable Subordination, 45 WM. & MARY L. REV. 157 (2003) (arguing an alternative theory that fraudulent conveyance remedies does not rescind transfers, but instead transfer debtor property rights directly to the creditors).

51 See N.Y. DEBT. & CRED. LAW § 278 (McKinney 2008).

52 See id. § 279.


54 Id. at 347.
agreement. This means that a creditor spouse would not be able to set aside conveyances of marital property during the marriage unless the court deemed it necessary to protect the spouse’s equitable distribution rights. In practice, courts would likely not entertain a fraudulent conveyance action unless it was clear that the marriage was coming to an end and the conveyance was objectively aimed at preventing the spouse from receiving the full amount of property intended under equitable distribution.

There are two types of transfers that give rise to a fraudulent conveyance claim. These are transfers that are actually fraudulent—even if the transferor received consideration—because the transferor intended to defraud its present or future creditors and those that are presumed fraudulent because they lack consideration. While showing that a conveyance was made with intent to defraud creditors concerns the subjective mindset of the transferor, it does not require actual proof of fraudulent intent. Because direct proof of fraudulent intent is rare, courts can infer intent from the circumstances surrounding the transfer—so called “badges of fraud.”

Conveyances without fair consideration are presumed to be fraudulent—that is, they are constructively fraudulent—when they prevent a debtor from being able to satisfy his financial obligations, regardless of the debtor’s actual intent. This is based on the simple

55 See N.Y. DEBT. & CRED. LAW § 276 (McKinney 2008) (“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”).

56 See id. §§ 273-275.

57 See, e.g., Trafalgar Power, Inc. v. Aetna Life Ins. Co., 131 F. Supp. 2d 341, 351 (N.D.N.Y. 2001). Circumstances leading to a presumption of fraudulent intent include:

(1) a close relationship between the parties to the transaction;
(2) a secret or hasty transfer not in the usual course of business;
(3) inadequacy of consideration;
(4) the transferor’s knowledge of the creditor’s claim and his or her inability to pay it;
(5) the use of dummies or fictitious parties; and
(6) retention of control of the property by the transferor after the conveyance.

Id. (citation omitted).

58 Fair consideration is given for property, or obligation,

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and
in good faith, property is conveyed or an antecedent debt is satisfied, or
b. When such property, or obligation is received in good faith to secure a present
advance or antecedent debt in amount not disproportionately small as compared with
the value of the property, or obligation obtained.

N.Y. DEBT. & CRED. LAW § 272 (McKinney 2008); see also In re Sharp Int’l Corp., 302 B.R. 760, 779 (E.D.N.Y. 2003), aff’d, 403 F.3d 43 (2d Cir. 2005) (“[T]here are three elements to ‘fair consideration[.]’ First, the recipient of the debtor’s property must either convey property or discharge an antecedent debt in exchange; second, the exchange must be for a fair equivalent; and third, the exchange must be ‘in good faith.’”) (citing HBE Leasing Corp. v. Frank, 61 F.3d 1054, 1058-59 (2d Cir. 1995)). Courts have disagreed as to whether the good faith requirement applies to both parties or just the transferee. Id.

59 See HBE Leasing Corp. v. Frank, 48 F.3d 623, 633-34 (2d Cir. 1995).
notion that a person who is entitled to be paid from the debtor’s assets should receive priority over a third party who is essentially receiving a gift. There are several types of conveyances that the law will presume fraudulent due to the lack of fair consideration, but the two that are most relevant for this discussion are conveyances by an insolvent debtor and conveyances that leave the debtor unable to pay his debts when they become due.

Conveyances by an insolvent debtor are fraudulent only to present creditors of the debtor. Therefore, someone that becomes a creditor after the purported fraudulent transfer is made—a future or subsequent creditor—does not have standing to set aside conveyances if the claim is based solely on the fact that the debtor was insolvent at the time the conveyance was made. However, both present and future creditors have standing to set aside transfers made by a debtor that intends or believes that he will incur debts beyond his ability to pay as they mature and transfers made by a debtor with the intent to defraud his creditors.

Whether a spouse is considered a present or future creditor matters little because a spouse could prove that a conveyance of marital property was fraudulent under any of the three theories discussed above. However, it seems likely that conveyances that defeat a spouse’s right to a full equitable distribution award would normally be found to be actually fraudulent considering the proximity of the conveyance to the initiation of the divorce proceeding and the circumstances surrounding the transfer. For instance, if a title-holding spouse gifted title to the marital residence to a family member or close friend and then shortly thereafter filed for divorce, it would be reasonable for the court to infer fraudulent intent, especially if the spouse retained possession of the property.

The law of fraudulent conveyances can be very complex and inquiries tend to be fact specific. For the purposes of this Note it is not important to discuss in any more depth what is involved in proving that a conveyance is fraudulent. What is important is that a spouse be

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60 See N.Y. DEBT. & CRED. LAW §§ 273-275 (McKinney 2008).
61 Id. § 273 (McKinney 2008) (“Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration.”); see also id. § 271 (“A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.”).
62 Id. § 275 (McKinney 2008) (“Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.”).
63 Id. § 273 (McKinney 2008).
64 Id. §§ 275-76 (McKinney 2008).
65 See supra text accompanying note 57.
considered a creditor—and thus have recourse to the fraudulent conveyance law—when needed to ensure a full equitable distribution award.

II. THE CURRENT PATCHWORK OF LAWS PROTECTING MARITAL PROPERTY RIGHTS

A. Statutory Protections of Equitable Distribution Awards Provide Insufficient Protection

There are two tools provided by the Domestic Relations law that help courts limit the damage caused by a spouse’s conveyance of marital property and thereby protect the other spouse’s right to a full equitable distribution award. First, once the divorce petition is filed, courts have the power to issue interim property restraints—a form of preliminary injunction—to restrict a spouse’s ability to convey marital property.66 Second, when determining how to divide the marital property, courts must consider whether either spouse engaged in economic misconduct—wasteful or fraudulent dissipation of assets—and adjust the award to compensate for such misconduct.

While both of these tools are effective in preventing one spouse from causing the other to receive less than a full equitable distribution award, they are only completely effective after the divorce petition is filed. Since a restraint on transferring marital property is only effective once issued, any previously conveyed property is not subject to distribution because the court cannot disturb the title of third party transferees (assuming that the spouse cannot establish a basis for setting aside the conveyance). Therefore, if the most valuable marital assets are conveyed pre-petition, the court may be powerless to provide the afflicted spouse with the property to which he or she is entitled through a compensatory adjustment in the equitable distribution award.

The court’s statutory obligation to consider economic misconduct comes from section 236 of the Domestic Relations Law, which enumerates thirteen factors that the court “shall” consider in distributing

66 As one commentator has aptly put it:
[A]n ex parte temporary property restraint granted in a matrimonial action is often a financial life-saving measure that stops a maliciously motivated spouse from making a mockery of the basic premise behind the Equitable Distribution Law. Simply put, an asset that has been improperly and secretly transferred or wasted cannot be shared with or distributed to the other spouse.
marital property to ensure that the result is “just and proper.” Of particular interest for this discussion are the eleventh and twelfth factors. Factor eleven requires the court to consider whether there has been a wasteful dissipation of assets by either spouse. Factor twelve instructs the court to consider and adjust for any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration. As one court has put it:

[The law] directs that “[m]arital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.” The mandate of the statute cannot be avoided by the wrongful conduct of one spouse in retaining, secreting or dissipating the marital assets, and that spouse will be held accountable to the other spouse for any such actions.

The current state of the law may fall short in ensuring this mandate is always followed. A straightforward use of an economic misconduct adjustment occurred in Contino v. Contino, where the court awarded the wife an amount equal to that which her husband withdrew from their bank accounts in anticipation of divorce and later concealed so they could not

67 N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2008). See supra note 42 for a list of these factors.

68 N.Y. DOM. REL. LAW § 236(B)(5)(d)(11) (McKinney 2008) (“In determining an equitable disposition of property . . . the court shall consider . . . the wasteful dissipation of assets by either spouse.”). Factor eleven is a relatively new requirement. Previously, wasteful dissipation of assets was only an express factor in maintenance determinations; however, the courts could consider such waste as a discretionary factor in determining equitable distribution. SCHEINKMAN, supra note 2, § 14:70.

69 N.Y. DOM. REL. LAW § 236(B)(5)(d)(12) (McKinney 2008) (“In determining an equitable disposition of property . . . the court shall consider . . . any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.”). This factor sounds very similar to the right of a creditor to avoid conveyances made by a debtor without fair consideration when the debtor intends or believes that he will incur debts beyond his ability to pay as they mature and those conveyances made by a debtor with the subjective intent to defraud. See N.Y. DEBT. & CRED. LAW §§ 275-276 (McKinney 2008).

70 Harrell v. Harrell, 502 N.Y.S.2d 57, 59 (App. Div. 1986) (citing N.Y. DOM. REL. LAW § 236(B)(5)(c)). In this case, the only valuable marital property was the couple’s home and a sum of money that the husband had hidden from the court. Id. at 58. When determining the spouse’s respective shares of the marital property, the trial court only considered the value of the marital residence because it thought it could only make a determination with regard to property that the spouses admitted to possessing. Id. at 58-59. The Appellate Division reversed and directed the trial court on remand to make an equitable distribution of all marital property. Id. at 59. This shows that a court must include the value of marital property dissipated pre-petition in its equitable distribution calculus to ensure that the innocent spouse’s fair share is determined based on the true value of the marital assets. See SCHEINKMAN, supra note 2, at § 14:94 (“The emerging view seems to be that, where one party, prior to (or even after) the commencement of the action, secretes or dissipates assets, such actions do not defeat the right of the other party to equitable distribution.”). Under the current system the court must make a distributive award to compensate for the fraud. Id. However, a distributive award is only effective if the remaining marital assets are of sufficient value to give the innocent spouse the value they would have received under a normal, full distribution.
In Di Bella v. Di Bella, the husband was more creative in secreting the marital assets. For example, he liquidated an investment savings plan and bought three Florida condominiums, registering title in his name only. Taking advantage of the fact that his wife was ignorant of the family’s finances, the husband also kept a secret bank account containing funds that he earned while working. Because there was no concrete evidence produced regarding the value of the marital assets, the court estimated their value and adjusted the final award to compensate the wife for the squandered assets.

Marital misconduct is generally not considered a factor in determining an equitable distribution award when it occurs in isolation, but it may be considered indirectly as part of the evaluation of economic misconduct. For example, in Maharam v. Maharam, the wife’s share of the marital property was increased because her husband squandered sizable sums on luxury items and in adulterous affairs. The trial court originally awarded the wife fifty-five percent of the marital assets, but the Appellate Division thought that five percent above equality was not enough to compensate for the property wrongly dissipated by the husband. The Appellate Division penalized the erring spouse by awarding his wife an additional ten percent, reasoning that there would be an incentive to hide or waste money if the penalty to be exacted was a mere five percent out of the remaining funds.

However, the court’s ability to compensate for economic misconduct alone is inadequate to protect against a spouse’s bad faith conveyances of marital property. These adjustments can only

73 Id. at 542.
74 Id.
75 Id. The husband contested the validity of this estimate, no doubt with good reason, but the Appellate Division upheld the trial court’s decision, sending the signal that spouses who attempt to cheat their partner will not receive the benefit of the doubt. Id.
76 See Scheinkman, supra note 2, § 14:74 (“The [Court of Appeals has] ruled that consideration of marital fault [as a factor in equitable distribution] is inconsistent with the underlying statutory assumption that marriage is, in part, an economic partnership . . . .”). However, marital fault may be considered in “egregious cases which shock the conscience of the court.” Id.; see also O’Brien v. O’Brien, 489 N.E.2d 712, 719, 498 N.Y.S.2d 743, 750 (1985).
78 Id. at 130.
79 Id. at 129.
80 Id. (“Penalizing one party in the distribution of assets from a marital estate is appropriate where his egregious economic misconduct has prevented the court from making an equitable determination.”); see Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113-14 (App. Div. 1984) (“[A]s a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law [unless] the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that ‘shocks the conscience’ of the court thereby compelling it to invoke its equitable power to do justice between the parties.”).
compensate with the remaining marital property—assuming that the court cannot set aside the conveyances—and there may not be much value left to distribute.

The court in *Kriger v. Kriger*\(^{81}\) recognized this potential for circumvention of the law. After initiating the divorce proceeding, the plaintiff wife in this case immediately sought to enjoin her husband from using marital assets to purchase a Brooklyn delicatessen, a transaction which would have taken thirty percent of the marital estate and an even more substantial portion of its liquid assets.\(^{82}\) The wife claimed that her husband had already “intermingled and confused their finances, motivated in great part to defeat her property rights, and particularly, her right to equitable distribution.”\(^{83}\) The court agreed that the purchase was intended to hinder the wife’s right to equitable distribution and granted an injunction enjoining the purchase until it could decide the spouse’s respective rights in the marital property and grant an equitable distribution judgment.\(^{84}\)

The court agreed with previous decisions that allowed the applicant to receive an order restraining transfers of marital property in such cases without meeting the traditional burden required for a preliminary injunction. The court’s theory was that “in order to give effect to the mandated equitable distribution injuctions should freely issue prohibiting distribution ‘except in the normal course of business or personal affairs.’”\(^{85}\) Other courts disagreed with this idea on

\(^{81}\) 454 N.Y.S.2d 500 (Sup. Ct. 1982).

\(^{82}\) *Id.* at 501.

\(^{83}\) *Id.* The husband had already misused and converted his wife’s inheritance, the children’s trust accounts, and the parties’ marital assets. *Id.*

\(^{84}\) *Id.* The court detailed the facts surrounding the transaction that pointed to this conclusion:

In his deposition the defendant acknowledged that he signed the restaurant contract on

the strength of an oral representation as to sales; that he never saw a balance sheet, operating statement or even written evidence of sales. He admitted to having made no inquiry and having obtained no representations with respect to the creditors of the business. He testified that prior to entering into the contract, he had never met the prior owners, that he did not see the contract prior to the day it was signed, did not know who the draftsman was or who made the interlinear changes in the instrument.

*Id.* at 501. Even more indicative of his fraudulent intent was his testimony that he intended to turn over operation of the delicatessen to an employee without managerial experience, whose name was uncertain and whose address was unknown. *Id.* Perhaps the most damaging fact against the husband was his testimony that he never saw the lease for the premises, and could not remember its duration or who the landlord was. *Id.* at 501-02.

\(^{85}\) *Id.* at 502 (citing Froehlich-Switzer v. Switzer, 436 N.Y.S.2d 123 (Sup. Ct. 1980)). The *Froehlich-Switzer* court noted that there is a substantial interest of justice in equitable distribution cases “requir[ing] that the assets of both parties not be significantly disturbed . . . until there has been a final determination by the court as to . . . the rights of the respective parties thereto in terms of ownership and possession.” *Froehlich-Switzer*, 436 N.Y.S.2d at 124.

The *Kriger* court recognized the difficulty that valuing and dividing assets in equitable distribution posed and sought to protect the plaintiff wife by keeping the assets as liquid as possible. *See* *Kriger*, 454 N.Y.S.2d at 503. The defendant husband argued in that case that he should be able to use his money in any way he saw fit, as long he would have the ability to pay
the grounds that the standards for issuing a preliminary injunction require a higher showing of need, particularly a showing by the moving party of the threat of irreparable harm and a probability of success on the merits.86 Leibowits v. Leibowits established the now accepted rule that traditional preliminary injunctions under the CPLR are not the exclusive means of restraining a spouse from conveying marital property pending the outcome of the divorce proceeding and a final equitable distribution judgment.87 Section 234 of the Domestic Relations Law is interpreted to give courts the discretion to issue interim property restraints with a lesser showing than that required under the CPLR for a preliminary injunction and without requiring an undertaking.88 The general rule is that there must be a showing of “proper cause” to receive an interim order restraining marital assets.89

his wife’s distributive share. Id. at 502. The court rejected this argument because the husband’s planned conveyance would transfer almost all of his liquid assets and a partition of property would be logistically difficult and most likely inequitable. Id. at 502-03.

Cases denying injunctions under similar circumstances had adopted the view that the mandate to the courts to distribute property “equitably” is satisfied if its value can be ascertained for eventual payment of a substitute award. Id. at 502; see also Franzese v. Franzese, 436 N.Y.S.2d 979, 982 (1981) (“A moving spouse must make an adequate showing that [he or she] has a right to physical retention of the asset or a part thereof and that the other party has control and is about to exercise it to the movant’s last detriment.”); Bisca v. Bisca, 437 N.Y.S.2d 258 (Sup. Ct. 1981) (denying plaintiff wife a preliminary injunction after she failed to produce substantial evidence that her husband would convey assets to her detriment in the absence of an injunction).

86 See, e.g., Gramazio v. Gramazio, 438 N.Y.S.2d 71, 72 (Sup. Ct. 1981). Scheinkman has observed that:

In the early years of equitable distribution, there was considerable controversy as to the scope of the court’s authority to intervene to preserve marital assets, as well as to the proper source of that authority. In particular, arguments were advanced to the effect that the [Domestic Relations Law] did not authorize matrimonial courts to issue interim restraining orders and that, if such orders were to be issued at all, it was necessary to follow the procedures and principles applicable to preliminary injunctions under CPLR Article 65.


88 See Leibowits v. Leibowits, 462 N.Y.S.2d 469, 470-72 (Sup. Ct. 1983) (per curiam) (“Section 234 of the Domestic Relations Law provides the authority for the issuance of an order restraining disposition of marital assets during the pendency of a divorce action. Therefore, compliance with the formalities and jurisprudential requirements of CPLR article 63 relative to preliminary injunctions is not a prerequisite to an order of restraint.”); see also Scheinkman, supra note 2, at § 13:1. Section 234 of the Domestic Relations Law states in relevant part that “[i]n any action for divorce . . . the court may . . . make such direction, between the parties, concerning the possession of property, as in the court’s discretion justice requires having regard to the circumstances of the case and of the respective parties.” N.Y. Dom. Rel. Law § 234 (McKinney 2008). The Leibowits court held that “[t]he section 234 power to direct one party to deliver possession to the other necessarily includes the power to prevent a party from frustrating such delivery by improper disposition of assets [and] is vital to meaningful enforcement of the equitable distribution statute.” 462 N.Y.S.2d at 471.

To show proper cause, the party seeking a restraint must demonstrate "that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant’s ultimate rights in equitable distribution."90 It has now become standard practice for courts to grant interim restraints to enjoin conveyances of marital property that go beyond the ordinary course of business and personal needs in an attempt to maintain the "financial status quo."91

As the preceding has shown, the legislature seeks to prevent the dangers that bad faith conveyances of marital property can pose to the right of a spouse to obtain a full equitable distribution award. However, the protection offered by interim property restraints and adjustments for economic misconduct are inadequate to ensure that a spouse will receive a full equitable distribution award. As explained above, restraints on the alienation of marital property are effective, at the earliest, from the time the divorce petition is filed, and economic misconduct adjustments are limited in effectiveness to distribution of the remaining marital assets. Under the current system a title-holding spouse may be able to circumvent the law simply by conveying the most valuable marital assets to his or her family or another party before filing for divorce.

To illustrate, consider the following simplified hypothetical. Imagine that the only assets of substantial value that H and W have are a house worth $80,000 and stocks worth $20,000, both acquired during the marriage and thus marital property. Assume further that H holds title to the residence solely in his name, but that W contributed to paying off the mortgage over the years with her salary. H has a midlife crisis and starts having affairs, and W soon finds out. H, anticipating that W will leave him, immediately gifts title to the house to M, his mistress, who he plans to marry after he gets divorced from W. W files for divorce a month later. Assume that the court would have awarded each spouse a fifty percent share of the property if the house had not been

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90 Stanton v. Stanton, 621 N.Y.S.2d 676, 677 (App. Div. 1995). In Maillard, the wife had liquidated over a quarter of a million dollars of marital assets and had transferred marital property to her mother. Maillard, 621 N.Y.S.2d at 716. The court granted her husband an interim property restraint, holding that “[p]roper cause may be shown to exist by the admission of such party that there was a conversion and/or dissipation of marital assets or upon a showing that money was spent in a manner that, to a neutral party, may be regarded as improper or questionable.” Id.

91 Clair & De Simone, supra note 66, at 9 (“[I]t appears that judges, in their well-intentioned efforts to protect non-monied spouses from the prejudicial games sometimes played by the other spouse, are granting [interim property restraints] on a wholesale basis . . . .”). The authors argue that courts are rubber-stamping requests for interim property restraints in divorce proceedings without requiring the moving party to establish a legal basis for the order. In doing so, they argue, the courts are exposing monied spouses to “unnecessary inconvenience or outright prejudice.” Id.
conveyed. However, under these circumstances there is only $20,000 worth of marital property left. The court would certainly issue an interim property restraint to prohibit H from squandering the value of the stock, given his propensity to do such things. But after adjusting the equitable distribution award for economic misconduct to give W one hundred percent of the marital property, she is still left with only $20,000—less than half of what she was entitled to under equitable distribution.

Under the current case law there may be nothing that W can do to get back the $30,000 that she is entitled to and toward which she contributed with her salary. This potential loophole is a problem that this Note seeks to prevent by allowing a spouse such as W standing as a creditor in all cases to set aside conveyances like the one described above. The legislature’s intent to prevent conveyances that would prevent a full equitable distribution award cannot be realized if the law can simply be bypassed. The following section analyzes the circumstances under which courts have allowed spouses to attack fraudulent conveyances in the past and addresses the shortcomings of these decisions.

B. Courts Have Allowed Recourse to Fraudulent Conveyance Law Only Under Limited Circumstances

The courts have granted spouses creditor standing under some circumstances and allowed them to set aside conveyances that would otherwise interfere with some sort of property right arising from the marriage. The first subsection below considers cases where a spouse’s claim was based on a duty imposed by a separation agreement or court order. The second subsection discusses cases where a spouse has obtained creditor standing despite the lack of a separation agreement or court order. There has been no case to my knowledge where a court has unequivocally granted a spouse the right to set aside a conveyance simply because it would interfere with his or her equitable distribution claim.92 The closest decision, although an unreported federal one, and its complex aftermath are discussed in the third subsection. The lack of a definite articulation of marital property rights and the courts’ inability to protect these rights in all situations is the shortcoming of the current case law and the reason for this Note’s proposal in the next part.

92 See SCHEINKMAN, supra note 4, § 3:57.
1. Creditor Standing Based on a Court Order or Separation Agreement

Courts have generally allowed a harmed spouse to maintain a fraudulent conveyance action where there is a duty imposed, such as in a separation agreement or a judicial order, including maintenance (or alimony under the old system) and child support. In these cases, the court considers the harmed spouse a creditor when the errant spouse fails to make mandated payments or makes a conveyance that would cause him or her to be unable to satisfy the liability in the future.

An early case before equitable distribution where a fraudulent conveyance action was allowed is *Enthoven v. Enthoven*. In this case, the husband and wife entered into a separation agreement that provided for a monthly payment to the wife for her support until her death or remarriage. Then, in an attempt to evade his support obligation after he remarried, the husband conveyed all of his assets to his son and new wife, leaving him insolvent and unable to make his payments under the separation agreement. The plaintiff wife brought her claim to set aside the conveyance pursuant to section 279 of the Debtor and Creditor Law, which protects creditors whose claims have not matured. The court held that the wife was a creditor in light of the separation agreement promising her future payments. The court found that the husband conveyed his assets to avoid his obligation to his now ex-wife and thus the conveyance was fraudulent. The court ultimately based its decision on the separation agreement, which made the husband “absolutely liable to pay, until her death or remarriage, a fixed sum at certain definite periods.”

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94 Id.; see also N.Y. DEBT. & CRED. LAW §§ 270, 273-a (McKinney 2008).
96 Id. at 515-16.
97 Id. at 516-17.
98 Id. at 515.
99 N.Y. DEBT. & CRED. LAW § 279 (McKinney 2008).
100 Enthoven, 4 N.Y.S.2d at 519.
101 Id. at 521.
102 Id. at 518.
103 Id.
104 Id. The court found it immaterial that the support obligations were laid out in separation agreement and not a judicial decree. Id. at 519.
A case based on a similar theory is *Crane v. Crane*. The plaintiff wife in this case brought an action seeking an increase in the amount of child support owed to her by her former husband. The court found that after the wife filed the action for increased support, the husband began hiding and misrepresenting his interests in various assets. One year before the wife filed her petition the husband had deposited $118,000 in a joint checking account with his current wife and received a bond worth $58,750. The husband had conveyed all these assets to his current wife in an attempt to evade an increase in child support. The conveyances made by the husband were without consideration and rendered the husband insolvent. The court, therefore, held that the husband’s transfers to his current wife were fraudulent and that the property would be considered part of the husband’s assets for purposes of increasing the child support award.

Cases falling into this category present a straightforward basis for granting a spouse standing to set aside fraudulent conveyances. As a corollary, after a court issues an interim property restraint or orders an equitable distribution award, any subsequent attempt by one spouse to convey assets in attempt to frustrate the other’s ability to satisfy the judgment could be attacked as a fraudulent conveyance. Unfortunately, spouses who face fraudulent conveyances of marital property often do not fall into this category of cases. Many spouses divorce without ever entering into a separation agreement (or if they do, the conveyances could be before separation) and by the time an order of

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106 *Id.* at 633. Such proceedings are authorized by the New York Family Court Act and the Family Court has jurisdiction. See N.Y. FAM. CT. ACT § 411 (McKinney 2008).
107 *Crane*, 609 N.Y.S.2d at 633.
108 *Id.*
109 *Id.*
110 *Id.* As discussed above, a conveyance that leaves a debtor insolvent and unable to pay his debts is constructively fraudulent. N.Y. DEBT. & CRED. LAW § 273 (McKinney 2008); see discussion supra Part I.B. Indeed, this is the ground the court used to set aside the conveyances pursuant to section 278 of the Debtor and Creditor law. See *Crane*, 609 N.Y.S.2d at 633.
111 *Crane*, 609 N.Y.S.2d at 633. There was a technicality in this case that prevented a normal application of the fraudulent conveyance laws. The plaintiff wife neglected to name the current wife as a party to the action, and the court could not affect her property rights without jurisdiction over her. As a result, the court did not set aside the transaction as is normal under the circumstances. Instead, it considered the assets to still belong to the husband as if he never made the conveyance and based the wife’s upward modification claim on that amount. Nevertheless, the court recognized this as an actionable fraudulent conveyance that could be set aside absent the technicality. *Id.* at 633-34.
112 See *Cahen-Vorburger v. Vorburger*, 838 N.Y.S.2d 543 (App. Div. 2007). In the matrimonial action, the lower court awarded the wife exclusive possession of the couple’s Manhattan apartment and fifty percent of the husband’s business interests. See *Cahen-Vorburger v. Vorburger*, 785 N.Y.S.2d 435, 437 (App. Div. 2004). Then the husband conveyed his business interests to his partners to prevent his ex-wife from realizing her equitable distribution award. *Cahen-Vorburger*, 838 N.Y.S.2d at 543. Based on this conveyance, the court allowed the wife to maintain a fraudulent conveyance action. *Id.*
maintenance is awarded, if ever, there may be no assets remaining to satisfy a judgment. These cases only protect against fraudulent conveyances that defeat a right explicitly provided for in a separation agreement or court order and do little to protect the right to equitable distribution.

2. Creditor Standing Without a Court Order or Separation Agreement

New York courts have also allowed a fraudulent conveyance action before the parties have entered into a separation agreement or received a divorce judgment. An early case establishing a limited ground for considering a spouse to be a creditor under these circumstances is Soldano v. Soldano.\(^ {113} \) This case arose before the enactment of equitable distribution, yet it established a basis for considering a spouse to be a creditor that is still used today. The facts as alleged by the wife and relied on by the court are as follows and are included in detail to give an example of the circumstances under which these cases sometimes arise.

When the husband discovered that his wife was pregnant he demanded that she abort the child.\(^ {114} \) The wife refused and the husband began a course of cruel and inhuman treatment intended to end the marriage and avoid his obligation to support his wife and soon-to-be born child. As part of his plan, the husband conspired with his co-defendants to divest himself of various land interests. He intended to make himself “judgment proof,” and to prevent the court from attaching the property once he commenced the divorce proceeding.\(^ {115} \) Because this case was before the enactment of equitable distribution, courts in matrimonial actions would award the more disadvantaged spouse, usually the wife, alimony based on the other spouse’s net worth.\(^ {116} \) With this in mind, the husband sought to avoid any substantial alimony payment to his wife or child support payment to his child.\(^ {117} \)

As part of his scheme, the husband systematically reduced financial support of his wife until he ceased all support roughly three months before the baby was born.\(^ {118} \) Just four days after his child was born, the husband conveyed his land interests to members of his family without consideration with the intent of depriving his wife and unwanted child of any support. To make matters worse, these family

\(^ {114} \) Id. at 396.
\(^ {115} \) Id. at 396-97.
\(^ {116} \) See supra note 3 and accompanying text.
\(^ {117} \) Soldano, 411 N.Y.S.2d at 397.
\(^ {118} \) Id. In fact, the husband admitted that he cut off all support to his wife and did not help pay for the medical expenses incurred in the delivery of the child. Id.
members had full knowledge of the husband’s scheme. Ten days later, he left his wife and child and initiated the divorce proceeding. The divorce was granted and the wife was given a judgment for reimbursement of “necessaries” expended by her when she was not being supported.\(^{119}\)

The wife challenged the two conveyances to her husband’s family members as fraudulent, even though they occurred before the divorce petition was filed.\(^{120}\) The husband was successful in getting the case dismissed at the trial level, but the Appellate Division reversed, holding that the wife had sufficient grounds for maintaining the action on the facts she alleged.\(^{121}\) The court held that the wife was a creditor of her now ex-husband based on the money she expended for her support and the support of her child when her husband abandoned her before the divorce.\(^{122}\) The court reasoned that this created a legal debt which entitled the wife to invoke the protections of the fraudulent conveyance law.\(^{123}\) This was based on the anachronistic common law notion that a husband has a duty to provide monetary support for his wife, and therefore the husband had breached his duty resulting in liability.\(^{124}\)

Moreover, the court held that the wife was a creditor as to future support obligations, even though no court order or agreement between the parties had granted her alimony at the time of the contested conveyances.\(^{125}\) The court based this on the provision of the fraudulent conveyance law that protects creditors with unmatured claims.\(^{126}\) Based on this, the court held that a conveyance made by a spouse in anticipation of divorce, made to prevent his or her partner from recovering alimony, is fraudulent and may be set aside unless the transferee took without notice and for value.\(^{127}\)

Presumably this holding could be extended to the post-equitable


\(^{120}\) Id. at 396.

\(^{121}\) Id. at 397.

\(^{122}\) Id. at 398.

\(^{123}\) Id.

\(^{124}\) The court cites Kuhlbarsch v. Sauter, 10 N.Y.S.2d 996 (Sup. Ct. 1939), aff’d, 13 N.Y.S.2d 844 (App. Div. 1939). In this case a wife was successful in setting aside conveyances of her decedent husband’s property to his daughter from another marriage. Id. at 997. The husband in this case “arbitrarily evicted [the wife] from their home and attempted to kill her with a knife, and threatened to kill her if she returned to their home.” Id. at 998. The wife was forced to take work as a live-in maid and sued for support. In response, her husband conveyed most of his assets to his daughter to keep them out of the reach of the court and out of the hands of his wife. The court stated that “[a] married woman abandoned by her husband has a cause of action against him to recover money expended to provide necessaries for herself even though the money so used was the outcome of the wife’s own labor.” Id. Based on this premise, the court allowed the wife to set aside the conveyances.


\(^{126}\) Id.; see also supra note 52 and accompanying text.

\(^{127}\) Soldano, 411 N.Y.S.2d at 398.
distribution matrimonial action, allowing spouses to set aside conveyances made before the divorce petition is filed if the conveyances are made with the intention to frustrate a future equitable distribution award. This seems like a logical extension since equitable distribution was largely intended to replace alimony, the foundation of creditor standing in Soldano, and even more so considering the modern view of marriage as an economic partnership to which both spouses contribute. Unfortunately, courts in general do not seem to have taken this approach.

The dissent in Soldano had a different view of the law. The dissent thought the case was properly dismissed because the wife “did not qualify as a ‘creditor’ of the defendant husband.”128 The dissenting judge based his decision on a blanket statement in Eccles v. Hutchinson that “[t]he mere relationship of husband and wife does not give rise to a debtor-creditor status.”129 However, that statement by the trial court in Eccles was not supported by any precedent and was said at a time when there were adequate judicial remedies to safeguard a spouse’s interests in marital property, which was an alimony award, not an equitable distribution award. Indeed, both Soldano and Eccles approved of Enthoven, which as discussed above, allowed conveyances to be set aside as fraudulent when they prohibited a spouse from meeting his support obligations.130

The dissent in Soldano thought that even if the defendant husband owed his plaintiff wife a duty of support as a result of the marriage, it was not in the nature of a legal debt.131 Instead, the dissent saw the duty of support as being in the nature of a general marital duty, one that is too speculative during the marriage to serve as the basis for considering a spouse to be a creditor.132 The judge seemed to base his idea on the changing times—where once the wife was a dependant of her husband, there is now less disparity between the earning capabilities of husband and wife.133

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128 Id. (Lantham, J., dissenting).
129 Id. (quoting Eccles v. Hutchinson, 213 N.Y.S.2d 122 (Sup. Ct. 1961)). Eccles was an ejectment action where the defendant ex-wife contested the title held by the plaintiff daughter of her former husband. Eccles, 213 N.Y.S.2d at 124. The ex-wife claimed that the plaintiff did not have good title to eject her because the conveyance from her ex-husband to the plaintiff was fraudulent and must be set aside. Id. The court rejected this contention because when the conveyance was made (during the marriage), the husband was solvent and able to support the defendant wife. Id. Then the court stated that the wife was not a creditor of her husband because they had not entered into any agreements that required payments to the wife. Id.
130 See Soldano, 411 N.Y.S.2d at 399 (Lantham, J., dissenting); Eccles, 213 N.Y.S.2d at 125.
132 Soldano, 411 N.Y.S.2d at 399 (Lantham, J., dissenting).
133 Id. The dissent stated:

[I]n some marriages the equality of earning power between husband and wife renders
A similar case decided after the enactment of equitable distribution is *Kasinski v. Questel*. The controversy in this case arose after the husband left his wife and conveyed title to the marital residence, to which he alone held title, to his girlfriend. The girlfriend then brought the lawsuit against the wife to have her removed from the residence. The wife counterclaimed that the transfer was a fraudulent conveyance and thus the girlfriend did not have good title to remove the wife. Special term dismissed the wife’s counterclaim, holding that she was not a creditor and thus could not maintain the action. This lower court based its decision on the line of cases requiring a separation agreement or court order of support to give creditor standing to the wife.

The *Kasinski* court, however, disagreed and could not “resist the conclusion” that the wife was a creditor of her husband, even though she had not obtained a support order or entered into a separation agreement. The court based this holding on the plain language used by the legislature in defining “creditor”—“a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” Although the reasoning is not especially clear, the court seems to say that the wife in this case, as a dependent spouse, had an unmatured and unliquidated claim for maintenance upon divorce and thus standing as a creditor. If the right to future maintenance or alimony payments is sufficient to consider a spouse to be a creditor then there should be no reason why the future right to equitable distribution should not do the same.

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135 Id.
136 Id.
137 Id. at 807-08.
138 Id. at 808.
139 N.Y. DEBT. & CRED. LAW § 270 (McKinney 2008).
141 Id.
3. A Further Complication: The Use of the Bankruptcy Process to Prevent a Full Equitable Distribution Award

The following two related cases illustrate the extent that a cunning spouse will go to defeat his or her partner’s right to a full equitable distribution award. The first of the two cases, Ostashko v. Ostashko,142 concerns the actual fraudulent conveyance claim and is the closest example, to my knowledge, of an implementation of this Note’s proposal (though it is unfortunately an unreported federal decision). In this case, the husband entered into an agreement with a bank to provide him with an unsecured credit line of $900,000.143 The husband at one time served on the bank’s board and was still close with the bank’s chairman at the time the loan was made. Then the husband withdrew almost the entire amount from his credit line and shortly thereafter defaulted on his payments.144 The bank sued and reached a settlement with the husband whereby the bank was given a consent judgment for $810,000, almost the entire value of the couple’s marital property.145

The wife subsequently commenced a divorce proceeding and moved to enjoin enforcement of the consent judgment and have it vacated as a fraudulent conveyance.146 The matrimonial court refused to decide the motion and directed the wife to bring the motion before the state court where the consent judgment was entered, staying the divorce proceeding until the matter was resolved.147 The action was then removed to the Eastern District of New York.148

The Eastern District considered the wife to be a creditor of her husband and set aside the consent judgment as fraudulent.149 The court cited Kasinski as support for its decision to consider the wife a creditor, which, as discussed above, considered the future right to maintenance to be sufficient to establish creditor standing.150 The Ostashko court in fact explicitly cited Kasinski for this proposition,151 but then without explanation or a clear articulation seems to have granted creditor standing to the wife based on her unmatured equitable distribution

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143 Musso v. Ostashko (In re Ostashko), 468 F.3d 99, 103 (2d Cir. 2006).
144 Id.
145 Id. at *51.
146 See Ostashko, 2002 U.S. Dist. LEXIS 27015, at *3-5 (describing the “byzantine” procedural history of this case, which even “the lawyers to both sides ha[d] difficulty summarizing” and which, unbeknownst to the court, would only get more complex).
147 Id.
148 Id.
149 Id. at *85-86.
150 Id. at *50-51.
151 Id. at *51.
claim. The court merely stated that “[e]ven though the matrimonial court had not rendered a judgment distributing the marital assets, ‘the fact that there was nothing due the wife at the time of the transfer does not deprive her of her status as a creditor.’” 152

The court then found the conveyance to be fraudulent and part of a systematic attempt by the husband to deprive his wife of any marital property upon equitable distribution.153 Afterwards, the matrimonial proceeding was resumed, and the court granted the divorce and awarded the wife the entirety of the marital property based on the husband’s economic misconduct.154 This case may be read as taking the approach advocated by this Note; however, the reasoning may be too unclear to establish persuasive authority for state courts to follow, and of course, there has been no decision on this matter from New York’s highest court.

Unfortunately, the story does not end happily there, but has continued so far to the Second Circuit’s decision in Musso v. Ostashko.155 Before the final divorce judgment was entered, the bank’s successor in interest to the judgment, Zurrita-Teks, filed an involuntary Chapter 7 bankruptcy petition against the husband.156 The bankruptcy trustee, in an effort to maximize the value of the bankruptcy estate, sought avoidance of any interest the wife had in the marital property that she was awarded in the divorce proceeding.157 The wife filed a cross-claim seeking a declaration that the marital assets awarded to her in the matrimonial action were not part of the husband’s bankruptcy

152 Id. (emphasis added) (citing Kasinski v. Questel, 472 N.Y.S.2d 807, 808 (App. Div. 1984)).
153 Ostashko, 2002 U.S. Dist. LEXIS 27015, at *52-82, *85-86 (finding the consent judgment to be made with both actual and constructive intent to defraud and setting it aside to the extent necessary to award the wife her full equitable distribution claim). The court in the later proceeding (Musso) noted the extent that the husband, Vladimir, went to prevent his wife, Tanya, from receiving anything through equitable distribution:

Vladimir intended to use the loan instrument to liquidate the value of the marital assets in the United States to the detriment of Tanya. The district court noted that Vladimir was one of Informtechnika’s founders, served on its board of directors throughout most of the 1990s, and remained close friends with one of the directors and chairman of the bank at the time of the loan. In light of statements by Vladimir that Tanya “would not receive a single kopeck when the dust from the divorce settled,” and the district court’s finding that toward the end of 1997 and the beginning of 1998 Vladimir engaged in a wholesale liquidation of the marital assets to prevent Tanya from securing an interest in them, the district court found that “the loan was clearly the means by which Vladimir turned remaining marital assets into immediate cash.” The district further found that, while direct evidence of the bank’s knowledge was lacking, “circumstantial evidence indicat[ed] that the bank was aware of Vladimir’s intentions.”

Musso v. Ostashko (In re Ostashko), 468 F.3d 99, 103 (2d Cir. 2006).
154 Id. at 103.
155 Musso v. Ostashko (In re Ostashko), 468 F.3d 99 (2d Cir. 2006).
156 Id. at 104.
157 Id.
The case made it to the Second Circuit, which held that the property awarded to the wife through equitable distribution was part of the bankruptcy estate because the divorce judgment was not entered before the bankruptcy petition was filed. The court noted that its decision did not nullify the wife’s equitable distribution award, but pointed out the reality that the wife, who was once entitled to all of the marital property, would only be a general unsecured creditor of the bankruptcy estate. The court then remanded the case to the bankruptcy court for further proceedings.

The court noted that “[i]t is possible to conclude, in this case, that [the husband] abused the bankruptcy process in his dealings with his spouse,” because he may have been connected to the successor in interest to the bank’s claim, which filed the bankruptcy petition. If this were the case, the court noted that the bankruptcy court could use its equitable powers to subordinate the claim of the bank to the wife’s equitable distribution claim. Although these bankruptcy issues are beyond the scope of this Note, this case is troublesome because it appears that the court, purporting to apply New York law, may give a federal bankruptcy court the discretion to effectively overturn state court decisions deciding that the wife had absolute rights in the marital property and that the creditor filing bankruptcy never had a good claim against that property. There have been no reported decisions in this matter since the Second Circuit’s 2006 decision, but hopefully more decisions will be forthcoming as this issue continues to be resolved.

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158 Id.
159 Id. at 108. The wife argued, and the vacated district court decision agreed, that her equitable distribution rights in the marital property vested upon the matrimonial court’s written decision, which occurred pre-bankruptcy petition, and “that entry of that judgment is merely ‘ministerial.’” Id. at 107 (citations omitted). The court rejected this argument, stating:

It may be the case that, as between spouses, actual entry of the divorce judgment is immaterial so long as a divorce has in fact been granted. Between spouses the dual policy concerns of notice and the ability of a judgment creditor to rely on its interest are absent because the spouses have had an opportunity to participate in the proceedings by which their respective rights in the property at issue have been determined. But as between a spouse and a third party (such as a judgment lien creditor), entry of the judgment is critical, under New York law, to cementing the spouse’s interest in the property.

Id. at 107-08 (citations omitted). The court considered the bankruptcy trustee to be a “hypothetical judgment lien creditor,” and thus held that the wife’s argument did not apply. Id. at 104, 108.
160 Id. at 108 (citing In re Palmer, 78 B.R. 402, 406 (Bankr. E.D.N.Y. 1987)).
161 Id. at 108.
162 Id. (citing HBE Leasing Corp. v. Frank, 48 F.3d 623, 634 (2d Cir. 1995), and 11 U.S.C. § 510(c)).
III. COURTS SHOULD ALLOW RECOURSE TO FRAUDULENT CONVEYANCE LAWS FOR EVERY EQUITABLE DISTRIBUTION CLAIM

Despite the protections currently in place, it may still be possible for one spouse to convey assets to a third party in anticipation of divorce, thereby violating the other spouse’s right to a full equitable distribution award. Interim property restraints and preliminary injunctions are effective in preventing a spouse from dissipating assets after the divorce proceeding is initiated. And courts that allow creditor standing in the circumstances described above have taken a step in the right direction. However, neither fully protects the unsuspecting spouse whose partner conveys marital property before filing for divorce to prevent a full equitable distribution award. It is true that the court can use its discretion to adjust the final distribution award in favor of the injured spouse, but by then the damage has already been done if there is no remaining property of value to distribute.

To protect either spouse against conveyances made before the divorce petition is filed, courts should allow the affected spouse creditor standing based on the equitable distribution award he or she will receive upon final judgment in the matrimonial proceeding. As previously discussed, a creditor is a person that has any claim, even if the claim is unmatured, unliquidated, or contingent. An equitable distribution award falls neatly within the plain language of the definition. Courts are required to equitably distribute marital property upon termination of the marriage—equitable distribution is a claim that every spouse is entitled to if the marriage ends. Once the court has granted a divorce, the contingency is met and the claim for relief in the form of equitable distribution matures, requiring the court to liquidate the claim based on each spouse’s contribution to the economic partnership and the circumstances of the case.

Allowing creditor standing in all cases would ensure that courts could always satisfy the legislature’s mandate to award each spouse a portion of the marital property that is just and proper. But as the lack of case law indicates, courts have not yet extended the protections to extent argued for by this Note, even though some have alluded to the possibility. Perhaps part of the reason that courts have not taken this approach is because of the accepted view that equitable distribution’s marital property concept does not create present and vested property interests in either spouse during the marriage. But presently vested property interests are not necessary to receive protection under the fraudulent conveyance law, which recognize unmatured and contingent

163 N.Y. DEBT. & CRED. LAW § 270 (McKinney 2008). See discussion supra Part I.B.
claims and seek to protect future creditors.

The Kriger court recognized the inchoate statutory creation of property rights that stem from the legislature’s enactment of equitable distribution, but did not consider whether they were sufficient to receive protection under fraudulent conveyance law. Noting the lack of cases considering marital property in a non-divorce setting it stated:

[T]here can be little doubt that the legislature has created a heretofore unknown species of property right which comes into being, not with the service of the divorce summons, but with the marriage and acquisition of the first earned asset. . . . To suggest . . . that even after the service of the summons [one spouse] is free to dissipate marital assets, destroying [the other] spouse’s rights to the assets, all without interference from the courts is to deny the very existence of marital property. To sustain such a view would require the courts to ignore the plain language of the statute which creates rights in property and not merely in the value of the property.  

From the discussion above, one will recall that the defendant husband in this case “intermingled and confused” marital assets in an attempt to defeat the plaintiff wife’s right to equitable distribution. However, the court was able to protect the wife with an injunction and was not required to consider her rights to set aside fraudulent conveyances.

The Kriger court’s discussion of marital property was criticized shortly thereafter by the lengthy concurrence in Leibowits, a case considering the discretion of the trial court to issue interim property restraints sua sponte. In a discussion concerning the power of courts to issue provisional remedies under section 234, the concurring judge took the position that “at no point prior to [a divorce] judgment does the [equitable distribution] law itself create any contingent or present vested interests, legal or equitable, by virtue of the parties’ marital status or prior to a judgment dissolving their union.” On the contrary, the court thought that “the spouses’ respective claims to . . . marital property [are] mere expectancies” pending a final distribution.

Regardless of whether equitable distribution creates vested

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165 Id. at 501.
166 Id.
167 Leibowits v. Leibowits, 462 N.Y.S.2d 469, 470 (App. Div. 1983) (holding that due process requires written notice from the moving spouse that he or she seeks possession or restraint of marital property and that the lower court abused its discretion by sua sponte restraining assets in the husband’s control).
169 Id. The concurring judge thought the expectancy was perhaps analogous to the rights of an heir, but rejected analogies to the “inchoate, contingent right of dower,” to “testamentary substitutes in an elective share;” “and to the present, vested rights of partnership.” Id.
property rights, the statutory definition of creditor and the legislative interest in protecting a spouse’s right to equitable distribution seem to mandate creditor standing for injured spouses. Courts are already allowing a dependent spouse’s future right to maintenance to establish standing for a spouse as a creditor. It would seem that a spouse who was capable of self-support—and who, because of his or her income, most likely contributed substantial amounts of money towards the acquisition of marital property, but would likely not receive maintenance—would present an even more compelling case for protection under the fraudulent conveyance law. But at least as far as the decisions show (with the possible exception of the unreported federal court decision in *Ostashko*), a spouse has not been allowed to set aside fraudulent conveyances of marital property solely on the basis of his or her unmatured equitable distribution claim.

Certainly, courts should allow spouses the right to reclaim fraudulently conveyed marital property only to the extent necessary to allow a full equitable distribution award. Naturally a concern with considering a spouse to be a creditor for this purpose is that there will be an onslaught of litigation from spouses seeking to set aside conveyances made by their partners during the marriage whenever they disagree with that decision. But this concern is illusory at best and in practice would not be an issue.

Creditors do not have the unqualified right to set aside conveyances in all circumstances. As discussed before, a creditor whose claim has not matured, such as an equitable distribution claim during the marriage, can ask the court to set aside a conveyance under the theory that the transferor has actual intent to defraud or will not be able to satisfy the creditor’s claim upon maturation, but the decision is left to the court’s discretion. In practice, courts at the very beginning of such actions would dismiss claims by spouses seeking to set aside their titled-partner’s conveyance of marital property, unless it was clear that it was made in contemplation of divorce and with fraudulent intent.

A fraudulent conveyance remedy would likely be used in most cases only once the court has granted the divorce, at which point the equitable distribution claim has matured and must be liquidated. Only then would a spouse have the unqualified right to set aside fraudulent conveyances of marital assets. The matrimonial court could stay the divorce proceeding to allow the harmed spouse to bring a separate action to set aside fraudulent conveyances of marital property, as the court did in *Ostashko*. In any case, the burden is on the spouse seeking to set aside the conveyance and the courts could set the burden high enough to prevent spouses from setting aside conveyances that were made in good faith or in the normal course of the marriage.
CONCLUSION

Equitable distribution is a right that courts are required to grant all spouses upon termination of their marriage in the absence of a valid premarital agreement. The enactment of equitable distribution was a drastic improvement over the common law scheme where each spouse, upon divorce, only took property for which he or she already held title. This system was unfair and put an undue burden on dependant spouses who were usually resigned to a small alimony payment after divorce. In enacting equitable distribution, the legislature recognized that marriage is an economic partnership with both spouses contributing to its success and wealth. Equitable distribution, therefore, became a way to give each spouse his or her fair share of property obtained by the partnership during the marriage.

Like the system before it, equitable distribution fell vulnerable to abuse and spouses soon realized that they could defeat their partner’s rights to equitable distribution by conveying marital property before final judgment. As a result, the legislature responded by easing the standards for issuing injunctions and directed courts to adjust for economic misconduct when distributing marital property. But these protections are only truly effective post-petition and do relatively nothing to repair the harm caused by carefully planned pre-petition conveyances aimed at preventing a full equitable distribution award.

Some courts have given creditor standing to individuals whose rights have been infringed upon by their former spouse’s fraudulent conveyances. But these decisions have stopped short of giving creditor status solely on the grounds of the spouse’s claim for equitable distribution. If the legislature and courts intend to protect the right to marital property then they should protect it against all possible attempts to defeat it by a cunning spouse. A spouse may be able to circumvent the current protections by getting rid of marital property before he or she files for divorce. To prevent this possibility, courts should give spouses recourse to fraudulent conveyance law to attack any conveyance that would otherwise prevent a full equitable distribution award.