

PERSONAL INJURY AWARDS AND DIVORCE:
PENNSYLVANIA SHOULD ADOPT THE ANALYTICAL
APPROACH THROUGH STATUTE TO PROMOTE FAIRNESS
AND CONSISTENCY

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I. INTRODUCTION

Justin Focht was at a go-cart track with his wife and her children when another driver struck his go-cart.¹ He sustained serious injuries, suffering fractured vertebrae and two ruptured discs requiring multiple surgeries.² Despite this treatment, Mr.

¹ Brief for Appellant at 5, *Focht v. Focht*, 990 A.2d 59, 2009 WL 6354690, (Pa. Super. Ct. 2009) [hereinafter Brief for Appellant].

² Brief for Appellee at 2, 18 & n.1, *Focht v. Focht*, 32 A.3d 668, 2010 WL 7505907 (Pa. 2011) [hereinafter Brief for Appellee].

Focht's ability to work was projected to end as early as age forty,³ and he continued to experience severe back pain.⁴

Justin and Tracy Focht separated before the settlement of his negligence action, and after the case settled for \$410,000, they agreed that for her loss of consortium Tracy Focht would take \$14,784.17 of the net \$246,402.76 received after attorney and other fees.⁵ Much of the settlement was dissipated, but Mr. Focht retained slightly more than \$69,000 from the sale of a home purchased with the proceeds.⁶ Despite less than seven percent of the settlement applying to lost wages during the marriage,⁷ the trial court awarded Mrs. Focht twenty-five percent of this remaining sum during equitable distribution.⁸ The treatment of these remaining proceeds was contested in the Supreme Court of Pennsylvania, which held the personal injury settlement proceeds were indeed marital property subject to equitable distribution if the cause of action accrued during the marriage.⁹ Mr. Focht, therefore, lost a quarter of *his* remaining share of the proceeds from *his* personal injury claim, and no longer had these funds to assist with the consequences of *his* injury, which was the basis of the claim.¹⁰ His former spouse received both a share for loss of consortium *and* a share of the proceeds she had once recognized as Mr. Focht's.¹¹

³ Brief for the Appellee, *supra* note 2, at 2.

⁴ Brief for the Appellant, *supra* note 1, at 11.

⁵ Focht v. Focht, 32 A.3d 668, 669 (Pa. 2011); Brief for Appellant, *supra* note 1, at 5.

⁶ Brief for the Appellant, *supra* note 1, at 6, 9. The home, purchased for \$156,000, had allegedly been allowed to fall into foreclosure and been damaged by the occupant and co-owner, a former girlfriend of Mr. Focht, after Mr. Focht moved out. *Focht*, 32 A.3d at 669 n.2; *see also* Brief for the Appellant, *supra* note 1, at 6-7.

⁷ *See* Brief for Appellant, *supra* note 1, at 11 (stating Mr. Focht lost \$27,731 of wages as a result of the accident).

⁸ *Id.* at 8.

⁹ *Focht*, 32 A.3d at 674.

¹⁰ *See* Brief for the Appellant, *supra* note 1, at 5, 8 (discussing the husband's injuries and the court's ruling, which granted the wife twenty-five percent of the husband's personal injury award).

¹¹ *Id.* at 6, 8.

This comment discusses Pennsylvania's treatment, during divorce, of a spouse's award or settlement for a personal injury claim that arose during the marriage. The facts above from *Focht v. Focht*,¹² a recent Supreme Court of Pennsylvania case, illustrate this issue.¹³ Currently, Pennsylvania follows the mechanistic approach that treats all proceeds of personal injury claims that accrue during marriage as marital property subject to equitable distribution.¹⁴ Moving to the more desirable method an analytical approach that defines portions of personal injury proceeds as marital property and other portions as the separate property of the injured spouse is suggested. The language of an amendment to Pennsylvania's Divorce Code to accomplish this change is recommended.

This comment first reviews the purpose of marital property and equitable distribution. Next is a discussion of the approaches used by other states for personal injury proceeds during divorce. The origin of Pennsylvania's rule is then considered in detail. An assessment of the problems inherent in Pennsylvania's mechanistic approach follows. Finally, this comment recommends a solution to these deficiencies through statutory enactment of the analytical approach to personal injury proceeds, with suggested provisions the statute should include.

II. TREATMENT OF PERSONAL INJURY PROCEEDS IN DIVORCE

The best method for addressing personal injury proceeds during divorce has been an area of considerable litigation and legislative activity.¹⁵ Several approaches to the issue have been

¹² *Focht v. Focht*, 32 A.3d 668 (Pa. 2011).

¹³ *Id.* at 669.

¹⁴ *Id.* at 674.

¹⁵ See, e.g., Kurtis A. Kemper, Annotation, *Divorce and Separation: Determination of Whether Proceeds from Personal Injury Settlement or Recovery Constitute Marital Property*, 109 A.L.R. 5th 1, 6 (2003) (providing an overview of the extensive case and statutory law on this issue in equitable distribution states).

developed.¹⁶ States' systems for classifying property during divorce influence these approaches.¹⁷

A. Systems for Classifying Property During Divorce

There are two systems of classifying property during marriage and divorce in the United States: the community property system and the equitable distribution system.¹⁸ Community property states, mostly in the southern and western United States, view all property acquired by either spouse during marriage as marital property, both during the marriage and at divorce, based on a marital partnership theory that each spouse contributes to the success of the marriage.¹⁹ However, all community property states now classify some or all aspects of personal injury proceeds as the separate property of the injured spouse, with one exception.²⁰

¹⁶ Amanda Wine, Comment, *Treatment of Personal Injury Awards During Dissolution of Marriage*, 20 J. AM. ACAD. MATRIMONIAL L. 155, 155-56 (2006).

¹⁷ *Id.* at 157.

¹⁸ *Id.* at 156.

¹⁹ 1 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY*, § 2:5 (3d ed. 2005). Pennsylvania briefly became a community property state in 1947, Act of July 7, 1947, P.L. 1423, Act 1947-550, *invalidated by* *Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521 (Pa. 1947), in order to secure income tax savings for Pennsylvanians, William H. Dodd, *Community Property in Pennsylvania*, 52 DICK. L. REV. 24, 25 (1947), that accrued to married couples in community property states before joint filing by married couples was permitted by the Internal Revenue Service in 1948. Peter Seveareid, *Increase in Value of Separate Property in Pennsylvania: A Change in What Women Want?*, 68 TEMP. L. REV. 557, 571 (1995). The Supreme Court of Pennsylvania found this law to be an unconstitutional taking from one spouse by the government. *Willcox*, 55 A.2d at 527, *abrogated by* *Bacchetta v. Bacchetta*, 445 A.2d 1194, 1196-98 (Pa. 1982).

²⁰ See Pamela E. George, *Whose Injury? Whose Property? The Characterization of Personal Injury Settlements Upon Dissolution of Marriage in Community Property States*, 32 IDAHO L. REV. 575, 582-84 (1996) (giving various examples). The exception is California. *Id.* at 580-81. Community property systems are generally beyond the scope of this comment, which focuses on Pennsylvania, an equitable distribution state. TURNER, *supra* note 19, § 2:9 & n.2.

The system followed in the majority of states is the equitable distribution system.²¹ This development from the common law system treats property acquired by a spouse during marriage as the property of that spouse until divorce, when some or all the property rights vest in the marriage.²² Equitable distribution states follow one of two rules.²³ A minority of equitable distribution states follow the all property rule, under which all property acquired during marriage vests as marital property upon divorce and is subject to equitable distribution.²⁴ The majority of states, including Pennsylvania, follow the dual classification system.²⁵ In a dual classification state, the court identifies property as either the separate property of an individual spouse or marital property at the time of final separation or divorce.²⁶ Ownership of separate property remains with the spouse having legal title, while marital property is subject to equitable distribution between the spouses.²⁷ Statutes usually define which property becomes marital property and which property remains separate at divorce.²⁸

B. *Equitable Distribution*

Equitable distribution is "derive[d] from the 'marital partnership' theory of community property law."²⁹ This theory "views marriage as a partnership in which both spouses contribute, financially or otherwise, to the growth of the partnership and the accumulation of assets."³⁰ Equitable distribution replaced the title system and other property division rules formerly used in common law jurisdictions that usually favored the husband in a divorce and

²¹ TURNER, *supra* note 19, § 1.4.

²² *Id.* § 2:7.

²³ *Id.* § 1:3.

²⁴ *Id.* § 2:8 & n.7.

²⁵ *Id.* § 2:9 & n.3.

²⁶ *Id.* § 2:9.

²⁷ TURNER, *supra* note 19, § 2:9.

²⁸ *Id.* § 1:3.

²⁹ Drake v. Drake, 725 A.2d 717, 721 (Pa. 1999).

³⁰ Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through The Dual Classification System*, 67 MISS. L.J. 115, 125 (1997).

failed to account for the contributions of a spouse for childcare and as a homemaker.³¹

Equitable distribution is distinct from community property because in an equitable distribution jurisdiction, marital property exists only at the time of the divorce.³² The distribution of the property is equitable, rather than equal, as it traditionally was in community property states.³³

All common law jurisdictions rapidly adopted equitable distribution in the 1970s and early 1980s.³⁴ Pennsylvania was one of the last states to do so, in 1980, when the General Assembly passed the modern Divorce Code.³⁵

Since the adoption of equitable distribution, the trend in dual classification property states is for legislatures to remove property from equitable distribution by reclassifying it as separate property.³⁶ This trend is partly a reaction to overly broad classifications in the initial statutes or court opinions establishing equitable distribution marital property classifications.³⁷ It also serves the policy goal of reducing unequal distributions of the marital estate by excluding those property elements from marital property that often encouraged unequal divisions.³⁸

³¹ TURNER, *supra* note 19, § 1:3.

³² *Id.* § 2:7.

³³ *Drake*, 725 A.2d at 721. Some states begin with a presumption that an equal distribution of property is fair and allow a court to modify from that presumption. *See, e.g.*, *Nornes v. Nornes*, 884 N.E.2d 886, 888 (Ind. Ct. App. 2008). Also, the majority of community property states now permit equitable rather than equal distribution. BRETT R. TURNER, *Measuring the Unmeasurable: Recent Case Law on "Equitable" Distribution of Marital Property*, 4 DIVORCE LITIG. 109 (1992).

³⁴ TURNER, *supra* note 19, § 1:3.

³⁵ Catherine M. McFadden, *The Evolving Law of Equitable Distribution and Alimony*, 76 PA. B. ASS'N Q. 104, 104 (2005).

³⁶ TURNER, *supra* note 19, § 1.5.

³⁷ *Id.*

³⁸ *Id.*

C. Approaches to Classifying Personal Injury Awards in Dual Classification States

There are three approaches applied by the states to classify personal injury awards during equitable distribution: the analytic approach, the unitary approach, and the mechanistic approach.³⁹

i. Analytic Approach

The majority of equitable distribution states use the analytic approach,⁴⁰ which receives its name because the approach requires that a court analyze the source of the personal injury award to classify it as marital or separate property.⁴¹ Typically, courts divide awards so that:

(a) the separate property of the injured spouse includes the noneconomic compensatory damages for pain, suffering, disability, and loss of ability to lead a normal life and the economic damages which occur subsequent to the termination of the marriage of the parties, including the amount of the award for loss of future wages and future medical expenses; (b) the separate property of the noninjured spouse includes loss of consortium; and (c) the marital property subject to distribution includes the amount of the award for lost wages or lost earning capacity during the marriage of the parties and medical expenses paid out of marital funds during the marriage.⁴²

Courts treat the portions of an award for pain and suffering or disfigurement as separate property because:

Nothing is more personal than the entirely subjective sensations of agonizing pain, mental anguish, embarrassment because of scarring or disfigurement, and

³⁹ *Id.* §§ 6:54-6:57.

⁴⁰ Wine, *supra* note 16, at 158.

⁴¹ 2 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY*, § 6:55 (3d ed. 2005).

⁴² *Weisfeld v. Weisfeld*, 545 So. 2d 1341, 1345 (Fla. 1989).

outrage attending severe bodily injury Equally personal are the effects of even mild or moderately severe injury. None of these, including the frustrations of diminution or loss of normal body functions or movements, can be sensed, or need they be borne, by anyone but the injured spouse. Why, then, should the law, seeking to be equitable, coin these factors into money to even partially benefit the uninjured and estranged spouse? In such case the law would literally heap insult upon injury.⁴³

Further, the prior good health of the spouse was property of the spouse before the marriage, and any sum received in exchange for this good health is likewise separate property of the spouse upon divorce.⁴⁴ Other courts have analogized the damage to one's person to the damage to one's separate property, holding that if an award for damage to one's separate property was separate property, then an award for damage to one's person should also be separate property.⁴⁵

Economic losses for the period of the marriage, however, are treated as marital property since "the portion of a personal injury award or settlement that simply reimburses marital assets that were lost because of a spouse's injury should be subject to equitable distribution."⁴⁶ An award for lost wages for a period during the marriage is marital property because it replaces wages that would have been marital property.⁴⁷ The portion awarded for lost wages for the period after the divorce is not marital property because the

⁴³ *Landwehr v. Landwehr*, 545 A.2d 738, 742-43 (N.J. 1988) (per curiam) (quoting *Amato v. Amato*, 434 A.2d 639, 643 (N.J. Super. Ct. App. Div. 1981)).

⁴⁴ *Amato*, 434 A.2d at 643.

⁴⁵ *Graham v. Franco*, 488 S.W.2d 390, 394 (Tex. 1972).

⁴⁶ *Landwehr*, 545 A.2d at 743.

⁴⁷ See *Bandow v. Bandow*, 794 P.2d 1346, 1348 (Alaska 1990) (applying the analytic approach to a workers' compensation disability award). Workers compensation disability awards and tort personal injury awards are usually treated similarly in divorce by the courts. TURNER, *supra* note 41, § 6:59.

spouse would have no equitable distribution claim to wages after the divorce.⁴⁸

"The core of the analytic approach is its recognition that the classification of the award depends upon the nature of the underlying loss."⁴⁹ When a judge or jury has allocated the award based on the underlying loss, or both spouses have signed a settlement allocating the award, the trial court simply classifies the results.⁵⁰ If only the injured spouse signed a settlement, the risk of deliberate misclassification arises.⁵¹ "Where the settlement proceeds or an award do not allocate between economic and non-economic damages . . . the trial court must, nonetheless, review the evidence presented regarding the underlying case and make its own allocation as to the different types of loss."⁵² The presumption is that any award received during the marriage is marital property, and the burden of proof is on the party claiming the award is separate property.⁵³ The need to classify awards is an additional step required for the analytic approach, but "[t]rial courts are used to allocating and tracing assets in equitable distribution cases" and the "allocation of such awards will [not] present any serious problems."⁵⁴

Under the statutory method of establishing the analytic approach, a statute defines which parts of the personal injury award are marital property and which are separate property.⁵⁵ While enacting the analytic approach through statute is common in community property states, with a slight majority of these states having such statutes,⁵⁶ it is still uncommon in equitable distribution states⁵⁷ because the majority of states that apply the analytic

⁴⁸ See *Bandow*, 794 P.2d at 1348.

⁴⁹ TURNER, *supra* note 41, § 6:55.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Murray v. Murray*, 989 A.2d 771, 779 (Md. Ct. Spec. App. 2010).

⁵³ *Parde v. Parde*, 602 N.W.2d 657, 663 (Neb. 1999).

⁵⁴ *Landwehr v. Landwehr*, 545 A.2d 738, 744 (N.J. 1988) (per curiam).

⁵⁵ Wine, *supra* note 16, at 174.

⁵⁶ George, *supra* note 20, at 580-83.

⁵⁷ Only three equitable distribution states have statutes specifically addressing personal injury proceeds and marital property: Arkansas, Ohio, and Virginia. Wine, *supra* note 16, at 174.

approach adopted the approach through judicial decisions.⁵⁸ The statutes in equitable distribution states reach results similar to the analytic approach reached by courts in other states.⁵⁹ In Ohio, the statute defines "[c]ompensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets" as separate property.⁶⁰ Arkansas excludes from marital property personal injury claims "when those benefits are for any degree of permanent disability or future medical expenses."⁶¹ Finally, Virginia permits only payment from the marital share of a personal injury recovery, and defines that marital share as lost wages and unreimbursed medical expenses during the marriage.⁶²

ii. Unitary Approach

The unitary approach treats personal injury awards solely as the separate property of the injured spouse, based on the award being personal to the spouse.⁶³ Its application is extremely uncommon,⁶⁴ New York follows the unitary approach through statute,⁶⁵ as interpreted through the courts.⁶⁶ Courts in other jurisdictions have occasionally applied this approach, but usually without lasting effect.⁶⁷ Indeed, it is questioned whether these courts even truly applied the unitary approach.⁶⁸ This approach is criticized "as "by far the worst" of the approaches to personal

⁵⁸ *Id.* at 155.

⁵⁹ See *infra* notes 60-62 and accompanying text.

⁶⁰ OHIO REV. CODE ANN. § 3105.171(A)(6)(a)(vi) (West 2012).

⁶¹ ARK. CODE ANN. § 9-12-315(b)(6) (2012).

⁶² VA. CODE ANN. § 20-107.3(H) (2012).

⁶³ TURNER, *supra* note 41, § 6:57.

⁶⁴ *Id.*

⁶⁵ N.Y. DOM. REL. LAW § 236(B)(1)(d)(2) (McKinney 2012).

⁶⁶ *Howe v. Howe*, 886 N.Y.S.2d 722 (N.Y. App. Div. 2009).

⁶⁷ Compare *Unkle v. Unkle*, 505 A.2d 849, 854 (Md. 1986) (applying the unitary approach), with *Newborn v. Newborn*, 754 A.2d 476, 491 (Md. Ct. Spec. App. 2000) (applying the analytic approach subsequent to *Unkle v. Unkle*); compare *Izatt v. Izatt*, 627 P.2d 49, 51 (Utah 1981) (applying the unitary approach), with *Naranjo v. Naranjo* 751 P.2d 1144, 1148 (Utah App. 1988) (applying the analytic approach subsequent to *Izatt v. Izatt*).

⁶⁸ TURNER, *supra* note 41, § 6:57 n.2.

injury awards for excluding from marital property those economic losses related to personal injury that would be treated as marital property under the analytic approach.⁶⁹

iii. Mechanistic Approach

The mechanistic approach solely considers whether the injury occurred during the marriage⁷⁰ to determine whether the award is marital property, "regardless of the underlying purpose of the award or the loss it is meant to replace."⁷¹ It is also known as the "literal"⁷² or the "mechanical" approach.⁷³ Courts following this approach do so because the personal injury proceeds are not included in the statutory definitions of separate property or the exceptions to marital property.⁷⁴

Courts applying the mechanistic approach decline to hold that health is property⁷⁵ and are "[un]willing to stretch the statutory language . . . to adopt" the "intuitively logical" analytic approach.⁷⁶ Since these courts reject the theory that an individual's good health is property acquired before the marriage, personal injury awards are not treated as property received in exchange for separate property, which would make the awards separate property upon divorce.⁷⁷

As marital property, personal injury awards are subject to equitable distribution.⁷⁸ The court considers factors in making the distribution, such as the contributions of each spouse to acquiring the property and the health and future earning potential of each

⁶⁹ *Id.* § 6:57.

⁷⁰ *Focht v. Focht*, 32 A.3d 668, 674 (Pa. 2011).

⁷¹ *Marsh v. Marsh*, 437 S.E.2d 34, 35 (S.C. 1993).

⁷² *Id.*

⁷³ *Newborn v. Newborn*, 754 A.2d 476, 489 (Md. Ct. Spec. App. 2000).

⁷⁴ TURNER, *supra* note 41, § 6:56.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See, e.g., Platek v. Platek*, 454 A.2d 1059, 1061 (Pa. Super. Ct. 1982).

⁷⁸ *Marsh v. Marsh*, 437 S.E.2d 34, 36 (S.C. 1993).

spouse.⁷⁹ The court "may, and in many cases probably should, award the proceeds entirely to the injured spouse."⁸⁰

Jurisdictions applying the all property rule universally apply this approach to facilitate later equitable distribution by the court.⁸¹ In dual classification property states, where legislatures have tried to limit court discretion on the division of property by establishing statutory classifications of separate and marital property, the mechanistic approach is the minority rule.⁸²

D. Personal Injury Classification in Pennsylvania: Statutes

Pennsylvania promulgated its modern Divorce Code in 1980, making it one of the last states to adopt legislation permitting no-fault divorce.⁸³ Chapter 35 of the Domestic Relations Code is devoted to property rights during divorce.⁸⁴ Two sequential sections of this chapter are relevant to the treatment of personal injury awards in divorce.

i. Title 23 Pennsylvania Consolidated Statutes Section 3501

The Definitions section of Chapter 35 defines marital property as "all property acquired by either party during the marriage and the increase in value" during the marriage of certain non-marital property.⁸⁵ The Divorce Code does not define "property," however.⁸⁶ This section also provides eight exceptions to marital property.⁸⁷

⁷⁹ *Id.*

⁸⁰ *Id.*; see also Richardson v. Richardson, 407 N.W. 2d 231, 234-35 (Wis. 1987) (adopting a presumption that the treatment of personal injury awards during divorce would deviate from the presumption of equal distribution established by statute).

⁸¹ See TURNER, *supra* note 41, § 6:56.

⁸² *Id.*

⁸³ McFadden, *supra* note 35, at 104.

⁸⁴ See 23 PA. CONS. STAT. §§ 3501-3508 (2008).

⁸⁵ *Id.* § 3501(a).

⁸⁶ McFadden, *supra* note 35, at 105.

⁸⁷ tit. 23, § 3501(a)(1)-(a)(8).

An exception exists for certain veterans' benefits, including disability benefits.⁸⁸ This narrow exception replaced a much broader exception proposed in an amendment to the original divorce bill in the Pennsylvania House of Representatives.⁸⁹ This amendment provided that:

Property acquired with . . . funds derived from compensation, pensions, income, or other payments received as payment for the loss or impairment of parts or functions of the body of the party who received the payment. This exclusion includes income and increases in value of the property. The burden of proof shall be on the party claiming the exclusion [P]roperty excluded by this paragraph or any increase in the standard of living [provided by such property] shall not be considered in the distribution of other property or the award of alimony.⁹⁰

Veterans' organizations proposed and supported the amendment.⁹¹ The intent was to exclude from marital property only payments for the loss or impairment of the body, while payments for loss of income were still included in marital property.⁹² However, the overall sponsor of the divorce bill, Representative Scirica, stated, "[t]he problem that I have . . . is that . . . these awards are not simply for a lost limb but maybe they are an award to breadwinner of the family, not just for his support but also for the support of the wife and children."⁹³ Representative Scirica and the amendment's sponsor, Representative Chess, agreed to cooperate and further refine the language of the amendment, which passed the House by a vote of 185 to 0.⁹⁴

⁸⁸ *Id.* § 3501(a)(6).

⁸⁹ H.R. 163-71, 1979 Sess., at 1968-69 (Pa. 1979) [hereinafter HOUSE].

⁹⁰ H.R. 640, 163rd Gen. Assemb., Reg. Sess. (Pa. 1979).

⁹¹ The organizations were the American Legion, Disabled American Veterans, and the War Veterans Council. HOUSE, *supra* note 89, at 1968.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1968-69.

The Pennsylvania Senate, however, deleted the amendment and inserted the current language that survives as section 3501(a)(6).⁹⁵ The senate amendment was offered because the house "amendment was overly broad and . . . would have excluded all sources of income which related to any injury including any payments which were intended to replace loss of wages or to support the injured person's family."⁹⁶

The General Assembly thus came close to enacting the analytic approach through statute to exclude noneconomic compensation from marital property, but was unable to develop satisfactory language to differentiate those economic losses the legislators believed should be included in marital property.⁹⁷

There is still no exception for personal injury awards during marriage,⁹⁸ but there is a provision for "[a]ny payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received."⁹⁹ Neither section 3501 nor any other Pennsylvania statute defines "accrue."¹⁰⁰ The General Assembly added this exception in 1988.¹⁰¹

ii. Title 23 Pennsylvania Consolidated Statutes Section 3502

The next section of Chapter 35 provides Pennsylvania's statute on Equitable Distribution.¹⁰² Section 3502 provides that marital property shall be divided equitably,¹⁰³ and case law makes clear

⁹⁵ Compare 23 PA. CONS. STAT. § 3501(a)(6) (providing the current language), with H.R. 640, *supra* note 90 (showing the bill's language is the same as section 3501(a)(6)).

⁹⁶ S. 164-1, 1980 Sess., at 1365 (Pa. 1980). During debate, Senator O'Pake referred to Representative Schwartz as the sponsor of the House amendment rather than Representative Chess. *Id.*

⁹⁷ See *infra* notes 89-96 and accompanying text.

⁹⁸ See tit 23, § 3501 (showing no exception for personal injury awards).

⁹⁹ *Id.* § 3501(a)(8).

¹⁰⁰ Focht v. Focht, 32 A.3d 668, 671 (Pa. 2011).

¹⁰¹ H.R. 1023, 173rd Gen. Assemb., Reg. Sess. (Pa. 1989).

¹⁰² tit. 23, § 3502.

¹⁰³ *Id.* § 3502(a).

that this does not mean equally.¹⁰⁴ Thirteen factors are provided for the courts to utilize in determining what distribution is equitable, and "[t]he court may consider each marital asset or group of assets independently and apply a different percentage to each."¹⁰⁵ The most relevant factors to personal injury awards are:

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties. . . .

(5) The opportunity of each party for future acquisitions of capital assets and income.

(6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.¹⁰⁶

The court has the responsibility of using these factors to ensure an equitable division of the marital property.¹⁰⁷

E. Personal Injury Classification in Pennsylvania: Cases

The Superior Court of Pennsylvania grappled with the issue of personal injury proceeds and divorce only two years after the promulgation of the 1980 Divorce Code,¹⁰⁸ while the Supreme Court of Pennsylvania did not speak on the issue until 2011.¹⁰⁹ In

¹⁰⁴ *Fratangelo v. Fratangelo*, 520 A.2d 1195, 1198-99 (Pa. Super. Ct. 1987) (holding that a fifty/fifty split used as a starting point before applying the factors rather than first applying the factors "subverted" the statute).

¹⁰⁵ tit. 23, § 3502(a).

¹⁰⁶ *Id.*

¹⁰⁷ *Fratangelo*, 520 A.2d at 1198-99.

¹⁰⁸ *Platek v. Platek*, 454 A.2d 1059, 1061 (Pa. Super. Ct. 1982).

¹⁰⁹ *See Focht v. Focht*, 32 A.3d 668 (Pa. 2011).

the interim, however, there were decisions from both courts on the closely related issues of whether disability pensions and workers' compensation awards were marital property during divorce.¹¹⁰

i. Establishing the Mechanistic Approach: *Platek v. Platek*¹¹¹

The Superior Court first applied the mechanistic approach to personal injury settlements in 1982.¹¹² The appellant, Patricia Platek, received a settlement award for a personal injury.¹¹³ During the divorce, she contended the settlement was her separate property, but the trial court rejected her contention.¹¹⁴ She appealed, arguing that the settlement proceeds were property received in exchange for her good health, which she characterized as "property acquired [before] the marriage."¹¹⁵ The Superior Court rejected that argument, "look[ing] to the everyday, popular meaning of those words"¹¹⁶ to adhere to the statutory requirement that words be construed "according to their common and approved usage."¹¹⁷ The court held that "in everyday speech" health or body parts would not be referred to as property.¹¹⁸

The court also looked to the legislative history of the Divorce Code, observing that the General Assembly considered an amendment to exclude settlement proceeds from marital property, but ultimately decided not to include it in the law.¹¹⁹ There were statements made in the House of Representatives debate indicating that the rejection of this amendment did not mean that the legislature wanted to include settlement proceeds in marital

¹¹⁰ See, e.g., *Drake v. Drake*, 725 A.2d 717, 723 (Pa. 1999); *Pudlish v. Pudlish*, 796 A.2d 346, 347 (Pa. Super. Ct. 2002).

¹¹¹ *Platek v. Platek*, 454 A.2d 1059 (Pa. Super. Ct. 1982).

¹¹² *Id.* at 1062-63.

¹¹³ *Id.* at 1060.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1061.

¹¹⁶ *Id.*

¹¹⁷ 1 PA. CONS. STAT. 1903(a) (1975).

¹¹⁸ *Platek*, 454 A.2d at 1061.

¹¹⁹ *Id.*; see also *supra* notes 89-96 and accompanying text (referencing the legislative history of the Divorce Code).

property, but based on court precedent, these statements made in the debate were not considered in construing the statute.¹²⁰

Pennsylvania had adopted the mechanistic approach for personal injury awards.¹²¹

ii. True Disability Payments Are Not Marital Property: *Ciliberti v. Ciliberti*¹²²

In 1988, the Superior Court of Pennsylvania, in a case of first impression, held that a disability pension was not marital property because it represented a true disability payment:

Such benefits are intended to compensate the employee spouse for lost earning capacity. They are paid in lieu of the earnings which would have been paid to the employee if he or she had been able to work. They replace the future salary or wages which the employee, because of physical or mental disability, will not be able to earn. They are comparable to Workmen's Compensation disability payments. Post-divorce payments intended to compensate for an inability to work are not marital property.¹²³

Without identifying the analytic approach by name, the court applied its logic by looking at the purpose of the disability pension rather than the timing of the award of the disability pension.¹²⁴ The court recognized that retirement pensions were marital property, but the purpose of a disability pension distinguished it from a retirement pension.¹²⁵

¹²⁰ *Platek*, 454 A.2d at 1062 & n.5.

¹²¹ *Id.* at 1061-62.

¹²² *Ciliberti v. Ciliberti*, 542 A.2d 580 (Pa. Super. Ct. 1988).

¹²³ *Id.* at 581-82.

¹²⁴ *See supra* notes 41-42 and accompanying text (providing some of the reasoning of the analytic approach).

¹²⁵ *Ciliberti*, 542 A.2d at 582.

iii. Applying the Analytic Approach to Workers' Compensation
Commutations: *Moore v. Moore*¹²⁶

The Superior Court of Pennsylvania expanded the application of the analytic approach to workers' compensation commutations in 1998.¹²⁷ Applying the logic of *Ciliberti*, the court held that because the spouse receiving the award had suffered partial permanent disability and the payment was in lieu of future earnings,

"[t]he fact that [the] husband received the disability benefit in one lump sum is irrelevant The character of a benefit should not be determined by the manner in which it is paid The benefits . . . were paid in lieu of future earnings and, consequently, do not constitute marital property."¹²⁸

Workers' compensation cases align very closely with personal injury awards for the purpose of equitable distribution.¹²⁹ The court reconciled its decision with *Platek* by stating that disability benefits in personal injury proceeds could be recognized as marital property, "*but only* when they cannot be separated from the remainder of the tort settlement."¹³⁰

iv. The Supreme Court of Pennsylvania Analyzes the Issue: *Drake v. Drake*¹³¹

The Supreme Court of Pennsylvania considered the different approaches to settlements and awards while determining whether a

¹²⁶ *Moore v. Moore*, 710 A.2d 633 (Pa. Super. Ct. 1998).

¹²⁷ *Id.* at 635.

¹²⁸ *Id.*

¹²⁹ See *Murray v. Murray*, 989 A.2d 771, 778-79 & n.6 (Md. Ct. Spec. App. 2010) (stating that the court could find only two states, Colorado and Indiana, that treated tort and workers' compensation awards differently in divorce); see also TURNER, *supra* note 41, § 6:59 ("[C]lassification of worker's compensation proceeds is split along the same lines as state court case law on classification of personal injury proceeds.").

¹³⁰ *Moore*, 710 A.2d at 635 (dictum).

¹³¹ *Drake v. Drake*, 725 A.2d 717 (Pa. 1999).

workers' compensation commutation was marital or separate property.¹³² After rejecting the appellant's argument that disability awards were separate property per se,¹³³ the court considered the analytic, unitary, and mechanistic approaches and noted the majority of jurisdictions considering this issue had selected the analytic approach.¹³⁴ The majority discussed with approval¹³⁵ *In re Marriage of DeRossett*,¹³⁶ an Illinois case that interpreted Illinois' statute and applied the mechanistic approach to find a workers' compensation award was marital property.¹³⁷

The majority examined the Pennsylvania marital property statute and found it "employs a hybrid of the 'mechanistic' and case by case approach."¹³⁸ It specifically considered section 3501(a)(8), the exception from marital property for awards or settlements for causes of action accruing before or after the marriage.¹³⁹ The majority observed that the statute "makes no distinction concerning the purpose of the award or settlement, but posits that it applies equally to all claims or causes of action for personal injury, lost wages, disability or other damage."¹⁴⁰ The purpose of the award was irrelevant and "[w]e look only for the timing of the right to receive it."¹⁴¹ The majority, therefore, rejected the analytic approach and looked only to the statute, "which "does not permit us to look at the purpose of the . . . award."¹⁴²

After determining the award was marital property, the Supreme Court of Pennsylvania next considered how to divide that award during equitable distribution.¹⁴³ The majority noted relevant

¹³² *Id.* at 724-26.

¹³³ *Id.* at 723.

¹³⁴ *Id.* at 724-25.

¹³⁵ *Id.* at 725-26.

¹³⁶ *In re Marriage of DeRossett*, 671 N.E.2d 654 (Ill. 1996).

¹³⁷ *Id.* at 656. The court also noted that personal injury awards were held to be marital property, "including claims for future pain, suffering, and loss of income." *Id.*

¹³⁸ *Drake v. Drake*, 725 A.2d 717, 725 (Pa. 1999).

¹³⁹ *Id.*; 23 PA. CONS. STAT. § 3501(a)(8) (2010).

¹⁴⁰ *Drake*, 725 A.2d at 725.

¹⁴¹ *Id.* at 725-26.

¹⁴² *Id.* at 726.

¹⁴³ *Id.*

factors from the Divorce Code included: " 'age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs' of the parties, and 'the sources of income of both parties, including, but not limited to medical, retirement, insurance or other benefits.' "¹⁴⁴ The injured spouse might receive the entire award during equitable distribution, or there might be reasons, like lost marital income, for the uninjured spouse to receive some portion.¹⁴⁵ The court held that "[t]he [trial] court may consider the purposes of the award and the injured spouse's health, employability and injury to equitably divide marital property, in accordance with the mandates of Section 3502."¹⁴⁶

Justice Castille, joined by Justice Zappala, dissented.¹⁴⁷ The justices argued for adopting the majority analytic approach, noting that "[a] spouse has no right to the other spouse's earnings after the marriage ends; therefore, the spouse should have no right to a[n] . . . award that is intended as a substitute for those future earnings."¹⁴⁸ The dissent cited the Superior Court of Pennsylvania's decision in *Moore* with approval¹⁴⁹ because that court looked at the commutation as the payment of future earnings, which was outside the scope of marital property.¹⁵⁰

The decision in *Drake* was both "inconsistent with trends in other states and with lower court decisions in Pennsylvania," which applied the analytic approach.¹⁵¹ Bound by statute, however, the Supreme Court of Pennsylvania followed the mechanistic approach and left equitable considerations solely to the equitable distribution process.¹⁵²

¹⁴⁴ *Id.* (quoting tit. 23, § 3502(a)(3), (a)(6)).

¹⁴⁵ *Id.*

¹⁴⁶ *Drake*, 725 A.2d at 726.

¹⁴⁷ *Id.* at 727-28 (Castille, J., dissenting).

¹⁴⁸ *Id.* at 728.

¹⁴⁹ *Id.*

¹⁵⁰ *Moore v. Moore*, 710 A.2d 633, 635 (Pa. Super. Ct. 1998).

¹⁵¹ James T. Baldwin, *Drake v. Drake: The Supreme Court of Pennsylvania Classifies Workers' Compensation Benefits as Marital Property Subject to Equitable Distribution upon Divorce*, 9 WIDENER J. PUB. L. 803, 812-13 (2000).

¹⁵² See *supra* notes 115-27 and accompanying text.

v. The Superior Court Takes a Detour: *Pudlish v. Pudlish*¹⁵³

In 2002, the Superior Court of Pennsylvania held that a workers' compensation award accrued on the date of the judgment or settlement, rather than the date of the injury, because it was on the date of judgment or settlement that the individual had an enforceable right to the proceeds.¹⁵⁴ The court based this decision on its interpretation of *Drake*.¹⁵⁵ Rather than moving Pennsylvania toward the majority rule analytic approach, this ruling moved Pennsylvania into a unique position, even among the minority of jurisdictions following the mechanistic approach.¹⁵⁶ As the appellee argued, this approach encouraged a divorcing claimant to delay settlement until after separation in order to have it classified as separate property.¹⁵⁷

vi. The Supreme Court of Pennsylvania Retains the Mechanistic Approach: *Focht v. Focht*¹⁵⁸

In 2011, the Supreme Court of Pennsylvania finally spoke on the issue of personal injury proceeds and divorce, confirming the mechanistic approach, as implied by its holding in *Drake* regarding workers' compensation commutations.¹⁵⁹ The court did not analyze the different approaches followed by different jurisdictions, as it

¹⁵³ *Pudlish v. Pudlish*, 796 A.2d 346 (Pa. Super. Ct. 2002), *overruled by* *Focht v. Focht*, 32 A.3d 668, 674-75 (Pa. 2011).

¹⁵⁴ *Id.* at 349.

¹⁵⁵ *Id.*

¹⁵⁶ *See* TURNER, *supra* note 41, § 6:56 n.6 ("No other state has adopted or even given serious consideration to the Pennsylvania rule."). Most attorneys within Pennsylvania continued to think the date of the accident was the relevant date after the *Pudlish* decision. DAVID L. LADOW & JEREMY MENKOWITZ, RECENT DEVELOPMENTS IN FAMILY LAW EQUITABLE DISTRIBUTION UPDATE 25 (2003).

¹⁵⁷ *Pudlish*, 796 A.2d at 349; *see also* TURNER, *supra* note 41, § 6:56 n.6 (discussing the negative aspects of the *Pudlish* rule).

¹⁵⁸ *Focht v. Focht*, 32 A.3d 668 (Pa. 2011).

¹⁵⁹ *Id.* at 674.

had in *Drake*,¹⁶⁰ but focused solely on the statutory interpretation of the section 3501 definition of marital property.¹⁶¹

The court's statutory analysis began with the presumption that all property acquired during the marriage was marital property, unless an enumerated exception applied.¹⁶² It then examined the exception in section 3501(a)(8) for settlements and awards for causes of action that accrued before the marriage or after the final separation.¹⁶³ The court focused narrowly on the meaning of accrued, holding that a personal injury action accrued "only when one has the right to institute a suit," not when a judgment or settlement is obtained.¹⁶⁴

The court then looked to its decision in *Drake*, as well as the Superior Court of Pennsylvania decision in *Nuhfer v. Nuhfer*,¹⁶⁵ to determine that the proceeds from a cause of action that accrued during marriage were marital property.¹⁶⁶ However, the court did not directly address an important issue.¹⁶⁷ In *Drake*, the spouse received the workers' compensation commutation during the marriage,¹⁶⁸ meaning the spouse had already converted his claim to property.¹⁶⁹ *Nuhfer* dealt with a cause of action regarding the disputed ownership of a winning lottery ticket, and an ownership interest in a lottery ticket is property.¹⁷⁰ Neither precedent, therefore, addressed the common law principle that a negligence cause of action for personal injury *is not property*.¹⁷¹ The court

¹⁶⁰ See *supra* note 134 and accompanying text (discussing the court's analysis of the different approaches).

¹⁶¹ *Focht*, 32 A.3d at 672-73.

¹⁶² *Id.* at 670-71.

¹⁶³ *Id.* at 671.

¹⁶⁴ *Id.* (quoting *Bell v. Brady*, 31 A.2d 547, 549 (Pa. 1943)).

¹⁶⁵ *Nuhfer v. Nuhfer*, 599 A.2d 1348 (Pa. Super. Ct. 1991).

¹⁶⁶ *Focht*, 32 A.3d at 673.

¹⁶⁷ See *infra* text accompanying notes 168-73.

¹⁶⁸ *Drake v. Drake*, 725 A.2d 717, 719 (Pa. 1999).

¹⁶⁹ *Id.* at 723.

¹⁷⁰ *Nuhfer*, 599 A.2d at 1348-49.

¹⁷¹ See *Amato v. Amato*, 434 A.2d 639, 642 (N.J. Super. Ct. App. Div. 1981), stating:

In our view of the matter an inchoate personal injury claim, unlike some other rights to sue, is not a property right. . . . The right has none of the

merely accepted the *Nuhfer* holding that the time of liquidation was no longer relevant after the 1988 amendment to the Divorce Code, while assuming that an inchoate claim for personal injury was property.¹⁷² The court reversed the Superior Court of Pennsylvania and *Pudlish* was overturned.¹⁷³

III. PROBLEMS OF THE MECHANISTIC APPROACH

The mechanistic approach has become the minority approach because it is more likely to lead to unfair outcomes and increase the complexity of the equitable distribution process by including in marital property portions of personal injury awards that should not be considered marital property.¹⁷⁴

A. The Policy Problems of the Mechanistic Approach

The mechanistic approach gets its name because the court applies the state's marital property law strictly, or mechanically.¹⁷⁵ The court considers only the timing of the award when classifying property.¹⁷⁶ Fairness is left to the equitable distribution process.¹⁷⁷

attributes of property. Thus, the right cannot be sold or assigned prior to judgment and cannot be transferred from an injured debtor to his trustee in bankruptcy in the absence of a state statute which would permit such transfer.

Id.; see also *Sensenig v. Pa. R. Co.*, 78 A. 91, 92 (Pa. 1910) ("Such a right does not seem to us to be a property right, capable of assignment, prior to liquidation; but similar, rather, to an action for malicious prosecution, or for the abuse of legal process, which actions are not assignable.").

¹⁷² *Focht v. Focht*, 32 A.3d 668, 673-74 (Pa. 2011). The court and the parties focused on *Pudlish*, other Superior Court of Pennsylvania cases, and the effect of the 1988 amendment to the Divorce Code. *Id.* at 673-75; see also *supra* note 99 and accompanying text (providing the relevant portion of the 1988 amendment). Justin Focht's Superior Court brief made this argument more effectively. Brief for Appellant, *supra* note 1, at 13-14.

¹⁷³ *Focht*, 32 A.3d at 674-75.

¹⁷⁴ TURNER, *supra* note 41, § 6:56.

¹⁷⁵ *Id.*

¹⁷⁶ *Focht*, 32 A.3d at 674.

¹⁷⁷ See *supra* notes 143-46 and accompanying text (providing the guidelines given by the Supreme Court of Pennsylvania in *Drake* for equitable distribution after applying the mechanistic approach).

However, this emphasis on equitable distribution runs counter to the basic policy behind legislatures' selection of the dual classification system with statutorily defined marital and separate property: limiting the discretion of courts in dividing property at divorce.¹⁷⁸ Had legislatures wanted the courts to have broad discretion to handle property division primarily through equitable distribution, they would have selected an all property approach, wherein all property is marital property and equitable distribution is the sole means of dividing property at divorce.¹⁷⁹ By selecting the mechanistic approach, the Pennsylvania courts have followed the letter of the law, but have undercut the policy that underlies the property classification system used in Pennsylvania.

The mechanistic approach initially appears more administrable, since a court need only apply the bright-line timing rule to classify property without trying to ascertain the purpose of the award or dividing it between economic and noneconomic components.¹⁸⁰ But, by making personal injury proceeds marital property solely based on timing, the mechanistic approach complicates equitable distribution. The trial court must consider the many factors of equitable distribution and apply them to the personal injury proceeds, while simultaneously considering the conditions of the spouses, the amount of other property, and many other variables, before trying to tailor a division that is equitable.¹⁸¹ While all equitable distribution decisions require the court to consider these factors, the injection of a large award or settlement based on a single spouse's pain and suffering or disfigurement complicates this analysis.

The mechanistic approach also increases the likelihood of an equitable distribution that is disproportionately larger for one of

¹⁷⁸ TURNER, *supra* note 41, § 6:56.

¹⁷⁹ *Id.*

¹⁸⁰ *See, e.g.*, Thomas v. Thomas, 408 S.E.2d 596, 598 (Va. Ct. App. 1991).

¹⁸¹ Drake v. Drake, 725 A.2d 717, 726 (Pa. 1999). *See generally* 23 PA. CONS. STAT. § 3502(a) (2010) (discussing the guidelines for a trial court to equitably divide marital property).

the parties,¹⁸² which undermines consistency, and thereby discourages negotiated settlements.¹⁸³

Another weakness of the mechanistic approach is that it is a minority rule¹⁸⁴ and the trend in the law is against it,¹⁸⁵ a trend that has been recognizable for a quarter of a century.¹⁸⁶ The majority of dual classification equitable distribution states and all but one of the community property states now follow the analytic approach.¹⁸⁷ States continue to abandon the mechanistic approach to move to the analytic approach.¹⁸⁸ This is consistent with the broad trend toward defining marital property more narrowly to obtain greater uniformity in equitable distributions.¹⁸⁹

B. Inequity of the Mechanistic Approach

The mechanistic approach considers only the timing of the award, not the underlying purpose of the proceeds,¹⁹⁰ which is unfair. The mechanistic approach considers proceeds for a spouse's highly personal pain and suffering or disfigurement as marital property.¹⁹¹ Perhaps even more bizarrely, so are proceeds to provide for the spouse's lost wages and medical expenses *after* the dissolution of the marriage.¹⁹² The mechanistic approach then

¹⁸² See *Drake*, 725 A.2d at 726 (stating that a court might properly award an entire workers' compensation commutation to one spouse). In such cases, the equitable distribution would tend to be much larger for the recipient spouse.

¹⁸³ TURNER, *supra* note 19, § 1:5.

¹⁸⁴ Wine, *supra* note 16, at 158.

¹⁸⁵ See *Newborn v. Newborn*, 754 A.2d 476, 490 (Md. Ct. Spec. App. 2000) (selecting the analytic approach and noting that "the analytical approach . . . appears currently to be a rule that is in its ascendancy").

¹⁸⁶ See Lynn F. Hendon, Note, *Classifications of Personal Injury Awards in Divorce Actions*, 27 J. FAM. L. 453, 473 (1989) (identifying the existence of the trend to the analytic approach in the late 1980s).

¹⁸⁷ Wine, *supra* note 16, at 158.

¹⁸⁸ See *Newborn*, 754 A.2d at 490 (noting the apparent ascendancy of the analytic approach).

¹⁸⁹ TURNER, *supra* note 19, § 1:5.

¹⁹⁰ *Focht v. Focht*, 32 A.3d 668, 674 (Pa. 2011).

¹⁹¹ See *Landwehr v. Landwehr*, 545 A.2d 738, 742 (N.J. 1988) (per curiam) (quoting *Amato v. Amato*, 434 A.2d 639, 641 (N.J. Super. Ct. App. Div. 1981)) (rejecting the mechanistic approach as inequitable).

¹⁹² See *id.* at 741.

requires that the injured spouse compete in equitable distribution to retain these proceeds.¹⁹³ The mechanistic approach "literally heap[s] insult upon injury."¹⁹⁴

C. *Equitable Distribution Does Not Provide a Solution*

The Supreme Court of Pennsylvania in *Drake* said that equitable distribution offered the method by which the trial court could address the inequities created by the mechanistic approach.¹⁹⁵ Courts in other jurisdictions have offered similar conclusions.¹⁹⁶ Experience shows that equitable distribution fails to fully address the deficiencies of the mechanistic approach.¹⁹⁷

i. Case Examples

Focht again serves to illustrate the inequity of the mechanistic approach because equitable distribution was not utilized to remedy the deficiencies of the mechanistic approach. A portion of Justin Focht's settlement proceeds, \$60,206, was the only "marital property" remaining.¹⁹⁸ Of the total award of \$410,000, only \$27,731, or 7%, could have related to lost wages during marriage,¹⁹⁹ and only this portion would have been marital property under the analytic approach.²⁰⁰ The court nevertheless granted Tracy Focht 25% of the total amount, or \$15,589, which was over 56% percent of the lost wages.²⁰¹ This was despite the fact that Justin Focht contributed *all* the marital property, that property was received in payment for *his* injury, and *he* would need the property to support him after his ability to work ended prematurely due to his injury.²⁰²

¹⁹³ *Drake v. Drake*, 725 A.2d 717, 726 (Pa. 1999).

¹⁹⁴ *Landwehr*, 545 A.2d at 743 (quoting *Amato*, 434 A.2d at 643).

¹⁹⁵ *Drake*, 725 A.2d at 726.

¹⁹⁶ See, e.g., *Marsh v. Marsh*, 437 S.E.2d 34, 36 (S.C. 1993).

¹⁹⁷ See *infra* Part III.C.i. (providing case examples).

¹⁹⁸ *Focht v. Focht*, 32 A.3d 668, 669-70 (Pa. 2011).

¹⁹⁹ Brief for Appellant, *supra* note 1, at 11.

²⁰⁰ *Weisfeld v. Weisfeld*, 545 So.2d 1341, 1345 (Fla. 1989).

²⁰¹ *Focht*, 32 A.3d at 669-70.

²⁰² See *supra* notes 2-7 and accompanying text.

In *Kozich v. Kozich*,²⁰³ the husband had received a tort settlement of \$905,000 for an electrical accident that led to the amputation of both arms.²⁰⁴ After his wife initiated divorce proceedings three years after the accident, the court granted her \$320,000—more than one-third of the settlement.²⁰⁵ The Superior Court of Pennsylvania devoted two short paragraphs to the issue of this large distribution to the wife, concluding that because the trial court considered the statutory factors, there was no abuse of discretion.²⁰⁶

Even where a trial court was willing to grant a large percentage of the distribution to the recipient of the settlement, as in *Focht* and *Kozich*, the other spouse still received a disproportionately large amount of the settlement to which the non-injured spouse had no equitable claim.²⁰⁷ Equitable distribution has not and does not provide a consistent means to avoid injustice when applying the mechanistic approach.

ii. Marital Fault

A court may grant alimony if it finds it necessary.²⁰⁸ Through alimony, a former spouse may be entitled to receive part of the future income of a spouse.²⁰⁹ Marital fault is a factor in both the decision to award alimony and the amount and duration of alimony.²¹⁰ Marital fault is, however, not a factor in equitable distribution.²¹¹ Nevertheless, through the equitable distribution of a personal injury award for lost future wages, a spouse may receive part of the other spouse's future earnings potential that the non-injured spouse may not have been entitled due to marital

²⁰³ *Kozich v. Kozich*, 580 A.2d 390 (Pa. Super. Ct. 1990).

²⁰⁴ *Id.* at 391, 393.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 393.

²⁰⁷ *See supra* notes 198-206 and accompanying text.

²⁰⁸ 23 PA. CONS. STAT. § 3701(a) (2010).

²⁰⁹ *See id.*

²¹⁰ *Id.* § 3701(b)(14).

²¹¹ *See id.* § 3502(a)(1)-(11) (showing marital fault is not listed as a factor in equitable distribution).

misconduct.²¹² This frustrates the intent of the legislature, as expressed in the Divorce Code.

iii. Standard of Review for Appeals

The standard of appellate review for equitable distribution is abuse of discretion, which enhances the deficiencies of using equitable distribution as the method to address the issue of personal injury settlements in divorce.²¹³ There is less chance of righting an unfair equitable distribution under the minimal review provided by this highly deferential standard.²¹⁴ Property classification, conversely, is a matter of statutory interpretation and, therefore, a question of law subject to de novo review,²¹⁵ ensuring a more meaningful appellate review capable of correcting issues at the trial court.²¹⁶

D. Capriciousness of the Mechanistic Approach

The mechanistic approach looks solely at when the right to an award accrued.²¹⁷ For torts like malpractice, the cause of action may accrue well after the tortious activity because the cause of action accrues only when the plaintiff has actual or constructive

²¹² See *Crawford v. Crawford*, 633 A.2d 155, 159 (Pa. Super Ct. 1993) (citing *Roach v. Roach*, 487 A.2d 27, 28 (Pa. Super. Ct. 1985) ("A dependent spouse is entitled to support until it is proven that the conduct of the dependent spouse constitutes grounds for a fault divorce.").

²¹³ *Anzalone v. Anzalone*, 835 A.2d 773, 780 (Pa. Super. Ct. 2003) (quoting *Viles v. Viles*, 610 A.2d 988, 990 (Pa. Super. Ct. 1992) (quoting *Murphy v. Murphy*, 599 A.2d 647, 653 (Pa. Super. Ct. 1991)).

²¹⁴ See *id.* (quoting *Viles*, 610 A.2d at 990) (stating that appellate courts "are guided by the fact that trial courts have broad equitable powers" and the court "will find an abuse of discretion only if the trial court misapplied the laws or failed to follow proper legal procedures").

²¹⁵ *Focht v. Focht*, 32 A.3d 668, 670 (Pa. 2011).

²¹⁶ *Commonwealth v. Virnelson*, 243 A.2d 464, 469 (Pa. Super. Ct. 1968) ("De novo review entails, as the term suggests, full consideration of the case anew. The reviewing body is in effect substituted for the prior decision maker and redecides the case.").

²¹⁷ See *supra* note 190 and accompanying text.

knowledge of the defendant's negligent conduct.²¹⁸ In *Diament v. Diament*,²¹⁹ a woman underwent psychological therapy for more than four years prior to the final separation, as well as post-separation.²²⁰ She later initiated a malpractice action and received a settlement.²²¹ The husband continued to pay the therapy expenses even after the final separation.²²² Nevertheless, the court held the malpractice settlement to be the separate property of the wife because the wife became aware of the malpractice only after the final separation.²²³ Had the wife become aware of the malpractice before the final separation, however, the proceeds would have been marital property in their entirety, even if the therapy had begun prior to the marriage and she had paid for all the therapy herself.

E. No Judicial Solution Is Likely

The Supreme Court of Pennsylvania is unlikely to reform how Pennsylvania addresses this issue based on precedent and Pennsylvania's rules of statutory construction.

i. Clear Pennsylvania Court Precedent

There is now clear Supreme Court of Pennsylvania precedent on this issue. The court's decision in *Drake* on the related matter of workers' compensation commutations considered, and expressly rejected, the majority analytic approach in favor of the mechanistic approach.²²⁴ The court made this decision based on its statutory interpretation of the Divorce Code.²²⁵ *Focht* applied this statutory interpretation to personal injury awards.²²⁶ Under *stare decisis*,

²¹⁸ *Diament v. Diament*, 816 A.2d 256, 266 (Pa. Super. Ct. 2003) (quoting *Scherbner v. Abbott Labs., Inc.*, 24 Pa. D. & C. 4th 108, 111 (Pa. Ct. C.P. Chester Cnty. 1995)).

²¹⁹ *Diament v. Diament*, 816 A.2d 256 (Pa. Super. Ct. 2003).

²²⁰ *Id.* at 265.

²²¹ *Id.*

²²² Brief for Appellant at 24, *Diament v. Diament*, 816 A.2d 256, 2001 WL 34748566 (Pa. Super. Ct. 2003).

²²³ *Diament*, 816 A.2d at 267.

²²⁴ See *supra* notes 134-42 and accompanying text.

²²⁵ See *id.*

²²⁶ See *supra* notes 159-64 and accompanying text.

trial courts and the Superior Court of Pennsylvania are required to follow these decisions.²²⁷ The Supreme Court of Pennsylvania may reverse itself,²²⁸ but is unlikely to do so.²²⁹

ii. Pennsylvania Rules of Statutory Interpretation

In Pennsylvania, the rules of statutory construction are provided by statute²³⁰ and common law. Judicial interpretations of the statute relate back to the effective date of the statute.²³¹ Failure of the General Assembly to change a statutory provision which had been judicially interpreted creates the presumption that the judicial interpretation is in accord with the legislative intent.²³² Legislative intent is controlling, but "when the words of a statute are clear and free from all ambiguity, the letter is not to be disregarded under the pretext of pursuing its spirit."²³³ "Words and phrases shall be construed . . . according to their common and approved usage."²³⁴ Only if these rules yield a result that varies from "the manifest intent of the General Assembly" may a court vary from the rules.²³⁵ Thus, the plain language of the statute is applied, and this constrains an alternate finding by the Supreme Court of Pennsylvania on the issue of personal injury awards in divorce.

In *Amato v. Amato*,²³⁶ the Superior Court of New Jersey stated: "The literal language of the statute ought not limit our inquiry to the time when the compensation is received. The

²²⁷ Commonwealth v. Tilghman, 673 A.2d 898, 903 (Pa. 1996).

²²⁸ Stilp v. Commonwealth, 905 A.2d 918, 967 (Pa. 2006) ("While stare decisis serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error.").

²²⁹ *Id.* ("[R]ecogniz[ing] the importance of reliance on settled jurisprudence when asked to overturn precedent.").

²³⁰ See 1 PA. CONS. STAT. §§ 1901-1910 (1975).

²³¹ Commonwealth v. Eller, 807 A.2d 838, 844 (Pa. 2002).

²³² Hunt v. Pa. State Police, 983 A.2d 627, 637 (Pa. 2009).

²³³ tit. 1, § 1921(b).

²³⁴ *Id.* § 1903(a).

²³⁵ *Id.* § 1901.

²³⁶ *Amato v. Amato*, 434 A.2d 639 (N.J. Super. Ct. App. Div. 1981).

purpose for which the property is received should control.' ²³⁷ A court in Pennsylvania could not reach a similar conclusion unless the court was convinced the literal language of the statute resulted in a conclusion that violated the manifest intent of the legislature, ²³⁸ a high hurdle to overcome to change the treatment of personal injury awards during divorce.

IV. SOLUTION

The analytic approach is the best of the three approaches for addressing the distribution of personal injury proceeds during divorce. Pennsylvania should move to the analytic approach through an amendment to the existing Divorce Code. The deficiencies of the mechanistic approach have been considered. In contrast, the analytic approach, implemented through statute, offers many advantages and few drawbacks.

A. The Superiority of the Analytic Approach

i. The Better Policy of the Analytic Approach

The policy supporting the analytic approach is better in several important ways. First, it furthers the dual classification system selected by the Pennsylvania General Assembly by addressing the ownership of personal injury proceeds by rule, rather than through equitable distribution. It therefore limits trial court discretion in a manner consistent with the dual classification system in other areas of property.

Second, the analytic approach is consistent with the underlying policy of equitable distribution: marriage is a partnership and both spouses contribute to the economic success of the marriage. ²³⁹ Equitable distribution statutes exclude from marital property those properties that the marriage did not

²³⁷ *Id.* at 643 (quoting *Harmon v. Harmon*, 391 A.2d 552, 556 (N.J. Super. Ct. App. Div. 1978) (Botter, J., concurring)).

²³⁸ tit. 1, § 1901.

²³⁹ Bell, *supra* note 30, at 124-25.

contribute to, such as bequests and gifts.²⁴⁰ Like an inheritance or a gift, the marital partnership contributes nothing to creating a cause of action for personal injury.²⁴¹ Therefore, the proceeds from these causes of action should likewise be excluded from marital property, like bequests and gifts.²⁴²

Third, the analytic approach makes equitable distribution more administrable. Trial courts face situations where the *only* asset in a marriage is the personal injury proceeds of one spouse.²⁴³ The court must then *equitably distribute* this one asset between the injured spouse and the uninjured spouse. The Supreme Court of Pennsylvania has indicated that distributing the entire award to the injured spouse might be appropriate "assuming" the factors "supported this determination."²⁴⁴ But, a trial court may not assume. The court must perform an arduous analysis that adds difficulty and needless complexity to the trial court's duty. By excluding proceeds that are so intimately tied to one spouse and which lead to divisions that may (and should) disproportionately go to the injured spouse, the analytic approach simplifies the trial court's application of the equitable distribution factors by limiting them to more traditional and appropriate areas of marital property.

Additionally, promoting consistency in equitable distribution encourages property settlements, which further conserves judicial resources.²⁴⁵ Since the establishment of equitable distribution systems, there has been a trend for legislatures to increase the exclusions from marital property.²⁴⁶ This leads to divisions of marital property that are more even and so promotes property

²⁴⁰ *Id.* at 126; *see, e.g.*, 23 PA. CONS. STAT. § 3502 (2010).

²⁴¹ *Parde v. Parde*, 602 N.W.2d 657, 663 (Neb. 1999) ("Compensation for purely personal losses is not in any sense a product of marital efforts.").

²⁴² *See Landwehr v. Landwehr*, 545 A.2d 738, 743 (N.J. 1988) (per curiam) ("One cannot fail to believe that at the time of the enactment of the [law] if personal injury claims like [the appellant]'s had been brought to the attention of the Legislature, it would have exempted them together with gifts and bequests from equitable distribution.").

²⁴³ *See, e.g.*, *Focht v. Focht*, 32 A.3d 668, 674 (Pa. 2011).

²⁴⁴ *Drake v. Drake*, 725 A.2d 717, 726 (Pa. 1999).

²⁴⁵ TURNER, *supra* note 19, § 1:5.

²⁴⁶ *Id.*

settlements.²⁴⁷ Pennsylvania has participated in this trend, expanding the definition of separate property since the Divorce Code established equitable distribution.²⁴⁸

Furthermore, the analytic approach is consistent with traditional views of property. Proponents of the mechanistic approach support their position by denying the good health of a spouse is property.²⁴⁹ While this position may be valid, adopting the analytic approach by statute makes this argument irrelevant, as the statute would exclude the *proceeds* from the personal injury claim, which are undeniably property, from marital property. Proponents of the mechanistic approach are inconsistent because the mechanistic approach treats a cause of action for personal injury as property,²⁵⁰ which conflicts with common law.²⁵¹ Adopting the analytic approach eliminates this conflict and maintains common law understandings of property. Finally, the analytic approach is both the majority rule²⁵² and the trend in the law.²⁵³

ii. The Analytic Approach Is More Equitable

The analytic approach has become the majority rule because it is fair. Most fundamentally, the analytic approach recognizes that:

Nothing is more personal than the entirely subjective sensations of agonizing pain, mental anguish, embarrassment because of scarring or disfigurement, and

²⁴⁷ *Id.*

²⁴⁸ See Act of February 12, 1988, P.L. 66, Act 1988-13 (amending the Divorce Code by excluding from marital property the proceeds for causes of actions accruing before the marriage or after final separation).

²⁴⁹ Platek v. Platek, 454 A.2d 1059, 1061 (Pa. Super. Ct. 1982).

²⁵⁰ Focht v. Focht, 32 A.3d 668, 674 (Pa. 2011).

²⁵¹ See Amato v. Amato, 434 A.2d 639, 643 (N.J. Super. Ct. App. Div. 1981); Sensenig v. Pa. R. Co., 78 A. 91, 92 (Pa. 1910).

²⁵² Kemper, *supra* note 15, at 1. Of community property states, all but California follow the analytic approach. Wine, *supra* note 16, at 158.

²⁵³ See Newborn v. Newborn, 754 A.2d 476, 490 (Md. Ct. Spec. App. 2000) (selecting the analytic approach and noting that "the analytical approach . . . appears currently to be a rule that is in its ascendancy").

outrage attending severe bodily injury. . . . Equally personal are the effects of even mild or moderately severe injury. None of these, including the frustrations of diminution or loss of normal body functions or movements, can be sensed, or need they be borne, by anyone but the injured spouse. Why, then, should the law, seeking to be equitable, coin these factors into money to even partially benefit the uninjured and estranged spouse? In such case the law would literally heap insult upon injury.²⁵⁴

The analytic approach preserves the proceeds for the injured spouse, since that individual incurred the loss.²⁵⁵

The analytic approach preserves the injured spouse's proceeds to provide for that spouse's living and medical expenses. Allowing the injured spouse to retain those assets that are needed for that spouse's living and medical care, and for which the proceeds were originally given, is much more fair than giving the proceeds to the injured spouse's estranged partner.

iii. Concerns About the Analytic Approach

The analytical approach does have some less desirable features. First, it is possible that the injured spouse may be the primary supporter of the family and the future lost wages of that spouse may be the only potential support of the uninjured spouse. Defining the personal injury proceeds as separate property leaves no resources to divide in equitable distribution to support the uninjured spouse; this concern was a significant reason why the original Divorce Code in 1980 did not include a marital property exception for personal injury proceeds.²⁵⁶

²⁵⁴ *Landwehr v. Landwehr*, 545 A.2d 738, 742-43 (N.J. 1988) (per curiam) (quoting *Amato*, 434 A.2d at 643).

²⁵⁵ TURNER, *supra* note 41, § 6:55.

²⁵⁶ See *supra* note 96 and accompanying text (explaining that this concern led the Pennsylvania Senate to change the language of the bill to limit protection to only certain veterans' benefits).

This concern, however, is addressed with three points. First, unlike the rejected amendment to the 1980 bill, the current proposed amendment includes within marital property the proceeds both for lost wages during the period of the marriage and for expenses paid during the marriage.²⁵⁷ Second, the prevalence of two-income homes makes the need for equitable distribution less critical now than it was when marriages often consisted of a single breadwinner and a homemaker who had limited economic options after divorce.²⁵⁸ Finally, alimony continues to be an option to provide support for the non-injured spouse, with the amount and duration flexible at the discretion of the court.²⁵⁹

The second challenge is that the court must ascertain the purpose of the personal injury proceeds, relating them to the underlying loss in order to classify them properly.²⁶⁰ This is an easy process when a judge or jury has classified an award, or when both spouses have agreed to a settlement where the proceeds are classified.²⁶¹ When the proceeds are unclassified, the court must make this determination.²⁶² However, trial courts routinely perform this type of analysis while implementing equitable distribution.²⁶³ The party claiming the exception from marital property bears the burden of proof and will assist the court in its analysis.²⁶⁴

Finally, there is the potential for increased appeals, as the property classification of personal injury proceeds would be a matter of law subject to de novo review, rather than addressed through a discretionary equitable distribution decision.²⁶⁵ However, a well-written statute will preclude many appeals. Further, as appellate courts interpret this law and create precedent,

²⁵⁷ See *infra* Part IV.C. (outlining the proposed language for an amendment to the Divorce Code).

²⁵⁸ TURNER, *supra* note 19, § 1:5.

²⁵⁹ See 23 PA. CONS. STAT. § 3701(a) (2010).

²⁶⁰ *Newborn v. Newborn*, 754 A.2d 476, 492 (Md. Ct. Spec. App. 2000) (noting that the determination is even more difficult in instances with lump sum awards or when significant time had passed since the claim was settled).

²⁶¹ TURNER, *supra* note 41, § 6:55.

²⁶² *Murray v. Murray*, 989 A.2d 771, 779 (Md. Ct. Spec. App. 2010).

²⁶³ *Landwehr v. Landwehr*, 545 A.2d 738, 744 (N.J. 1988) (*per curiam*).

²⁶⁴ *Parde v. Parde*, 602 N.W.2d 657, 663 (Neb. 1999).

²⁶⁵ *Focht v. Focht*, 32 A.3d 668, 670 (Pa. 2011).

the volume of appeals will diminish.²⁶⁶ There is extensive persuasive authority from which Pennsylvania courts can draw because the analytic approach is the majority rule.²⁶⁷

B. Implementing the Solution

For the reasons described, there is little likelihood that Pennsylvania will adopt the majority analytical approach judicially.²⁶⁸ Pennsylvania should, therefore, follow the examples of other states and replace the mechanistic approach through legislation that enacts the analytic approach in order to obtain the desirable features of the analytic approach.²⁶⁹

i. Examples from Other States

1. Arkansas

Arkansas courts applied the mechanistic approach for personal injury awards during divorce based on the presumption that all property acquired by either spouse during marriage was marital property, unless expressly exempted by Arkansas' marital property statute.²⁷⁰ In 1987, the legislature expanded the exemptions from marital property, including some aspects of personal injury claims.²⁷¹ The new law provided an exception for benefits received

²⁶⁶ Cf. McFadden, *supra* note 35, at 104 (discussing the implementation of the Pennsylvania Divorce Code in 1980 when no guidance from appellate decisions was available).

²⁶⁷ See, e.g., Kemper, *supra* note 15; TURNER, *supra* note 41, § 6:55 (providing authority for many different aspects of the analytic approach).

²⁶⁸ Baldwin, *supra* note 151, at 812; see also *supra* notes 224-38 and accompanying text.

²⁶⁹ Arkansas, Virginia, and five of the nine community property states replaced the mechanistic approach through legislation; Ohio also passed legislation implementing the analytic approach, but Ohio courts had already begun applying this approach. See Kemper, *supra* note 15, § 5(b); George, *supra* note 20, at 580-83.

²⁷⁰ Liles v. Liles, 711 S.W.2d 447, 452 (Ark. 1986) (citing Day v. Day, 663 S.W.2d 719, 722 (Ark. 1984)).

²⁷¹ Bunt v. Bunt, 744 S.W.2d 718, 720 (Ark. 1988).

for personal injury claims for any degree of permanent disability or future medical expenses.²⁷²

Arkansas' statute only moves part way to the analytic approach. The statute does not exclude awards for pain and suffering from marital property, and the treatment of future lost income is ambiguous.²⁷³ Arkansas courts have held that personal injury settlements are not separate property in their entirety²⁷⁴ and subsequently developed a two-prong test to determine whether personal injury awards were excluded from marital property.²⁷⁵ While Arkansas' statute provides some improvement over the mechanistic approach, it does not do enough.

2. *Ohio*

Ohio enacted its statutory provision addressing the treatment of personal injury awards during divorce in 1990.²⁷⁶ The statute codified the analytic approach recently adopted by Ohio courts.²⁷⁷ It specifies that separate property includes "[c]ompensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets."²⁷⁸ The statute faithfully applies the analytic approach.

3. *Virginia*

As in Arkansas, Virginia courts followed the mechanistic approach under the presumption that any property received during marriage, unless expressly exempted by statute, was marital

²⁷² ARK. CODE ANN. § 9-12-315(b)(6) (2012).

²⁷³ *Id.* § 9-12-315.

²⁷⁴ Clayton v. Clayton, 760 S.W.2d 875, 876 (Ark. 1988).

²⁷⁵ Collins v. Collins, 61 S.W.3d 818, 825 (Ark. 2001) (providing the two-prong test that "the claim be for a degree of permanent disability or future medical expenses" and that "the injury must be sustained while on the job or in the consequence of a tortious act").

²⁷⁶ H.R. 514, 118th Gen. Assemb., Reg. Sess. (Ohio 1990).

²⁷⁷ See, e.g., Everhardt v. Everhardt, No. L-86-060, 1987 WL 6197, at *3 (Ohio Ct. App. Feb. 6, 1987) (unpublished).

²⁷⁸ OHIO REV. CODE ANN. § 3105.171(A)(6)(vi) (West 2012).

property.²⁷⁹ Virginia revised its statute in 1990²⁸⁰ to indicate that a court must divide a personal injury award into separate and marital property,²⁸¹ with the marital share being the "part of the total personal injury or . . . recovery attributable to lost wages or medical expenses" not covered by insurance if the lost wages or medical expenses were for the period of the marriage.²⁸² The Virginia courts continue to recognize the presumption in favor of marital property and, therefore, hold that the spouse seeking to have a portion of the recovery treated as separate property bears the burden of proof.²⁸³ Virginia's statute and judicial treatment are very consistent with the analytic approach, classifying those aspects of the recovery that represent a loss to the marital estate—lost wages and unreimbursed medical expenses during the marriage—as marital property.²⁸⁴ By default, those portions of a recovery that are personal to the injured spouse, like pain and suffering and disfigurement, and those that are unrelated to the marital estate, like future lost wages and medical expenses, are all treated as separate property.²⁸⁵

C. Proposal for a Pennsylvania Statute

The adjustment necessary to incorporate the analytic approach in the Pennsylvania Divorce Code is straightforward. Section 3501, Definitions, provides that all property acquired during the marriage is marital property unless an exception included in the section applies.²⁸⁶ The current final exception, section 3501(a)(8) provides: "Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to

²⁷⁹ Thomas v. Thomas, 408 S.E.2d 596, 598 (Va. Ct. App. 1991) (applying the law in effect in July 1988, when the bill for divorce was filed, to hold that an award must be proven as entirely separate property to be excluded from marital property).

²⁸⁰ Kemper, *supra* note 15, § 3(a).

²⁸¹ VA. CODE ANN. § 20-107.3(A) (2012).

²⁸² *Id.* § 20-107.3(H).

²⁸³ Chretien v. Chretien, 670 S.E.2d 45, 48 (Va. Ct. App. 2008).

²⁸⁴ *Id.* at 47-48.

²⁸⁵ *Id.*

²⁸⁶ 23 PA. CONS. STAT. § 3501(a) (2010).

the marriage or after the date of final separation regardless of when the payment was received."²⁸⁷ Adding an additional subsection, section 3501(a)(9), to section 3501 would implement the analytic approach and eliminate the mechanistic approach.

The language required to implement the analytic approach in Pennsylvania is simple. Proposed section 3501(a)(9) would except from marital property:

(9)Any payment received as a result of an award or settlement for any cause of action or claim for the personal injury of a spouse which accrued during to the marriage, regardless of when received, subject to the provisions of section 3509.

A new section in Chapter 35, section 3509, to be called the "Division of personal injury awards accruing during marriage," would provide for further aspects of the analytic approach not appropriate for the Definitions portion of the statute. This section would provide:

For awards and settlements for personal injury occurring during marriage excluded by Section 3501(a)(9):

(1)The allocation of damages provided by a jury or court for a personal injury award, or provided in a settlement signed by both spouses, shall be used to determine which aspects of the award or settlement constitute separate property. If damages were not allocated in the award or settlement, or the settlement was signed by only one spouse, the court hearing the divorce shall classify the award or settlement to determine whether any aspects of the award or settlement constitute separate property.

(2)Any portion of such an award or settlement for loss of consortium shall be the separate property of the spouse claiming the loss of consortium.

²⁸⁷ *Id.* § 3501(a)(8).

(3) For each award or settlement, punitive damages shall be excepted from marital property to the same proportion as the actual damages.

(4) Attorney fees shall be paid from marital and separate property proportionately to the extent that the actual damages are marital or separate property.

(5) Those portions of the award or settlement attributable to lost income during marriage or to expenses paid from marital assets and not reimbursed by insurance during the period between the date of marriage and the date of final separation shall be marital property.

(6) Interest earned on an award or judgment between the date of the judgment and the date of final separation is marital property.

Finally, a provision could be added to the Procedure Subchapter of Chapter 33 creating section 3324, providing that:

The burden of proof shall be on the spouse claiming the exclusion from marital property under section 3501(a)(9).

The proposed language of these sections draws from the best features of existing analytic approach statutory language. The proposed language, however, improves on the other statutes in several ways. First, it includes all personal injury causes of actions without limiting the exceptions to damages for permanent injury or future medical expenses, as the Arkansas statute does.²⁸⁸ Like the Ohio statute,²⁸⁹ it retains within marital property proceeds for all expenses paid out of the marital estate, not just medical expenses like Virginia.²⁹⁰

The proposed exception expressly addresses areas not included in any of the statutes by codifying the typical analytic

²⁸⁸ ARK. CODE ANN. § 9-12-315(b)(6) (2012).

²⁸⁹ See OHIO REV. CODE ANN. § 3105.171(A)(6)(vi) (West 2012).

²⁹⁰ VA. CODE ANN. § 20-107.3(H) (2012).

approach to these areas, prospectively addressing commonly litigated issues. This will avoid needless litigation to establish these rules in Pennsylvania. For instance, the analytic approach recognizes loss of consortium proceeds as separate property,²⁹¹ and the proposed statutory language provides for this. Under the analytic approach, the burden of proof is typically on the person claiming the proceeds are separate property, and the proposed amendment to Chapter 33 provides for this.²⁹²

The amendment addresses post-judgment interest, applying the Pennsylvania rule that all income during marriage is marital property.²⁹³ It also apportions attorneys' fees between the marital estate and the separate property of the spouse by dividing the fees proportionally with the underlying proceeds, consistent with the analytic approach in several states.²⁹⁴

Finally, punitive damages are an exception to marital property in the same proportion as the underlying damages. This approach applies a holding of Supreme Court of Alaska that "[a]n award of punitive damages should be apportioned in the same manner as the underlying compensatory damages award."²⁹⁵ This holding is cited as a desirable treatment of punitive damages under the analytic approach that other states should consider.²⁹⁶

This proposed amendment would establish the analytic approach through statute. It would accomplish the policy goals of the analytic approach by promoting fairness and uniformity of decisions while simplifying the transition for the courts of Pennsylvania by providing a clear statutory framework. The proposed exception excludes from marital property that portion of the proceeds that the analytic approach excludes: pain and suffering, disfigurement, and lost wages and medical expenses after the final separation.²⁹⁷

²⁹¹ See *supra* note 42 and accompanying text.

²⁹² See, e.g., *Parde v. Parde*, 602 N.W.2d 657, 663 (Neb. 1999).

²⁹³ 23 PA. CONS. STAT. § 3501(a) (2010).

²⁹⁴ See *Polk v. Polk*, 937 N.E.2d 124, 129-30 (Ohio Ct. App. 2010); *accord* *Smith v. Smith*, 22 S.W.3d 140, 146 (Tex. App. 2000).

²⁹⁵ *Lundquist v. Lundquist*, 923 P.2d 42, 51 (Alaska 1996).

²⁹⁶ TURNER, *supra* note 41, § 6:55.

²⁹⁷ See *supra* note 42 and accompanying text.

V. CONCLUSION

The issue of classifying personal injury proceeds is a discrete area of divorce law, but is of critical importance to divorcing spouses who have or will receive an award or settlement for an injury that might have to sustain them for the rest of their lives. To address these situations, the analytic approach is superior to the mechanistic approach currently employed in Pennsylvania. The analytic approach yields results that are both more equitable and more consistent with the policies and goals of the dual classification of property and equitable distribution.

The General Assembly should amend the Divorce Code to implement the analytic approach by statute because there is little likelihood of judicial adoption of the analytic approach. A well-drafted amendment similar to the one proposed will implement this change efficiently and allow Pennsylvania to join the majority of states that benefit from the analytic approach.