

## **Divorce Equality**

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The battle for marriage equality has been spectacularly successful, producing great optimism about the transformation of marriage. If we are looking to same-sex marriage to revolutionize marriage, however, the real struggle has yet to begin. This is the battle for divorce equality. With the initial wave of same-sex divorces starting to appear on court dockets, this Article is the first to address the distinctive property division problems that have begun to arise and, in the absence of rule reform, will both amplify and reinscribe problems with the conventional marital framework. The central problem is that courts have, in the context of opposite-sex marriage, failed to realize the cornerstone concept of equitable distribution rules – the idea of marriage as an economic partnership. Same-sex divorce highlights the ways in which courts and property rules have failed to actualize this guiding principle. Accordingly, this Article uses same-sex divorce as a lens through which to reexamine the untapped potential of equitable distribution statutes.

Two questions drive the analysis. One question, made salient by same-sex “hybrid” cases in which the spouses have been long-term cohabiting partners but short-term marital partners, is when an economic partnership begins. I propose that courts use the category of “pre-marital” property in order to count assets and income acquired outside of the marriage itself. Another question is what assets count as marital property and how courts should value one spouse’s contributions to the other spouse’s career success. I propose that courts begin characterizing enhanced earning capacity as marital property and properly counting indirect spousal contributions to business assets, otherwise courts fail to both capture the nature of marital partnership and correctly compensate contributions made by non-earning spouses. Addressing these questions is critical to the reformation of marriage because property rules impact how spouses bargain with one another, how diverse roles get valued in marital bargains, and how we assign and perform gender within marriage. Moreover, correct compensation for spousal contributions rewards individuals for making choices that benefit the couple rather than the individual, which is normatively positive behavior. These proposals for rule reform will provide a blueprint not only for courts as they encounter an increasing number of same-sex divorces but also for advocates who seek to continue the work of marriage equality.