June 2013

Marriage Is Between a Man and a Woman and … : Latest Evolution of Marital Residence Regime in Contemporary China

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INTRODUCTION

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

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

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

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

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

Now put yourself on the other side of the equation. Imagine that you are an urban Chinese young woman, and you have met the prince of your dreams. He is handsome, well mannered, and the only scion of a rich family. His parents are willing to bestow a big house on him upon his marriage. And he loves you. You cannot believe your luck, and when he asks for your hand, you accept. You move into the big house with him and do not ask in whose name it is titled (and of course, it is titled under his name only).

Then you find that his parents are overbearing and are treating you as a child-rearing machine. They want you to resign from your job so that you can devote your whole time to the family. They want you to obey them in every way and show them the kind of respect that is

2. According to Shanghai Fangjia Zoushi Tu [上海房价图] [Graph of Historical Housing Prices in Shanghai], Fangjia Wang [方家] [Housing Price Network, http://sh.fangjia.com/zoushi/] [last visited Apr. 5, 2013] (China), the average housing price in Shanghai for May 2012 is 21744 CNY per square meter, which is roughly equivalent to $318.84 per square feet. This already represents a significant drop from the housing price around Aug. 2011 (the issuance date of the Third Judicial Interpretation on the Marriage Law which started the controversy discussed in this paper), which exceeded 24000 CNY per square meter (around $350 per square feet).
more appropriate from a medieval serf to her lord. What’s worse, your husband has lost interest in you and is openly living with his trophy mistresses elsewhere.

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

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

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

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

I. HISTORICAL DEVELOPMENT OF LAWS OF MARITAL PROPERTY DISTRIBUTION IN CHINA

A. Marriage, Divorce and Marital Property in Imperial China

The reader might wonder why, in both hypothetical cases, the woman seems to invest so little financially in the marital residences

3. It is a common enough practice for the woman and her family to pay for the decorations and improvements of the newly purchased marital residence, and to pay for the furniture. Housing improvement projects generally cost around 10% of the house price. See Zhang Xu (张旭), Gao ning Zhuangxiu Feiyong Rang Yangbanjian Nan Cheng Yangban (高装饰费用理扬白银南城杨班) (The High Decoration Cost Renders Model Units Unsuitable as ‘Models’) (Jun. 18, 2009), http://house.people.com.cn/GB/98388/100320/9497612.html (China). Thus, the bulk of the investment is still from the man’s family. Some commentators mention that the total investment from the woman’s family can be “of roughly equal value” as the house itself. Taisu Zhang, The Pragmatic Court: Reinterpreting the Supreme People’s Court of China, 25 COLUM. J. ASIAN L. 1, 39-40.
and the husband’s parents seem to be so closely integrated into the life of the married couple. To answer these questions, we need to turn to the history and traditions of Chinese society.

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

Families were further organized into extended family groups, with strict hierarchy and an oft-written “Family Code,” under which the head of a family group could impose various rulings and punishments (including capital punishments in certain cases) to members of the group, and to which the law generally gave great deference. In fact, the whole traditional Chinese society was organized like a huge extended family group, with the Emperor as the *paterfamilias* for all.

(2012). However, such a high investment in improvements (high even for professional stages of model units for sale) is likely not the norm. See Zhang Xu, *supra* (real estate companies may spend 1/3 of the house price on decorations and improvements of the model units, and some companies spend as much as the house price itself).  

4. It was a crime punishable by three years’ penal labor (in Tang Dynasty, 618-907 A.D.) or 100 canings (in Qing Dynasty, 1644-1912 A.D.) to set up a separate family unit or to possess legally separate property during the lifetime of one’s parents or grandparents. See *Tang Lu Shuyi* (唐律 ) [CODE OF TANG DYNASTY] § 155, http://zh.wikisource.org/zh/ 唐律疏議 (last visited Apr. 5, 2013) (China); DA QING LÜ Li (大清律例 ) [CODE OF QING DYNASTY] § 87, available at http://zh.wikisource.org/wiki/ 大清律例/ 侓 (last visited Apr. 5, 2013) (China).  

5. Under the law, if a parent or grandparent killed a disobedient (in any way) child or grandchild, the punishment was one and half years’ penal labor. *Tang Lu Shuyi* § 529. Even if the killing was absolutely without cause, the punishment was still only two years’ penal labor. *Id.* Moreover, any child or grandchild who insulted the parent or grandparent was punishable by strangulation. *Id.* This means that the *paterfamilias* could in practice kill with impunity. As for property, it was a crime for a person to use the family property without approval from a more senior member of the family. *Id.* at § 162; *Da Qing Lü Li* § 88. The influence of the *paterfamilias* extended even beyond his death, officially for three years, as every man was required to mourn his father for three years and to keep following his father’s ways during this period, see LUN Yu (論語 ) [ANALECTS], §§ 1, 17, http://www.confucius2000.com/confucius/lunyu.htm (last visited Apr. 5, 2013) (China). The *ius vitae necisque* (right of life and death) of a Roman *paterfamilias* is similar to the power that a Chinese parent has, but “by the [Roman] imperial period it seems a *paterfamilias* would utilize his ‘right of life and death,’ if at all, only in deciding whether or not to rear a newborn child.” Judith Evans Gubbe, *WOMEN AND THE LAW IN THE ROMAN EMPIRE: A SOURCEBOOK ON MARRIAGE, DIVORCE AND WIDOWHOOD* 20 (2002). In contrast, the full power remained available to the Chinese parent throughout the imperial era, to the end of the 19th century.


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

Moreover, the purpose of the marriage was to extend the family of the husband, by taking in the wife as a new family member and by producing offspring for the future. Thus women were always placed in a subservient position. The law sometimes says that a woman is in a

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8. See Li Ji (礼记) [CLASSIC OF RITES] § 44, available at http://www.guoxue.com/jinshu/13jing/liji/liji.htm (last visited Apr. 5, 2013). (China) ("The institution of marriage is to unite the two families, to give service to their ancient temples, and to produce offspring for the future.")

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


11. Treggiari, supra note 9, at 146-47.

12. It is true that ancient Greek and Jewish marriages were generally contracted between the bride's father and the groom. Sarah B. Pomeroy, Families in Classical and Hellenistic Greece: Representations and Realities 33, 36 (1997); Michael L. Satlow, Jewish Marriage in Antiquity 111-12 (2001). Also, early Roman marriages usually required consent from patres familias of both families. GRUBBS, supra note 5, at 89. However, Roman law in imperial era recognized marriages contracted without such consent. Id. at 90. In any event, marriages without paternal consent were long recognized under the doctrine of ritualized rape and magic in these societies. See Satlow, supra at 124-25, 130.

13. Chen Guilian, supra note 10, at 7-8. Poor men may agree to become a member of his wife’s family instead, and produce offspring for the wife’s family. Such men were always looked down on and sometimes treated as semi-criminals, but the practice survived throughout the Imperial era.

14. A canonical text of Confucian principles stated that "a woman obeys her father before her marriage, then obeys her husband during the marriage, then obeys her eldest son during her widowhood; a woman cannot have autonomy in her doings, but must obey others." Guiliang Zhiyuan yingong er nian (战国策·公孙鞅) [COMMENTARY OF GULIANG TO THE SPRING AND AUTUMN ANNALS, YEAR OF
semi-filial position with regards to her husband,15 or that her status is similar to that of a child.16 The inequality is most visible from the law's vastly different treatments of husband and wife in domestic violence cases.17

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

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

15. See ẒANGLI LIÈWAN HAN JIAN ZHOU XIAN SHU (CHINESE JUDICIAL RESEARCH IN WESTERN HAN-ERA TOMBS OF ZHANGJIAHAN) § 21, http://www.xinfajia.net/648f.html (last visited Apr. 5, 2013) (China). This collection of documents was unearthed during 1983-1984 from three tombs of early Western Han Dynasty (202 B.C.-9 A.D.), and consists of judicial rescripts from the Supreme Justice’s Office in answer to legal questions from local government officials.
16. TANG LÚ SHU WÍ § 325.
17. Under the Code of Tang Dynasty, if a husband intentionally injured his wife, he would be sentenced to 40 lashes. TANG LÚ SHU WÍ §§ 1-2, 302, 325. (The sentence under the statute was to be two degrees below the sentence if he intentionally injured an unrelated person. The sentence for injuring an unrelated person was 60 canings. Two degrees lighter would be 40 lashes.) However, if a wife intentionally hit her husband (with or without injury), she would be sentenced to one year's penal labor, which was seven degrees higher than the regular sentence for hitting an unrelated person without injury (40 lashes). Id. at §§ 1, 3, 302, 326.
18. CHÉN GÜYUAN, supra note 10, at 187-88, 199.
19. Id. at 195.
20. Id.
21. Id. at 54-55; RÈN YINHÈ (REN YINHI) (ZHONGQU GUOUI DE HÚN HÚNG) (MARRIAGE IN ANCIENT CHINA) §§ 125-32 (1996) (China). The law sometimes imposed restrictions on the number of concubines of non-magistrates, but such restrictions were not strictly enforced. Id. at 130.
22. Id. at 125-26.
23. TANG LÚ SHU WÍ § 178.
24. RÈN YINHÈ, supra note 21, at 131-32.
25. TANG LÚ SHU WÍ § 178.
In all, this is a system with few parallels in the Western tradition, one of lawful polygyny, of complete subordination of women, and of patriarchal power over generational families. A further difference from the Western tradition is its permissive attitude towards divorces. The law recognized consent-based and fault-based divorces, with the faults all on the woman's side. Moreover, since a marriage was a union between two families, certain conflicts between the families (also bearing more harshly on women than on men) would result in statutory divorce. In practice, most divorces happened through consent because of the social stigma associated with fault-based divorces. The husband would write a divorce letter, which may or may not list out the reasons for the divorce, and negotiate with the wife's family for a financial settlement.

Overall, it was easy for the husband and his parents to obtain a divorce, but very difficult for the wife to do so. Even divorce by consent required a divorce letter by the husband, which meant great leverage.

26. "[M]arriage in early Rome was usually accompanied by manus." TREGGIARI, supra note 9, at 16. This means that women would not be independent (sui juris, "of their own right") but would become subject to the spousal right (manus, "control") of her husband through marriage. Id. at 16-17. However, the subordination of women in an early Roman marriage was still far less severe than that in a traditional Chinese marriage. She might be filiae loco ("in the position of a daughter") for the purposes of inheritance and civil liability, but her husband would have no power of physical discipline over her. Id. at 29-30. In any case, by Cicero's time, marriages with manus had become uncommon, and a husband generally had no inherent power to give orders to his wife. Id. at 30, 209-10. (All references to manus were finally edited out of Roman law when Justinius Code was compiled. Id. at 32.) Instead, women came into marriages as uxor once ("mere wives") and as women sui juris. Id. at 32. They would not be entering into the manus of their husbands, and would have independent rights to acquire property after marriage and to dispose of them. Id.

27. TANGLO SHOU, supra note 190.

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

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

30. Since the wife had no property at all in a marriage, in theory she was entitled to nothing in a divorce. In fact, the financial settlement frequently results in a "ransom" paid to the husband by the wife's family for the divorce. See TAI YEN-HUI, DIVORCE IN TRADITIONAL CHINESE LAW, IN CHINESE FAMILY LAW AND SOCIAL CHANGE: IN HISTORICAL AND COMPARATIVE PERSPECTIVE 75, 100-02 (David C. Buxbaum ed., 1978).

31. CHEN GUOYUAN, supra note 10, at 245; REN YINHU, supra note 21, at 162-63.
for the husband in negotiating the terms. Furthermore, the concept of divorce was to adjust the relationship between a husband and his wife, not his concubines or female servants. Those were little more than chattels of the man, and could be disposed at will.

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

Starting from the late 19th century, the laws of China began to modernize. In September 1911, *Da Qing Min Lü Cao’An* (Draft of the Civil Code of Qing Dynasty), the first attempt at a modern Civil Code of China, was completed. However, this draft never really went into effect, as the Qing Dynasty was overthrown in 1912. With regards to the institution of marriage, it was more of a reiteration of the traditional Chinese family law than an adoption of the European Civil Law tradition. Generational family was still preferred to nuclear family. Consent of parents, not of parties, was still required for marriage. Polygyny was still allowed. Generally, a wife still had no management and control over any property.

This draft, however, changed the law of divorce. The fault grounds for divorce were overhauled so that they bore more equally on the two parties, and some ancient grounds (such as mere disrespect to the

32. See Ren Yinhu, *supra* note 21, at 163-64.


34. *Id.*

35. The draft still required consent of parents for setting up a separate household, and it squarely put the governance of a household under the power of “the eldest in the household.” *Da Qing Min Lü Cao’An* §§ 1323, 1327. The code is quoted from *Da Qing Min Lü Cao’An-Mingguo Min Lü Cao’An* (《明國民律草案》) [Draft of the Civil Code of Qing Dynasty & Draft of the Civil Code of the Republic of China] 170 (Yang Lin Xin (杨立新) ed., 2002) (China).


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

38. An exception would be when there were prenuptial agreements with regards to marital property. *Da Qing Min Lü Cao’An* § 1357, Yang Lin Xin, *supra* note 35, at 173. In the absence of such agreements, there was a separate property interest of the wife in the properties that she owned before marriage and the properties that she acquired by herself during marriage, but the husband was in management and control of even these separate properties (except when a court of competent jurisdiction puts the wife in management and control at the wife’s demonstration that the husband would impair the property). *Da Qing Min Lü Cao’An* § 1358, Yang Lin Xin, *supra* note 35, at 173.
husband’s parents or talkativeness) were gone. Moreover, the draft recognized that the wife was entitled to her separate property (but only that) in a divorce. This was still a huge improvement from the days when a wife who kept separate property would be divorced solely on that ground. The draft also introduced the concept of alimony (based solely on the fault of the husband) into Chinese law.

In 1915, the Department of Justice of the Republic of China made its own draft of a Civil Code called MINGUO MIN LU CAO’AN (民国民律草案) (DRAFT OF THE CIVIL CODE OF THE REPUBLIC OF CHINA). The Congress never formally adopted the draft but courts did apply it. This draft was substantially the same as DA QING MIN LU CAO’AN with regards to family law and in particular the marital property regime. However, there was one difference in organization: the draft grouped the provisions under a section named “statutory marital property regime.” This showed some conscious effort in dealing with this aspect of family law.

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

40. DA QING MIN LU CAO’AN §§ 1368, 1369, Yang Lixin, supra note 35, at 175.
41. DA QING MIN LU CAO’AN § 1369, Yang Lixin, supra note 35, at 175.
42. MA ZHIBING, supra note 33, at Chapter 11.
43. Id.
44. MINGUO MIN LU CAO’AN §§ 1063, 1073, Yang Lixin, supra note 35, at 345-46 (preference for generational families); MINGUO MIN LU CAO’AN § 1105, Yang Lixin, supra note 35, at 350-51 (consent by parents or grandparents essential for marriage for persons below the age of 30); MINGUO MIN LU CAO’AN §§ 1196-1198, Yang Lixin, supra note 35, at 362 (tacit recognition of concubines).
45. MINGUO MIN LU CAO’AN §§ 1135-1137, Yang Lixin, supra note 35, at 355 (no provision of any common ownership, but instead dividing the properties into "his" and "hers", and vesting the power of management and control in the husband).
46. MINGUO MIN LU CAO’AN §§ 1130 et seq, Yang Lixin, supra note 35, at 354. In contrast, DA QING MIN LU CAO’AN provided the elements of a property regime, but did not call it a regime.
47. MINGUO MIN LU CAO’AN § 1138, Yang Lixin, supra note 35, at 355 (husband to render periodic accountings to wife with regards to management and control over her separate property); MINGUO MIN LU CAO’AN § 1158, Yang Lixin, supra note 35, at 358 (in a divorce proceeding, husband is liable to wife for damages to her separate property from his mismanagement).
49. MINGUO MIN LU CAO’AN §§ 1155-1156, Yang Lixin, supra note 35, at 357-58.
In 1929, the new government of the Republic of China started drafting a new Civil Code.\textsuperscript{50} The drafters drew from the existing drafts but also sought to bring the code in line with the trend of Civil Law in the world.\textsuperscript{51} Article 4 (Kinship) of the code was promulgated on Dec. 26, 1930 and became the first modern family law of China.\textsuperscript{52}

Compared to the two previous drafts, the new code was truly revolutionary. Consent of parties, not of parents, became the requirement for a valid marriage.\textsuperscript{53} The implicit recognition for concubines was gone. Also gone was the requirement that consent of parents was needed for the establishment of a separate household.\textsuperscript{54} With these changes, kernel monogamous family became the preferred family structure in Chinese law.

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

Thus did the concept of community property first make its inroad into Chinese law, but it would still take some time before this new regime took root and became established as the default statutory marital property regime. Moreover, revolutionary as the new code was, it had little effect on the reality of Chinese marriage. The Republic of China era was marked by political turmoil, civil wars, and the ruinous Japanese invasion, which took 10 to 20 million lives. Even during the rela-

\textsuperscript{51} Li Xiuqing, supra note 50.
\textsuperscript{52} Id.
\textsuperscript{54} Id. at § 1127.
\textsuperscript{55} Id. at §§ 1013, 1016 et seq.
\textsuperscript{56} Id. at § 1004.
\textsuperscript{57} Id. at §§ 1031 et seq.
\textsuperscript{58} Id. at §§ 1032-1033.
tively peaceful years, the laws never effectively reached the rural societies, and traditional family structure persisted there.

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

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

The law gave the marital property regime cursory treatment. It gave "equal rights in the possession and management of family property" to both the husband and wife, but did not define in detail what is included in the family property.66 In the scenario of divorce, the parties were to negotiate on the division of all properties except the pre-marital properties of the wife.67 If the negotiation should fail, the People's Court was to divide such properties after "taking into consideration the actual state of the family property, the interests of the wife and

61. Id.
63. Id. at § 2.
64. Id. at § 3.
65. Id. at §§ 7, 11. The right to use one's own family name is a revolutionary change from the traditional practice, where wives generally take on their husbands' family names. See ZHONGHUA MINGGUO MINFA § 1000 (1930).
67. Id. at § 23.
the child or children, and the principle of benefiting the development of production." Thus the system was one of unitary community property and discretionary division.

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

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


While keeping most of the provisions of the 1950 law intact, the new law formally introduced a marital property regime. Under this regime, absent an agreement between the parties, the husband and the wife jointly owned all properties acquired during the marriage, in

68. Id. (Translation from Meijer, supra note 62, at 482).
69. “The statutory regulation of marital property in both the Soviet Russia and the People’s Republic of China—as societies not based upon private ownership—consists only of a clear expression that legislation should merely be granted a secluded role in this area.” W. Müller-Freienfels, Soviet Family Law and Comparative Chinese Developments, in CHINESE FAMILY LAW AND SOCIAL CHANGE 323, 378 (David C. Burkbaum ed. 1978).
70. For an overview on the government’s effort in implementing the new marriage law, see Meijer, supra note 62, at 451-53.
71. Hunyin Fa (婚姻法 [Marriage Law]) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 10, 1980, effective Jan. 1, 1981) § 13, available at http://zh.wikisource.org/zh/%E4%B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%8D%8E%E4%BA%BA%E6%B0%91_%2B1980%E5%B9%B4%29 (last visited April 15, 2013) (China).
which they shared equal management and control. In a divorce, such properties would be subject to division, preferably through a negotiation, but if that should fail, then through court action after “taking into consideration the actual state of the property and the interests of the wife and the child or children.” Thus, the law retained the discretionary division principle, but limited the scope of jointly possessed property such that the overall scheme became more similar to the community property model in the United States. The law also re-established the rights of the parties to dispose of marital property through agreement, and opened the door for marriage contracts.

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

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

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

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

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

79. The divorce rate of China was 0.3% in 1979, 0.7% in 1990, and 1.0% in 2000. Minzheng-bu, Zhongguo Lihun Lü Lianzu 30 Nian Shangsheng (中国离婚率系列 30 周年 上升) (According to the Ministry of Civil Affairs, the Divorce Rate of China Has Been Continuously Rising for 30 Years) (Oct. 3, 2010), http://news.163.com/10/1003/13/6I2TUNPB0001124.html (China). The rise in divorce rate was further accelerated after 2003, when the registration of divorce was simplified. Id.


81. Id. at § 2(2).

82. Id. at § 6.

83. Id. at § 12.

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

85. Id.

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

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

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

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

89. Id.
90. Id.
93. The low-rent system was abolished in 1998. Bao Zonghua, supra note 88.
94. See Feng, supra note 59, at 354-57 (listing concerns behind the reduction in scope of jointly possessed property by the 2001 revision of Marriage Law, which are mostly about the protection of individual ownership of property); see also Chen & Guo, supra note 75; see also
On April 28, 2001, the Marriage Law of 1980 was revised. The revision continued in the direction of limiting the reach of jointly possessed property, and specified that certain properties, even if acquired after marriage, would be separate. In particular, gifts explicitly made solely to one party would be separate property. The revision was silent on the treatment of marital residences, but with the direction where the law was going, it was conceivable that transmutation was now disfavored.

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


97. Id. at §§ 17(4), 18(3).

98. Id. at § 40.


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

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

D. Judicial interpretations on the revised Marriage Law of 2001

The Supreme Court issued its first Judicial Interpretation on the revised Marriage Law on December 25, 2001. The most important provision in this interpretation, both in principle and in practice, is that separate property would be completely protected from transmutation into jointly possessed property in the absence of explicit agreement. This firmly established the new preference for individual ownership over any form of shared ownership.

The second Interpretation was issued on Dec. 4, 2003. Under this interpretation, absent explicit expression of donor’s intent, funds provided by parents of one party before marriage towards the purchase of real property would be characterized as a gift to that party.

102. The faults are bigamy, extramarital cohabitation, domestic violence, cruelty and desertion. Id. at § 46. In practice, because of evidentiary problems, the fault-and-damage system is seldom brought into force. See Mao Jingjing (毛静京), Dui Zhongguo Hunyinfa Zhong Shantai Peichang Youquan Qingxing De Sikao (对《中华人民共和国婚姻法》中审判前妻权情况的调查) [Thoughts on Situations of Damage and Compensation in the Marriage Law of China] (July 12, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=61406 (China). According to this article, a survey by the Law Society of China in 2003 revealed that only 24 out of 100 appellate divorce proceedings in the city of Harbin involved damage claims, none of which was awarded; and only 4 out of 400 trial divorce proceedings in the city of Xiamen involved damage claims, only 1 of which was awarded.


104. Id. at § 42.

only, but similar funds provided during marriage would be characterized as a gift to the couple and thus jointly possessed property.108

The detailed treatment of housing gifts from parents is again a reflection of developments in the society. By this time, real estate has become the biggest piece of property in many urban Chinese families.109 It is also one of the most fast-appreciating pieces of property.110 Moreover, it is a property that few people can afford with their salaries alone.111 Yet, most Chinese couples desire the purchase of a residence as a prerequisite of marriage.112 In addition, the husband is generally supposed to shoulder most of the expense.113 But how can he do it on his own? Very frequently, his parents will come in and invest their

108. Id. at § 22. One curious issue is that this article only mentioned the fund, not the real property itself. See Xue Ninglei (薛男丽), "Hunyinfa Sifa Jieshi (San) Caichanxing Guiding Jiedu (《婚姻法司法解释 (三) 羁押性解释》) [Interpretations on the Property Regulations in “the Third Judicial Interpretation on the Marriage Law”] (Aug. 16, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=63623 (China). But since the article expressly mentioned a gift, a reading that this is about a characterization of liability does not seem well supported. Thus, it seems likely that the article intended to characterize the real property itself.


110. The mean price of new housing rose by 18% in 2004. This appreciation would be dwarfed by the appreciation in 2009, which was 24%. Liu Xiuhao (刘秀浩), Zhongguo Nian Lai Zai Da Gongying Duanque Jiang Chixu (中国近年来大型购房欺骗现象 [The Rise in Housing Price Last Year Was the Biggest in 15 Years, and the Shortage in Supply Will Persist]) (Jan. 20, 2010), http://www.tcf.net/view.aspx?id=269 (China).

111. The calculation in notes 1 and 2 illustrate this point.


whole life savings as a "gift." As this is a very common pattern, the Second Interpretation sought to clarify the characterization of such housing gifts, and the approach it took was one based on the timing of purchase, rather than on the form of title.

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

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

When the parents of both parties provided the funding for the purchase of real property, and the deed of such real property is recorded under the name of one party only, such real property may be categorized as under a proportional common ownership of the parties, the proportion being that between the amount of funding from...
their respective parents, unless the parties have agreed otherwise.118

And Article 10 says:

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

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

Thus, under these two Articles, no matter whether the parents of a party provide house or funding for house to that party, and no matter whether the gift is before or during marriage, as long as the house is titled under that party's name only, the resulting marital residence will be separate property and not subject to discretionary distribution. The most that the other party can get with regarding to the house is compensation for that party's financial contribution to the house during the marriage.120 Moreover, it is not even clear that all financial contri-

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

119. Id. at § 10 (emphasis added). The “principles contained in Section 39(1) of the Marriage Law” mean the considerations of “the actual state of the property and the interests of the wife and the child or children.” Hunyin Fa § 39(1) (2001). However, the new rule does not mention contribution of marital labor: One can say that presumably falls under “profit from productivity” in §17(2) of Marriage Law, but that is not explicitly supported in the rule. Also, it is not clear whether passive appreciation is included in the compensation, since Article 5 of the new Interpretation in general excluded passive appreciation of separate properties from jointly possessed property. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) §§. For an example of compensation for joint mortgage payments in action (where the court included passive appreciation in the compensation), see Qin Fa (唐藩) & Luo Shuangliang (骆双良), Hunqian Fangchan Zengzhi 90 Wan Fayuan An Huankuan Bili Fenge Gel Fuqi (储建国等与钱芳诉离婚后共同财产分割案件) [A Court Divided the 90,000 RMB Appreciation in Pre-Marital Real Estate Proportionally Between the Couple According to Mortgage Payments] (Aug. 30 2011), http://www.dk2000.cn/news/5794.html (China).

120. See supra note 119.
buttons will be compensable. The enforcement of such compensation, especially when the house dominates the marital property, may also be problematic. In all, the new rule, together with the traditionally limited reach of alimony and damage, elevates title to a predominating position in the distribution of the residence – the single biggest piece of marital property.

Societal uproar immediately followed. The interpretation was denounced as a method to deny women of their contribution to the family and deprive them of their fair share in the property. Everywhere in China, people have rushed to change the deed of real properties and make sure both spouses’ names are on the deed. Some people also added their parents to the title, to assure a better financial outcome in case of divorce. The volume of such deed changes was so big that the Ministry of Finance suspended the stamp tax charge for adding a

121. The rule only mentions the contribution to mortgage payments. It is unclear how financial contributions to home improvements will be handled. Some scholars think that it is compensable. See Zhuanjia Jiedu Hunyinfa Xin Jieshi Mingque Jingshenchuhu Fang “Shanhun” [专家学者解读婚姻法新解释：婚姻财产如何分] (Scholars Explain the New Interpretation on the Marriage Law, Clarify the Concept of “Getting Divorced with Nothing Left” as Only a Deterrence Against “Flash Marriage”) (Sept. 6, 2011), http://news.sohu.com/20110906/n318458245.shtml (China). One scholar, however, thinks that decorations may count as “removable additions” and as such are not compensable. Minfa Zhuanjia: Nüfang Zhuanz勖uan Viding Yao Jiru Goufangkuapan Bing Fuming [专家：家婚装要体现出布尔分] (According to a Civil Law Expert, the Best Practice for Women is to Count Their Decoration Contributions Into Housing Payments and to Add Their Names Onto the Titles) (Oct. 17, 2011), http://house.ifeng.com/zhiyezhinan/detail_2011_10/17/9904853_0.shtml (China).

122. See supra notes 109-111.

123. Under Chinese law, judicial sale of a marital residence is only appropriate when neither side claims the house itself. Zhugao Renmin Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 20(3). Thus, when there is not enough other marital property, compensation becomes a monetary judgment on the other party, and this gives rise to enforcement problems. See Wang Yong [王勇, Falu, Qing Buyao Lijian Women De Hunlian (法务·清包养恋女不同囑) [Law, Please Don’t Come Between Us in Our Marriage and Love] (Aug. 22, 2011), http://wangyong.blog.caixin.cn/archives/23674 (China).

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


126. Id.
spouse’s name on August 31, 2011 under great pressure from the society.127

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

The Chinese legal community is largely divided over the new interpretation. Some praised it as an emphasis on the contractual nature of the marriage, and believed that it would help improve the social mores by promoting the “contractual principles” of fair dealing and good faith.131 Some denounced it as emphasizing the individual nature of property ownership over the community nature of family life, and believed that such law would “encourage meanness of people” and

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129. Id.

130. Id.

131. See Zeng Zhihui [错解, Dui Hunyin Shu Jieshi San De Qiyue Jingshen Jiedu [阅读对婚姻司法解释三的理解] [A Reading of the Contractual Principles in the Third Judicial Interpretation on the Marriage Law] (Aug. 22, 2011), http://article.chinalaminfo.com/Article_Detail.aspx?ArticleID=62429 (China). This author, however, also thinks that the new interpretation is overly emphatic on the contractual nature of marital property but insufficiently emphatic on the contractual nature of marriage itself. Also, whether contract theory is really a good “fit” for marriage is debatable. See Ira Mark Ellman, The Theory of Alimony, 77 CAL. L. REV. 1, 24 (1989) (“Because contract is designed to aid the party whose losses result from another’s broken promise, it is useless where we cannot reliably define the promise.”).
promote intra-family strife. One scholar believed that while implementing property-based principles in a marriage law could be a right approach, the current interpretation was a formulaic and mechanical application of such property theories. In his opinion, the categorization of real property under mortgage as separate property under Article 10 was the foremost example of such mechanical application. He thought that since the property rights to such real property were not yet absolute (because of the potential claim from the mortgagee), it did not make sense to talk about whether it was separately or jointly possessed.

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

The Supreme People's Court has continued on its glorious tradition of administering Justice for the People, and given a precise solution to this mess [of the marital residence issue]. For the married parties and their parents who are faced with the question of how to treat investment in a marital house, the Court has pointed out a path to them that rationally protects the rights of investors. A marriage is

132. See Zhao Xiaoli (赵小丽), Fanbu Moshi Yu Hunyin Fa (反哺模式与家庭法) [The “Reverse-Feed Model and the Marriage Law] (Aug. 29, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=62628 (China). “Reverse-feed” is an ancient Chinese saying that refers in general to the elderly care by the young generation. This author believes that the traditional Chinese family model, with its emphasis on shared property ownership and family-based welfare, is superior to the “non-sustainable” European model of kernel family and self-paid retirement, and believes that the new development is a desirable attempt to impose the European model in China and destroy the “self-evident concepts formed through thousands of years of tradition, which will last longer than any law.” He believes that the parents' payment for children's marital property is a superior institution of intra-family welfare that promotes family harmony. For an opposite view, see Hu Bo (何博), Wo Wei Hunyinfan Jieshi San Gu Yu Hu (我为婚姻法官说三句) [I Advocate for the Third Judicial Interpretation on the Marriage Law] (Sept. 2, 2011), http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=62773 (China). This author comments on the new interpretation as a “resolute step of the law militating against a morally questionable social tradition.” He denounces the parents’ payment for children’s marital property as a result of extortion from lazy and greedy children.


134. Wang Liren, supra note 133.

135. Id.; see also Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (乙) § 21 (when the title to real estate is not yet absolute, a division of such property in a divorce is inappropriate). However, to the extent this provision might conflict with the new interpretation, it is preempted by the new interpretation. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 19.
now not just a union of the two families, in fact, it is a joint venture in real estate investment, with a marriage thrown in as an extra! ... How can one party believe the house to be jointly possessed property solely because he or she has joined in the effort to repay the mortgage or because the title was acquired during marriage? That would be a shameless logic designed to promote fights over real property!136

II. DISTRIBUTION OF MARITAL RESIDENCE IN U.S. LAW

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

Most states in the United States maintain some distinction between marital property and separate property because of “a widespread consensus that marriage alone should not affect the ownership interest that each spouse has over property possessed prior to the


139. Id.

140. Id. (citing UNIF. MARITAL PROPERTY ACT §§ 4(a), 17(3) (1983)).

141. Id. (citing CAL. FAM. CODE §§ 760, 2550 (West2013)).

142. Id. (citing In re Marriage of Polsky, 899 N.E.2d 454 (Ill. App. 1st Dist. 2008), appeal denied sub nom. Polsky v. Polsky, 904 N.E.2d 986 (Ill. 2009) (Table)).
marriage or received after the marriage by gift or inheritance.143 In
comparison, fifteen states allow the court to divide all properties,
marital or separate, equitably in a divorce.144 However, even in these states,
since the source of property is generally taken into consideration, the
result is not necessarily much different from that in a state where sepa-
rate property is not subject to distribution.145

A gift to one party is generally considered separate property.146 Even
in the "hotchpot" states that "in principle apply[y] the same equi-
table-distribution principles to all property,"147 such gifts are often
given special treatment.148 Problems arise when "there is a dispute as

143. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.03 comment a (2002) (hereinafter
PRINCIPLES OF FAMILY DISSOLUTION). For a list of states, see BRETT R. TURNER, EQUITABLE DISTRIBUTION
OF PROPERTY (3d ed. 2010), § 2:9 n.3.
144. TURNER, supra note 143, at § 2:8 n.7.
145. Id. at § 2:10.
146. PRINCIPLES OF FAMILY DISSOLUTION, supra note 143, at §§ 4.03(2), 4.03 comment b; TURNER,
supra note 143, at § 5:31.
147. PRINCIPLES OF FAMILY DISSOLUTION, supra note 143.
148. Alabama and Iowa expressly exclude such gifts from distribution. Alabama Code
excludes all gifts from division unless it "has been used regularly for the common benefit of the
parties during their marriage." Ala. Code § 30-2-51(a) (West 2013); see Harmon v. Harmon, 928
interest completely to the husband on evidence that such interest is a gift from husband's father).
Iowa Code excludes all gifts unless "refusal to divide [the gift] is inequitable to the other party or
to the children of the marriage." Iowa Code § 598.21(6) (West 2013); see In re Marriage of Good-
win, 606 N.W.2d 315, 319, 321 (Iowa 2000) ("no inequity in setting aside" the assets purchased
with deceased son's life insurance proceeds to wife, which is classified as a gift or inheritance to her).
But see In re Marriage of Muelaupt, 439 N.W.2d 656, 660 (Iowa 1989) (common stock given
to husband by his family before marriage is included in the division because it would be inequita-
ble to do otherwise). Indiana, Montana, New Hampshire and Oregon give such gifts some special
treatment. Indiana Code prescribes a presumption of equal division being "just and reasonable,"
but allows that presumption to be rebutted by "[t]he extent to which the property was acquired
by each spouse ... through inheritance or gift." Ind. Code § 31-15-7-5 (West 2013). Montana Code
requires consideration on the other party's contribution when dividing gifts. Mont. Code Ann.
§ 458:16-a(II) (West 2013). Oregon statute made the presumption of equal contribution inap-
licable to gifts. Or. Rev. Stat. § 107.105(1)(f)(D) (West 2013). However, such treatment does not
necessarily amount to an automatic award of the gift to the receiving party. Eye v. Eye, 849 N.E.2d
698, 702 (Ind. Ct. App. 2006) (whether the property was acquired by gift was a factor in division,
but not the "sole factor."); Wallace v. Wallace, 714 N.E.2d 774, 781 (Ind. Ct. App. 1999) (trial court
abused its discretion by "systematically excluding" from the marital estate those assets that were
attributable to gifts or inheritance from [the husband's] family.); In re Marriage of Funk, 270 P.3d
39, 44 (Mont. 2012) (while court must consider the factors set forth in the statute, "they are not
limitations on the court's obligation and authority to equitably apportion all assets and property
of either or both spouses, based upon the unique factors of each case."); In re Harvey, 899 A.2d
258, 269 (N.H. 2006), overruled on other grounds, In re Chamberlin, 918 A.2d 1 (N.H. 2007) (assets
acquired by gift during the marriage shall be included in marital property and distribution).
Connecticut, Hawaii, Kansas, Massachusetts, North Dakota, South Dakota, Vermont, Washing-
ton and Wyoming do not provide any special treatment for gifts. See generally CONN. GEN. STAT. § 46b-
81(a) (West 2013); HAW. REV. STAT. § 580-47(a)(3) (West 2013); KAN. STAT. ANN. § 60-1610(b)(1)
(Lexis 2013); MASS. GEN. LAWS ANN. § 208-34 (West 2013); N.D. CENT. CODE ANN. § 14-05-24(1)
(West 2013); S.D. CODIFIED LAWS § 25-4-44 (West 2013); VT. STAT. ANN. § 15-11-6-751 (West
to whether the third party’s gift was made to one spouse or to both jointly.” 149 In such cases, “the title used in transferring the property is not dispositive on the question of whether it is marital or separate, even though it is relevant evidence.” 150 Moreover, “the burden of proof is on the spouse asserting that the gift was to an individual.” 151 Thus, the courts in the United States tend to use a fact-based case-by-case approach to this question, rather than a bright-line rule based on title.152

In certain states, property that started out as separate, such as gifts, may be transmuted into marital property by commingling.153 Under such a principle, a marital interest may appear in marital residences that started as separate because of marital contribution to mortgage payment,154 because of upkeep and improvement from marital property or labor,155 or simply because of usage for the party’s common benefit.156 Such transmutation not only allows the residence

2013]; WASH. REV. CODE ANN. § 26.09.080 (West 2013); WYO. STAT. ANN. § 20-2-114 (West 2013). In these states, gifts may be characterized as separate but can still be subject to distribution. See e.g., Schiller v. Schiller, 205 P.3d 548, 574-76 (Haw. Ct. App. 2009) (finding a partnership interest to be gift from husband’s mother to husband hence separate property, but still subject to distribution); Rice v. Rice, 361 N.E.2d 1305, 1306-07 (Mass. 1977) (gifts from husband’s father to husband are separate property but the court has authority to transfer it to wife). However, even in these states, the nature of gift may still influence the distribution. See e.g., Williams v. Massa, 728 N.E.2d 932, 938-39 (Mass. 2000) (characterizing as part of the marital estate husband’s stocks and bonds which he received as gift from his parents, yet refusing to assign any of them to wife).

149. PRINCIPLES OF FAMILY DISSOLUTION, supra note 143, at § 4.03 comment b (reporter’s notes).

150. Id. (citing cases).

151. Id. (citing cases).

152. For common law states, see TURNER, supra note 143, at §§ 5:6, 5:40, 5:70. For community property states, see 15B AM. JUR. 2D Community Property § 19 (2012); see also e.g. In re Marriage of Smith, 2008 WL 3919359, *1 (Ariz. Ct. App. Aug. 26, 2008) (when a party purchases property with separate fund but the title is held jointly, there is a rebuttable presumption that the property was taken in trust for the paying party); Kircher v. Kircher, 117 Cal. Rptr. 3d 254, 261 (Cal. Ct. App. 2010) (“The characterization of property as community or separate is not dependent on the form in which title is taken.”); Pemeton v. Pemeton, 809 S.W.2d 642, 647- 48 (Tex. App. 1991) (presumption of separate gift rising from deed from wife’s parents to wife is rebutted by other evidence), rev’d on other grounds sub nom. Heggen v. Pemeton, 856 S.W.2d 145 (Tex. 1992).

153. TURNER, supra note 143, at § 5:65.

154. California holds such contribution creates a pro tanto interest in the house, and there are some indications that Nevada and New Mexico may be following the same approach, see Elizabeth Barker Brandt, The Treatment of Community Contributions to Mortgage Payments (Including Principal and Interest) on Separate Property, 30 IDAHO L. REV. 697, 699-703 (1994). In most common-law states, the source-of-fund rule reaches the same result. TURNER, supra note 143, at §§ 5:21, 5:23.


156. ALA CODE § 30-2-51(a); Green v. Green, 29 P.3d 854, 858 (Alaska 2001) (“[m]arital effort and use” can transmute a house completely into marital property); In re Marriage of Hoffman, 493 N.W.2d 84, 89 (Iowa Ct. App. 1992) (eighteen years of marriage is sufficient to transmuted a gift
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to be divided in a divorce, but also allows the marital estate to share in the passive appreciation of the property. 157 Other states do not allow such transmutation. 158 Instead, they recognize a reimbursement claim from the community estate, which may preclude the community’s sharing in the subsequent passive appreciation of the house value. 159

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

into marital property); Bowen v. Bowen, 982 So. 2d 385, 395 (Miss. 2008) (because husband and wife lived and worked on the marina which was husband’s separate property, the marina is transmuted into marital property); Stewart v. Stewart, 2 So. 3d 770, 773 (Miss. Ct. App. 2009) (“prolonged use as . . . family home” for either three, five or seven years is sufficient to transmute the house; and the homemaker contribution by the wife counts towards transmutation)


158. See 15B AM. JUR. 2D Community Property § 30; Knauss, supra note 157, at 862.

159. Knauss, supra note 157, at 862. See e.g. Kriegel v. Kriegel, 635 So. 2d 180, 188 (La. 1994) (reimbursement is appropriate if community labor substantially enhanced the value of separate property); In re Marriage of Johnson, 625 P.2d 720, 722 (Wash. Ct. App. 1981) (reimbursement for increased value of separate property resulting from community investment is appropriate, but inflationary increase in value is not community property).


161. UNIF. PROBATE CODE § 2-203(b) (2008).

162. PRINCIPLES OF FAMILY DISSOLUTION, supra note 143, at § 4.12.

163. For a strong criticism, see TURNER, supra note 143, at § 5.71.
Another factor that may affect the distribution of marital residence, especially in long marriages, is alimony. In the United States, alimony has a broader reach than in China, and aims to compensate financial losses from marriage rather than to aid the needy. Such loss can be from “[homemakers’] sacrifice in financial independence arising from their focus on homemaking tasks.” It can also include “the less affluent spouse’s loss of his or her expectation of continuing to enjoy a standard of living that has been sustained by the other spouse’s income.” Because of such broad reach of alimony, the categorization of a property as separate or marital does not carry as much importance as it would have in China.

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

164. Principles of Family Dissolution, supra note 143, at §§ 5.02, 5.02 comment a (reporter’s notes) (citing cases).
165. Id. at § 5.05 comment a (reporter’s notes) (citing cases).
166. Id. at §§ 5.04 comment a, 5.04 comment a (reporter’s notes) (citing cases).
167. E.g. Martin v. Martin, 2011 WL 2937403, *7-8 (Ala. Gv. App. July 22, 2011) (a gift from husband’s parents intention “for the parties to use only as a marital home” was one to the couple, not to the husband); L.H. v. B.A. 2008 WL 1948470, *1-2, 4 (Del. Fam. Ct. Mar. 10, 2008) (when husband’s parents deeded a house to husband and his father for $1, and later husband's father transferred his 50% share to husband for $10.00, the deed only shows husband’s name, but on the next day of the latter transfer, husband took out a loan for $207,400, paid off $157,164.64, and gave his father $50,235.36 in cash, the 50% share from the mother was indeed a gift to husband only, but the 50% share from the father was not a gift and was marital property); In re Marriage of Sanfratello, 913 N.E.2d 1077, 1087 (Ill. App. Ct. 2009) (house was from husband’s parents to husband in contemplation of marriage and therefore was a gift to the marital estate); In re Marriage of Beilke, 2002 WL 31757475, *2-3 (Iowa Ct. App. Dec. 11, 2002) (since husband testified that a $8,000 gift for deck construction was for “us”, it was a gift to the marital estate); In re Marriage of Fulton, 147 P.3d 163, *2 (Kan. Ct. App. 2006) (Table) (house was gift from wife’s parents to wife only and not subject to distribution); Arenson v. Arenson, 2003 WL 1389057, *9-11 (N.Y. Sup. Ct. Feb. 13, 2003) (although wife’s parents paid for the house with $160,000 in cash and the title was in wife’s name alone, because husband testified that he chose the form of title to protect the house from other liabilities and because wife’s credibility was at issue, the house was still marital property); Bechara v. Essad, 2004 WL 1325636, *1, 13-14 (Ohio Ct. App. June 11, 2004) (wife’s parents gave the couple $30,000 for down payment towards the house and wife’s father testified that the gift was to wife alone, but a document listed both the couple as recipients of the gift, and wife’s father sometimes testified the gift as to “them” or “him”, therefore the gift was marital property); Kainrad v. Kainrad, 2002 WL 1049704, *1-3 (Ohio Ct. App. May 24, 2002) (when husband and his father both testified that $25,000 of the house price was a gift from the father to the husband alone, the gift was separate property).
nation of marital contribution and how that transmuted the house. 168
Some other cases involved the situation where the interest of the parents was never totally extinguished, and in these cases the courts tend to favor the protection of such interest, since the parents were not a party to the divorce. 169

III. THE IDEAL AND THE REALITY

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

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

169. E.g. In re Marriage of Clickard, 2002 WL 1001771, *2, 4, 9-11 (Cal. Ct. App. Aug. 6, 2002) (when wife’s parents gave the couple $20,000 for down payment towards a house, and then moved into the condominium titled under the couple’s name, lived there, and paid off the mortgage on the condominium, and the couple intended to transfer the title of the condominium to wife’s parents but did not do so, there is a valid and enforceable oral agreement to transfer the title of the condominium to the parents); Nicewski v. Nicewski, 909 N.E.2d 446, 447-50 (Ind. Ct. App. 2009) (when the title to the house was held in the name of husband’s parents and the couple was effectively renting from the parents, the trial court had no power to "adjudicate the issue of the ownership of that property."); transfer denied, 919 N.E.2d 553 (Ind. 2009); Ver Brycke v. Ver Brycke, 843 A.2d 758, 762-64, 776-77 (Md. 2004) (the gift from the parents in the form of fund towards purchase of a house was conditional on the couple moving into the house, and since the move did not happen, the parents could recover the fund and recover a pro tanto share in the profits from the sale of the house).

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

Changes in law always reflect changes in the society. The rapid urbanization and expansion of market economy of the recent years gave rise to new developments in legal thoughts and practices in areas such as jurisprudence, criminal law and civil law. In the civil law area, the prominent issue is the protection of property rights as a way to promote a social environment more conducive to economic development. To achieve this, lawmakers look to jurisprudence in developed countries for guidance. In particular, the growing interest in a more clearly delineated scheme of property rights has led to a renewed emphasis on title and third-party rights in marital property. Such emphasis was present since the very beginning of modern Chinese civil law. The emphasis remained even after the introduction of


172. The Chinese government officially adopted market economy as the governing economic policy in 1993, before that, the Chinese economy was mainly planned. See Wu Jixue (吴基学), Hui-wang Shehuizhuyi Shichang Jingji De Quzhe Lujing (社会主义市场经济社会的曲折历程 [Retrospective on the Tortuous Progress of Socialistic Market Economy]) [Jul. 15, 2006], http://theory.people.com.cn/GB/49154/49155/4594081.html (China).


177. See Da QING MIN LO CAO’AN § 1358, Yang Lixin, supra note 35, at 173 (clearly delineated separate property); MINGGUO MIN LO CAO’AN §§ 1135-1136, Yang Lixin, supra note 35, at 355 (same); ZHONGHUA MINGGUO MINFA § 1017 (1929) (same); Da QING MIN LO CAO’AN § 1355, Yang Lixin, supra note 35, at 173 (third-party rights with regard to marital property); MINGGUO MIN LO CAO’AN § 1123, Yang Lixin, supra note 35, at 353 (same); ZHONGHUA MINGGUO MINFA § 1020 (1929) (same).
community property. The new Property Rights Law of 2007 further affirmed the importance of title registration and rights of *bona fide* third parties (such as mortgagors) in dealings over commonly owned properties.

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

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

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

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

Marriage is, after all, not a purely economic decision. It necessarily involves much sharing of property and disregard of formal title. Furthermore, it encourages “life choices made in reliance on the continuation of marriage—choices to have children, to invest in the human capital of the primary breadwinner, and to divide roles to enhance the economic productivity of one spouse,” which are seldom in the choice-maker’s best economic interest when viewed retrospectively at the point of divorce.

The non-economic nature of marriage is the driving force behind the adoption of partnership principles in distribution of marital property in the United States. “[U]nder equitable distribution theory, a marriage is viewed as a partnership to some extent, with each partner entitled to a share in the property of the enterprise.” While there

186. See id. (But the situation regarding reimbursement for “community time, talent and labor” is not clear in China).
187. See Turner, supra note 143, at § 2.2.
188. Principles of Family Dissolution, supra note 143, at § 4.02.
189. Wang Yong, supra note 123; Zeng Zhihui, supra note 131.
191. Turner, supra note 143, at § 1.5.
194. 41 A.L.R. 4th 481 § 3 (1985) (citing cases).
remain criticisms that the partnership theory does not sufficiently compensate the disparate positions in the absence of sufficient marital property, no one seriously wants to go back to the pure title theory that was in force before the promulgation of Uniform Marriage and Divorce Act.

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

In particular, marital residence, as discussed above, constitutes the predominant part of marital property. Restoring title theory

196. Wang Yong, supra note 123.
198. Zuigao Remin Fayuan Guanyu Shiyong “Zhonghua Remnin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 17. This is not a complete doctrine of recrimination, as mutual fault does not prevent divorce itself but only prevents fault-based property claims.
200. See supra note 109.
201. Wang Yong, supra note 123. Also, Chinese Marriage Law does not recognize non-conventional properties such as future earning power, future retirement benefit or personal injury compensations as marital property. See Hunyin Fa § 18(2) (2001) (personal injury compensations are not marital property); Zuigao Remin Fayuan Guanyu Shiyong “Zhonghua Remnin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (Er) § 11 (payments from the pay-as-you-go-type retirement insurance—similar to 401(k) plan in the United States—that are actually acquired or vested during the marriage would be marital property, but there is no mention of defined-benefit retirement plan, or of future payments from retirement insurance after divorce); Zuigao Remin Fayuan Guanyu Shiyong “Zhonghua Remnin Gongheguo Hunyin Fa” Ruogan Wenti De Jieshi (San) § 13 (only the escrow amounts resulting from payments into retirement insurance during marriage, not the future insurance benefits, are subject to division if the insurance beneficiary is not yet retired at the divorce).
with regards to this one piece of property almost makes title theory the default marital property regime, with the jointly possessed property system an add-on.202 Before the change, the couples did not have to pay much attention to forms of title during the marriage, as they would not matter much even in a divorce, when properties are subject to a discretionary distribution on equitable considerations.203 Now, forms of title will matter in a divorce, and the party that does not pay enough attention will potentially be “punished.” Such encouragement for awareness of forms of title undermines the sense of sharing and trust that should accompany a marriage.204

Proponents of the new rule may point out that the new rule in China is in essence the same rule as in, for example, Texas, where marital residence is either separate or community depending on the time of the inception of title, and community contributions to separate marital residence only create a claim for compensation. However, such similarity is misleading. First, more Texas couples buy their marital residence during marriage than Chinese couples, where the practice of a husband buying residence before the marriage or of husband’s parents gifting the residence to the couple is widespread.205 Second, Texas also explicitly recognizes a claim out of labor contributions to the separate property.206 The Chinese counterpart is at best ambiguous and at worst non-existent.207 Lastly, the extremely limited reach of alimony in Chinese law,208 as opposed to that in the law of Texas (and most other states in the United States),209 means that even if the property distribution schemes were exactly the same, the result would still be more inequitable under Chinese law. For example, a party that did not bring a separate residence to the marriage but instead contributed much as

202. Wang Yong, supra note 123.
204. Wang Yong, supra note 123.
205. See supra notes 112-114.
207. See supra notes 119-121; see also Falü Dui Lihun You Nazie Guiding, supra note 101 (Chinese divorce law traditionally pays more attention to financial contributions than to labor contributions).
209. For example, in marriage that lasted for more than 10 years, a party is entitled to alimony in consideration of such factors as “the contribution ... to the education, training, or increased earning power of the other spouse” or “the contribution ... as homemaker.” TEX. FAM. CODE § 8.052 (West 2013). While there is a prerequisite of not being able to meet “minimum reasonable needs,” such a standard is a fact-specific and case-by-case one. TEX. FAM. CODE § 8.051; In re Marriage of Hale, 975 S.W.2d 694, 698 (Tex. App. 1998) (federal minimum wage does not necessarily establish the standard).
homemaker can at least hope to get some alimony after a long marriage in Texas. In contrast, such a party in China will not be able to entertain the same hope, and will probably leave the marriage with no meaningful property award. This seems quite incompatible with the supposed objective of the new rule to discourage short marriages.210

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

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

211. See TURNER, supra note 143, at § 1:5.
212. See id. at § 6:84.
213. See id. at §§ 6:21, 6:60, 6:62, 6:71.
214. PRINCIPLES OF FAMILY DISSOLUTION, supra note 143, at § 5.02; see also Kay, supra note 190, at 31-32 (discussing the “degree dilemma” and advocating a flexible approach based on “loss incurred by the supporting spouse”).
215. WEITZMAN, supra note 199, at 59-61.
216. The Anti Employment Discrimination Law is still in drafting stage in China, and discrimination is rampant. An egregious example is the requirement from a governmental office (among all employers) for all female applicants to have “well-developed secondary sexual characteristics, and symmetric breasts without lumps.” Gongwuyuan Tijian Biaozhun Qishi Guiding Duo Yao Nüxing “Rufang Duicheng” (Government Standards for Governmental Workers, with One Asking for “Symmetric Breasts” in Women) (Feb. 19 2004), http://bbs.zz18.com/thread-18365-1-1.html (China). A party that contributed to the marriage instead of to his or her own earning capacity will likely face severe discrimination (such as discrimination based on age, gender prototype, and family status) when he or she tries to find a job again after the divorce.
C. The new rules fails both in advancing the ideal of personal autonomy, and in adjusting to the realities of marriage in China

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

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

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

However, with diminished governmental ideology in everyday life, traditional family notions and practices gradually resurfaced. Generational families made a comeback.219 Interest in genealogical compilation, traditionally related to huge multigenerational family groups, surged.220 Lavish bridal gifts, a hidden "bridal price," have become so widespread that the Second Judicial Interpretation dedicated one arti-
ople to this practice. Polygyny, although still illegal, is now widely practiced – and even widely tolerated – under the names of “二奶” (second wife) and “小三” (third party). A survey showed that in one single city there were 200 complaints rising from open cohabitation with “second wives” in 1998, and the number of complaints is still growing. Moreover, such cohabitation is more and more open, with even governmental officials openly engaging in such practice. Curiously, courts have shown a remarkable restraint in financially regulating such behavior. In an interesting case, the husband bought a house for his “second wife” and put the title under her name, and then lived there openly with his wife, “second wife” and four children from both “wives” for four years. While the husband and the “second wife” eventually received criminal penalties for bigamy, the wife’s civil suit against the husband for a compensation from the dissipation of jointly possessed property failed, as the court concluded that there was no evidence that the husband paid for the house (even though the “second wife” never had any fixed job or income).

Underlying these developments is a revival of the view of women as merchandise—though an expensive piece of merchandise—probably out of reach of most men of suitable age in China. And there is a reason for such high price: the massive imbalance between the numbers of men and women of suitable age in China. Based on the 2010 census, the proportion between newborn boys and girls over the

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221. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hunyin Fa” Ruogang Wenti De Jieshi (Er) § 10 (China).
224. Id.
226. Id. (In the end, the parties settled, the “second wife” paid the wife a sum of 35K CNY and the wife moved out.)
227. See Qingdao Nühai Dinghun Jiehun De Xiangxi Jiaasu Biao (青岛耐海订婚结婚的向喜家表) [A Detailed Price Sheet for Engagement and Marriage with a Girl in Qingdao City] (Aug. 3, 2007), http://www.tianya.cn/publicforum/content/develop/1/124561.shtml (China). The “price sheet” shows that the husband generally will spend around 100,000RMB for a marriage, not counting the purchase of a house. The discussions following the “price sheet” show a strong feeling that the woman is some kind of merchandise.
228. See id.
last 10 years is 1:1806:1, and it is predicted that by 2020 there will be
30 million more men between the ages 20 and 45 than women of similar
ages. Moreover, the practice by the rich and powerful of keeping
“second wives” further drained the supply of suitable women (and
provided a “referential price” for women seeking financial commit-
ment from their mates).

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

This development appears the very antic of the ideal of personal
autonomy underlying the title view of marital property, yet the new


230. The Chinese stock market has been very volatile in the past decade, like the rest of
the world.

231. The tradition is strong enough that even detractors of the new rule believe men in
general should provide houses to women, instead of the couple working together for the house. See Wang Yong, supra note 123.


233. See supra notes 113, 231; see also Zhao Ningning (Wo Zai Lüxie Nü Lüshi Yantao-hui de Fayan Tigang (Wo Zai Lüxie Nü Lüshi Yantao-hui de Fayan Tigang) [Synopsis of a Talk on Conference of Female Lawyers Hosted by Shanghai Bar Association] (Sept. 14, 2011), http://www.9ask.cn/blog/user/claudia/archives/2011/279481.html (China).

234. See Interview Regarding the Interpretation, supra note 128.


236. This saying has been circulating on the internet for a while, but the author cannot find
the original source.
rule does nothing to counter it. Rather to the opposite, the Supreme People’s Court has explained that the aim of the new rule is the protection of the investing family.\textsuperscript{237} Apparently, the realities of marriage in China have prevailed over the ideal and led to a rule that “takes into consideration the relationship between rights of all members of the whole family.”\textsuperscript{238}

But the new rule does not adjust itself to the realities very well, either. While its objective is to protect the investing family, it is unlikely to achieve this in an equitable manner. If the husband’s family is rich and powerful, then it is in the upper-hand position in the marriage “trade,” and can resist the wife’s request to add her name to the title, thus the protection from the new rule is unnecessary. On the other hand, if the husband’s family is not so rich, then the wife is generally in the upper-hand position because of the overall scarcity of suitable women, and she will be able to force the family to add her to the title, thus defeating the new rule’s protection. This means that the new rule only protects a family when that family is relatively powerful in the marriage “trade.” This can hardly be considered equitable.

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

However, there are several flaws in that conclusion. First, such bargaining power does not protect women in existing marriages very well, as they have missed their crucial opportunity (at the inception of marriage, when their bargaining power was strongest) to ensure that their names appear on the titles. Instead of adding them to the titles, their husbands may choose to divorce them and keep the houses as “payments” for their new wives. Second, while the overall bargaining power of women may be good, this is not necessarily the case for each individual woman. A woman who wants to marry a rich and powerful man or a woman well past her prime will not draw any consolation

\textsuperscript{237} See Interview Regarding the Interpretation, supra note 128.
\textsuperscript{238} Zhao Ningning, supra note 233.
\textsuperscript{239} Hunyun Fa § 39(1) (2001).
\textsuperscript{240} See supra note 123.
from the fact that other women can force their husbands to add them to the titles. At the very extremes, the bargaining power may protect an attractive gold-digger interested only in taking away half of the life savings of her husband’s parents; yet may not protect a plain woman who has nothing to show but her devotion to the family.

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

Proponents of the new rule may also argue that the powerful side could have achieved whatever they wanted anyway, even without this rule. For example, they can use prenuptial contracts.245 The powerful parents can also keep the house under their names and only rent out the house to the couple,246 or they can make a conditional gift to the couple instead of an absolute gift.247 The powerful wife can also force the parents to transfer the house under her name (or the couple’s names) outright. Thus, the proponents would argue that the new rule

242. Id. at 25.
243. Id. at 22.
244. Id. at 20-22.
245. Hunin Fa § 19 (2001). But the law specifically requires consideration of homemaker contributions when a prenuptial contract is involved in a divorce proceeding. Id. at § 40.
246. Cf. Nieczk v. Nieczk, 909 N.E.2d 446, 447-48 (Ind. Ct. App. 2009). Under Chinese law, even when the couple intended to buy a house from one party’s parents and made joint payments for that house, if that house was directly acquired from the government during the housing reform, and if the deed of the house is still under the parents’ names, then the house is still treated as the parents’ property in a divorce. Zuigao Renmin Fayuan Guanyuan Shiyong “Zhonghua Renmin Gongheguo Hunin Fa” Ruogan Wenti De Jieshi (San) § 12.
only affects situations where neither side is too comparatively powerful, and can reach equitable results in these cases.

However, this argument is also flawed. On one hand, it presumes that a powerful party, in the absence of the new rule, will go the extra length at the inception of marriage to ensure a favorable outcome at a divorce, but is that really the case? After all, contemplations of marital life, not contemplations of divorce outcomes, fit the occasion. The slow adoption of prenuptial contracts reflects the prevalent social opinion against such negotiations. In addition, when the result of such prenuptial negotiations would not be determinative of the outcome in a divorce, there is a further disincentive for the extra effort. On the other hand, even if neither side is too comparatively powerful, the new rule changes “the basic dynamics of the marital game,” and encourages—even forces—the sides to engage in a prenuptial match of strengths. Even if the sides are able to work the problem out amicably, such an encouragement for awareness of the distinction between forms of title does little to promote harmony in the marital life.

D. The new rule is overly rigid and mechanical

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

As an American court states, “[i]t is the court’s function to make good business sense for spouses to create joint title that have

248. Xia Yinan, supra note 99 (about 2.7% of urban families and 1.1% of rural families approve of separate property ownership based on contracts); Huang Baoshu (黄宝书), Qianyi Hunqian Caichan Xieyi Gongzheng (钱延婚前财产协议) [On Notarized Prenuptial Property Agreements] (Mar. 31, 2011), http://falvluwen.com/nd/ShowArticle.aspx?ArticleID=104 (China).

249. Wang Yong, supra note 123.

250. Turner, supra note 143, at § 1-5; Wang Yong, supra note 123.

251. Zhang, supra note 3, at 42 (“There is… considerable reason to believe that the SPC’s primary objective in pushing forth the new marriage law interpretations was the pursuit of doctrinal simplicity and judicial efficiency.”)


253. Wang Yong, supra note 123.
nothing to do with any intent to create community property.”254 Conversely, there are also many reasons it may make sense for spouses to hold houses under a sole title, or for parents to gift the house into sole title, that have nothing to do with any intent to exclude the house from distribution. In fact, “[i]t is frequently placed in the name of one spouse or the other for reasons of convenience or even for no discernible reason at all.”255 A title-based bright-line rule is admittedly easy to administer, but, just like the pure title theory that has been abandoned in the United States, it is not “fair”.256

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

It might be argued that the current interpretation is just such a presumption, because it does not absolutely require the courts to ex-

255. Turner, supra note 143, at § 2.3.
256. Cf. id. at §§ 2.2, 2.3.
258. Wuqian Fa § 17.
259. Id. at § 15.
260. The Chinese law requires written contracts for real property transfers. Chengshi Fang-dichan Guanli Fa [Urban Real Property Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Jul. 5, 1994, effective Jan. 1, 1995) § 41, http://www.gov.cn/flfg/2007-08/30/content_732595.htm (last visited Apr. 5, 2013) (China). However, substantial performance can overcome this requirement. Hetong Fa § 36. The Contract Law also governs gifts. Id. at §§ 185-195. Moreover, promise can be inferred from course of dealing and practice of trade. Id. at § 22. Practice of trade can be such practice that is often applied in the locus of contract and is known or should be known by the parties. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Hetong Fa” Ruogan Wenti De jieshi (Er) (最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（二） [Second Judicial Interpretation by the Supreme People’s Court on Several Questions Regarding the Application of “Contract Law of the People’s Republic of China”]) (promulgated by the Sup. People’s Ct., Apr. 24, 2009, effective May 13, 2009) § 7(1), http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1051.htm (last visited Apr. 5, 2013) (China). Thus, the parties may contend such a contract exists based on substantial performance or practice of trade.
clusively use title for the classification. However, this is certainly not how the society views it. If it were the intention of the drafters to create a presumption only, it would be much better if they had worded it in a way clear to everyone. The current wording of the rule, instead, shows a clear and predominant preference for form of title. In the very least, this is sending a signal, not only to the lower courts, but also to the whole society, that legal formalities and operative ease, instead of equity and fairness, should be the guideline in divorce proceedings. Such a signal will by itself have profound impact on the realities of divorce.

CONCLUSION

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

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

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

261. Cf. Clarke, supra note 170 (arguing that the interpretation uses the word “may” so it allows but does not require the courts to give house to one party and give compensation to another, and some flexibility still exists).

262. See supra notes 125, 1311-1366.

263. See Marsha Garrison, The Economics of Divorce: Changing Rules, Changing Results, in DIVORCE REFORM AT THE CROSSROADS 75, 78, 90-92 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (judicial perception of the new rule, “underlying entitlement rules” and legislative actions, more than changes in negotiation power, affected the financial outcomes of divorces).

264. See supra notes 160-162.

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

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

Moreover, Marriage Law governs the dissolution of common ownership. It can be argued that at the time of divorce the common ownership already disappeared, and Property Rights Law no longer applies, especially since concerns about third-party rights are of less importance at this time.271 Thus it is entirely possible to come up with a different set of rules for the purposes of Marriage Law only. Such different rules exist in the United States. Washington uses community property system during the marriage, but adopted the all-property version of United Marriage and Divorce Act for the purpose of property distribution at divorce.272 Wisconsin has one definition for marital property during marriage and another for property subject to division at divorce.273 All the common law states apply the classification of marital and separate properties only for the purpose of equitable divi-

266. Wang Yong, supra note 123; Wang Liren, supra note 133.
267. Wuquian Fa § 97.
270. See also Wang Yong, supra note 123 (the division scheme in the new Judicial Interpretation is at odds with the division scheme for commonly owned property in Property Rights Law).
271. Id.
273. WIS. STAT. ANN. §§ 766.31, 767.61.
tion at divorce, and not during the marriage. So, why cannot Chinese law do the same?

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

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

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