43 S.Ct. 158
Supreme Court of the United States.

PENNSYLVANIA COAL CO.

V.

MAHON et al.

No. 549.
Argued Nov. 14, 1922.
Decided Dec. 11, 1922.

Synopsis

In Error to the Supreme Court of the State of Pennsylvania.
Suit by H. J. Mahon and another against the Pennsylvania Coal Company. A judgment for defendant was reversed by the Supreme Court of Pennsylvania (274 Pa. 489, 118 Atl. 491), and decree directed for plaintiffs, and defendant brings error. Reversed.

Opinion

*412 Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921 (P. L. 1198), commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the

defendant would cause the damage to prevent which the bill was brought but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs, A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other *413 things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

123 Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

456 This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560. But usually in ordinary private affairs the public interest does not warrant much of this

kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 103, 90 Am. Dec. 181. The extent of *414 the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land-a very valuable estate-and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should **160 be discussed. The Attorney General of the State, the City of Scranton and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

7 It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, ‘For practical purposes, the right to coal consists in the right to mine it.’ Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 Atl. 820, L. R. A. 1917E, 672. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This *415 we think that we are warranted in assuming that the statute does.

It is true that in Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713, it was held competent for the legislature to require a pillar of coal to the left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

8 The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

9 The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go-and if they go beyond the general rule, *416 whether they do not stand as much upon tradition as upon principle. Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & Boston Ry. Co., 172 Mass. 488, 489, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298. We are in

danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said this is a question of degree-and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short of the present act. Block & Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289, 66 L. Ed. 595, March 20, 1922.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

Mr. Justice BRANDEIS dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent 'as to cause the * * * *417 subsidence of * * * any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.' Act Pa. May 27, 1921, § 1 (P. L. 1198). Coal in place is land, and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance, and uses, once harmless, may, owing to changed conditions, seriously threaten **161 the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the

power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatended is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious-as it may because of further change in local or social conditions-the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private *418 persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923. Compare Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Walls v. Midland Carbon Co., 254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargine cases settled

that. Mugler v. Kansas, 123 U. S. 623, 668, 669, 8 Sup. Ct. 273, 31 L. Ed. 205; Powell v. Pennsylvania, 127 U. S. 678, 682, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253. See also Hadacheck v. Los Angeles, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927; Pierce Oil Corporation v. City of Hope, 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power. Compare Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; Missouri Pacific Railway Co. v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157. If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to *419 like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending ab orco usque ad coelum. But I suppose no one would contend that by selling his interest above 100 feet from the surface he could prevent the state from limiting, by the police power, the height of structures in

a city. And why should a sale of underground rights bar the state's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See Powell v. Pennsylvania, 127 U. S. 678, 681, 684, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; Murphy v. California, 225 U. S. 623, 629, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. But even if the particular **162 facts are to govern, the statute should, in my opinion be upheld in this case. For the defendant has failed to adduce any evidence from which *420 it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare Reinman v. Little Rock, 237 U. S. 171, 177, 180, 35 Sup. Ct. 511, 59 L. Ed. 900; Pierce Oil Corporation v. City of Hope, 248 U. S. 498, 500, 39 Sup. Ct. 172, 63 L. Ed. 381. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the Legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house, that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs, and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. Welch v. Swasey, 214 U. S. 91, 106, 29 Sup. Ct. 567, 53 L. Ed. 923; Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 365, 30 Sup. Ct. 301, 54 L. Ed. 515; Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 Sup. Ct. 281, 58 L. Ed. 539. May we say that notice would afford adequate protection of the public safety where the Legislature and the highest court of the state, with greater knowledge of local conditions, have declared, in effect, that it would not? If the public safety is imperiled, surely neither grant, nor contract, can

prevail against the exercise of the police power. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Atlantic Coast Line R. R. Co. v. North Carolina, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 39 Sup. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274, 63 L. Ed. 599. The rule that the state's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary (Chicago, Burlington & Quincy R. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948); *421 and, likewise, to supersede, by an Employers' Liability Act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. Ed. 789. Compare Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Douglas v. Kentucky, 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 23, 38 Sup. Ct. 35, 62 L. Ed. 124. Nor can existing contracts between private individuals preclude exercise of the police power. ‘One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them.’ Hudson Water Co. v. McCarter, 209 U. S. 349, 357, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 438, 23 Sup. Ct. 531, 47 L. Ed. 887; Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. The fact that this suit is brought by a private person is, of course, immaterial. To protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a state to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of--

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not limited to, churches, schools, hospitals, theaters, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

*422 (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Law, section 1.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be 'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity **163 of advantage is an important consideration, and may even be an essential, where the state's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects (Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369); or upon adjoining owners, as by party wall provisions (Jackman v. Rosenbaum Co., 260 U. S. 22, 43 Sup. Ct. 9, 67 L. Ed. 107, decided October 23, 1922). But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited

from using his oil tanks in 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381; his brickyard, in 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, Ann. Cas, 1917B, 927; his livery stable, in 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; his billiard hall, in 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; his oleomargarine factory, in 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; his brewery, in 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.

769 S.W.2d 849
Court of Appeals of Tennessee,
Middle Section, at Nashville.

Jack Miller BATSON, Sr., Plaintiff/Appellant,

v.

Mary Neal BATSON, Defendant/Appellant.

Sept. 30, 1988.
Permission to Appeal Denied by
Supreme Court Feb. 21, 1989.

Synopsis

Appeals were taken from order of the Probate Court, Davidson County, James R. Everett, Jr., J., which granted the wife a divorce, divided the property, and awarded the wife alimony and attorney fees.

The Court of Appeals, Koch, J., held that: (1) increase in value of pension plans, accounts receivable from husband's medical practice, notes from sale of property, and husband's income from margin accounts, medical practice, and rental property were marital property; (2) note which wife gave to husband and condominium which husband gave to wife became separate property, even though they had been marital property; and (3) in view of characterization of marriage and disparity in assets

brought into the marriage, marital property was not to be divided equally and the parties should in large measure be restored to their premarriage financial condition. Affirmed as modified.

OPINION

KOCH, Judge.

This appeal involves a middle-aged couple who were divorced after seven years of marriage. The Davidson County Probate Court, sitting without a jury, granted the wife the divorce, divided the property, and awarded the wife alimony *in solido* and attorneys fees. Both parties take issue with the manner in which the trial court classified and divided their property. In addition, the wife takes issue with the amount of the alimony *in solido* award, and the husband questions the trial court's award for attorney's fees. We have determined that the trial court's judgment should be affirmed as modified herein.

I.

Jack Miller Batson, Sr. met Mary Neal Klausner Batson in September, 1979. He was a forty-five-year-old physician specializing in internal medicine. She was a forty-six-year-old employee of the Tennessee Department of Human Services. Both parties had been married twice before and had children from their earlier marriages. Dr. Batson had a young son and several step-children from his second marriage, and Mrs. Batson had three older children, two of whom were still living with her.

The parties decided to marry after a whirlwind courtship. They signed a prenuptial agreement on December 16, 1979.[1] On December 27, 1979, they executed an addendum to the agreement in which Dr. Batson agreed to purchase a half interest in Mrs. Batson's Currywood home. They were married on December 28, 1979. Mrs. Batson left her job in January, 1980 because Dr. Batson told her that taking care of him would be a full-time job.

Dr. Batson moved into the Currywood home with Mrs. Batson and her two children. His young son came to live with them some time later. In January, 1980, he paid Mrs. Batson $25,000 and agreed to assume the mortgage on the Currywood home. In return, Mrs. Batson conveyed him a half interest in the Currywood property. In November, 1980, Dr. Batson purchased another home on Davidson Road. He paid cash for the property using his separate funds, but the title was made out in the names of both Dr. and Mrs. Batson.

The Batsons sold their Currywood home in April, 1981. The cash proceeds from the sale were used to retire the mortgage on the Currywood home. The purchasers also executed a $52,000 promissory note (“Boatman note”) made payable to Mrs. Batson. Dr. Batson explained at trial that he wanted Mrs. Batson to have the income from the note because she was not working.

Dr. Batson provided Mrs. Batson each month with funds for the household expenses and for her own personal use. During the marriage, she used portions of the *852 money, as well as the funds she received from Dr. Batson for part interest in the Currywood house, to assist her children with their educational expenses.

Married life in the Batson household was not tranquil. Dr. Batson underwent open-heart surgery in April, 1981, and his recovery was problematic. His relationship with Mrs. Batson's children deteriorated and became acrimonious and strained. His increasing problems with alcohol made matters worse. Mrs. Batson filed for divorce in May, 1981 but later dismissed her complaint. In October, 1981, Mrs. Batson went back to work for the Department of Human Services. While she did not return to her old job, she was able to return at her old salary.

In April, 1982, Dr. Batson began treatment for his alcoholism at an out-of-state psychiatric center. He asked Mrs. Batson to move out of the Davidson Road house, and so Mrs. Batson moved into a rented apartment with her children and Dr. Batson's son. Dr. Batson returned from treatment in July, 1982 and moved back into the Davidson Road house. In September, 1982, Mrs. Batson and her children moved back to the Davidson Road house at Dr. Batson's request.

The Batsons' married life did not improve, even though Dr. Batson had his drinking under control. His relationship with Mrs. Batson's children worsened. Mrs. Batson filed for divorce during the summer of 1983[2] following an incident involving Dr. Batson's second wife, and Dr. Batson moved into a rented apartment.

Dr. and Mrs. Batson attempted to reconcile in the fall of 1983. Dr. Batson refused to live with Mrs. Batson's children. Accordingly, he agreed to purchase a condominium in Mrs. Batson's name for the use of her children, and, in return, Mrs. Batson agreed to give Dr. Batson the Boatman note.

In November, 1983, Dr. Batson, using borrowed funds, purchased a condominium on Acklen Avenue for $66,000. The title to the property was placed only in Mrs. Batson's name. He also gave Mrs. Batson $3,500 to furnish the condominium. In December, 1983, Mrs. Batson and her daughter moved out of the Davidson Road house and into Dr. Batson's rented apartment with Dr. Batson and his son.

The Batsons sold their home on Davidson Road in February, 1984 for $170,000. They received $130,000 in cash and a $40,000 note (“Marianelli note”) payable to them jointly. Dr. Batson used the cash to repay the loan he had obtained to buy the Acklen Avenue condominium for Mrs. Batson and to meet the margin calls on his accounts with three stock brokers.

Dr. Batson suffered a serious heart attack in April, 1984. His recovery hampered his ability to work, and the income from his medical practice dropped off sharply during 1984. When he did return to work, he was able to work only part-time and was required to adjust his practice accordingly.

During the summer of 1985, Dr. Batson bought a condominium on Elmington Avenue in his own name for approximately $133,000. He paid for the condominium using funds from the sale of some of his stock and the federal income tax refund from the Batsons' 1984 joint tax return. Dr. Batson told Mrs. Batson that she could move into the Elmington Avenue condominium with him and his son if she wanted to. Mrs. Batson declined to do so based on a marriage counselor's recommendation that they separate while trying to work out their problems. Thus, in June, 1985, Dr. Batson and his son moved into the Elmington Avenue condominium, and Mrs. Batson moved into the Acklen Avenue condominium.

Believing that Mrs. Batson had "ran off and left a sick man with a helpless little boy", Dr. Batson filed for divorce in July, 1985. Mrs. Batson counterclaimed for divorce, *853 and the trial court heard the matter in April, 1986. The trial court filed a lengthy memorandum opinion in January, 1987 granting Mrs. Batson the divorce, distributing the property, and awarding Mrs. Batson alimony *in solido* and attorney's fees.

II.

The Reconciliation Agreement

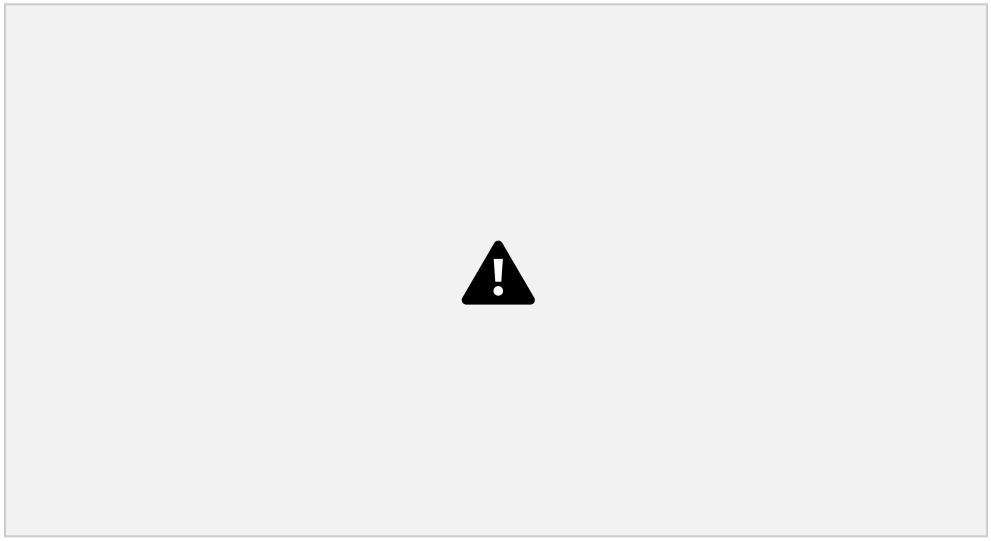
Dr. Batson has asserted throughout these proceedings that he and Mrs. Batson are bound by the terms of a purported reconciliation agreement they entered into sometime in the latter part of 1983. The trial court did not address the issue. However, the only conclusion we can draw from the memorandum opinion is that the trial court did not follow the purported agreement. We have chosen to take up this issue first because its resolution affects the division of the Batson's property.

The Batsons' relatively short marriage was punctuated by discord. On several occasions, they separated and began divorce proceedings, only to dismiss them later. One such occasion was during the summer of 1983 after Dr. Batson permitted his second wife to spend the weekend in their home. Both parties retained counsel, and Mrs. Batson filed a complaint for divorce.

Several months later, in late October or the first three weeks of November, Dr. Batson and Mrs. Batson began to discuss a reconciliation. They did not involve their lawyers in these conversations. The main point of contention was where Mrs. Batson's children would live because Dr. Batson did not want them living with him. They resolved the problem by providing Mrs. Batson's children with another place to live.

Mr. Batson described the agreement as follows: "[o]ur agreement for reconciliation was that if I would purchase a condo for her children to have a place to live while they were here in Nashville, then she would come back to me." Mrs. Batson's version of the agreement is similar. She testified that Dr. Batson and she agreed to reconcile and that she agreed to give Dr. Batson the Boatman note in return for his purchase of the condominium on Acklen Avenue.

Dr. Batson insists that their agreement went beyond the Boatman note and the purchase of the Acklen Avenue condominium. He supports this claim with an undated note, scribbled on a sheet from a legal pad, purporting to contain other agreements with regard to their property. The note provides:



*854 Mrs. Batson conceded that her signature appears on the note Dr. Batson prepared, but she testified that she could not remember signing it. While she readily admitted giving Dr. Batson the Boatman note in exchange for the Acklen Avenue condominium, she denied agreeing to relinquish her interest in the house on Davidson Road during the reconciliation discussions.

Following the principles applicable to prenuptial agreements, the Tennessee Supreme Court has held that reconciliation agreements are valid and enforceable. *In re Estate of Montesi,* 682 S.W.2d 906, 910 (Tenn.1984); *Hoyt v. Hoyt,* 213 Tenn. 117, 126, 372 S.W.2d 300, 304 (1963). However, the agreements construed by the Tennessee Supreme Court in these two cases bear little resemblance to the handwritten note relied upon by Dr. Batson.

Both parties in *In re Estate of Montesi* and *Hoyt v. Hoyt* were represented by counsel. Both agreements contained specific provisions for the full and final adjustment of the parties' interest in the property described in the agreements. Both agreements were also formally prepared and executed.

Dr. Batson offered little elaboration concerning the preparation or execution of the note. It is undated. It does not recite the purposes for which it was prepared, and it does not state that it is intended to represent a final and binding allocation of the parties' interests in the described property.

In addition to the ambiguities concerning the note's preparation, all the undertakings mentioned in the note were not carried out. The note provided that “Mary, Jack, and Drew [Dr. Batson's son] plan to find [a] permanent residence [in the] spring of 1984”

and that “Mary [would be] in on it.” Dr. Batson testified that the statement “Mary in on it” meant that he would “make her, in some way, beneficiary of the property” that would be purchased in the spring of 1984. He explained that “when I signed that, that I meant for Mary to have something of value come to her, something of financial—not emotional, but something of financial value—come to her.”

The Batsons did not find or purchase a permanent residence in the spring of 1984. Dr. Batson suffered a serious heart attack in April, 1984. It was not until the summer of 1985 that Dr. Batson purchased the Elmington Avenue condominium. While he intended it to be his permanent residence, he purchased it in his own name. Mrs. Batson was not “in on” the transaction since she received nothing of financial value from it.

1

2

Reconciliation agreements are contracts and should be construed using the rules of construction generally applicable to contracts. *See Matthews v. Matthews,* 24 Tenn.App. 580, 593, 148 S.W.2d 3, 11 (1940). Thus, if there has been substantial performance by one party, the other party cannot refuse performance after receiving the promised benefits. *Hoyt v. Hoyt,* 213 Tenn. 117, 128, 372 S.W.2d 300, 305 (1963).

3

Dr. Batson concedes that he did not follow through on the portion of the note stating that he would give Mrs. Batson a financial interest in the permanent residence he planned to purchase in the spring of 1984. Therefore, he has not substantially performed all the undertakings in the purported agreement.

Under these circumstances, we find that Dr. Batson's handwritten note does not embody a binding reconciliation agreement pertaining to the property described in the note. However, it does not necessarily follow that the parties will not be held to other agreements with regard to their property that are supported by the record.

III.

The Division of the Property

Both Dr. Batson and Mrs. Batson take issue with the manner in which the trial court divided their property. They insist that the trial court erred in classifying specific assets as either marital or separate property and that the distribution of the marital estate was inequitable. We find that the trial court misclassified several *855 assets and failed to deal with others. However, we find that the overall effect of the trial

court's distribution is equitable. Therefore, we affirm the trial court's division of the Batsons' property subject to the modifications discussed below.

A.

The Trial Court's Decision

The trial court filed a lengthy memorandum opinion in which it awarded the following assets to Dr. Batson as his separate property: (1) the real estate he owned prior to the marriage, (2) his IRA, (3) the funds in his Keogh plan, (4) his “medical practice,” and (5) his “financial holdings.” The trial court also found that Mrs. Batson's separate property included: (1) her retirement funds, (2) the household furnishings and property listed in Exhibit 51, and (3) the unspecified personal property listed in Exhibit 52.

The trial court determined that the Batsons' marital estate consisted of: (1) the Elmington condominium, (2) the Acklen Avenue condominium, (3) a 1981 Cadillac, (4) a 1983 Cadillac, (5) the furnishings and household goods in the two condominiums, and (6) the Boatman note. The trial court did not specifically deal with (1) the Marianelli note, (2) the corpus of Drew Batson's Clifford Trust, and (3) Dr. Batson's three margin accounts.

The following table depicts our understanding of the trial court's distribution of the Batson's property and the value of each asset as found by the trial court or as it appears in the record. It allocates the property not specifically mentioned by the trial court in accordance with our understanding of the terms of the memorandum opinion.

Trial Court's Property Division

Separate Property

		Husband	Wife
1.	Real Property	$ 119,000	
2.	IRA	6,325	
3.	Keogh plan	195,957 .58	

4.	Medical Practice				
	a. building	$500,000			
	b. equipment & computer	85,000			
	c. accounts receivable	31,360	.60		
				616,360	.60
5.	“Financial Holdings”				
	a. Clifford Trust corpus	28,000			
	TOTAL	$1,014,704	.18		$80,365

Marital Property

1.	Elmington condo	$133,000
2.	1983 Cadillac	13,000
3.	household goods	5,000
	TOTAL	$151,000

Trial Court's Property Division Separate Property Husband Wife1. Real Property $ 119,000 1. Retirement $ 20,3652. IRA 6,325 2. Prop. in Exh. 34,000 513. Keogh plan 195,957 .58 3. Prop. in Exh. 26,000 524. Medical Practice a. building $500,000

b. equipment & 85,000 computer c. accounts 31,360 .60 receivable ---------- 616,360 .605. “Financial Holdings” a. Clifford Trust 28,000 corpus ---------- --------- TOTAL $1,014,704 .18 $80,365 Marital Property1. Elmington condo $133,000 1. Acklen Ave. $ 66,000 condo2. 1983 Cadillac 13,000 2. 1981 Cadillac 5,0003. household goods 5,000 3. household goods 2,800 4. Boatman note 44,265 ---------- --------- TOTAL $151,000 $118,065

B.

Classification Errors

Between them, Dr. Batson and Mrs. Batson assert that the trial court made six errors with regard to the classification of their property. Dr. Batson takes issue with the classification of the Boatman note and the Acklen Avenue condominium as marital property. Mrs. Batson takes issue with the classification of Dr. Batson's Keogh plan, IRA, accounts receivable and investment income earned during the marriage as his separate property.

*856 We agree with both parties. The trial court's classification errors fall into three categories: (1) the failure to recognize the Batsons' gifts of marital property during the marriage, (2) the failure to accredit Mrs. Batson's indirect, non-cash contributions during the marriage to Dr. Batson's ability to accumulate assets, and (3) the failure to differentiate between assets owned prior to the marriage and the increase in the value of these assets during the marriage.

1.

[4]

Tennessee is a “dual property” jurisdiction because its divorce statutes draw a distinction between marital and separate property. Since Tenn.Code Ann. § 36–4–121(a) (Supp.1988) provides only for the division of marital property, proper classification of a couple's property is essential. *See* 3 *Family Law and Practice* § 37.08[1] (1988). Thus, as a first order of business, it is incumbent on the trial court to classify the property, to give each party their separate property, and then to divide the marital property equitably. *See* 2 H. Clark, *The Law of Domestic Relations in the United States* § 16.2, at 183–84 (2d ed. 1987).

Tenn.Code Ann. § 36–4–121(b) contains the ground rules for classifying property, and little elaboration is needed beyond the statute itself.

Tenn.Code Ann. § 36–4–121(b)(2) defines “separate property” as:

all real and personal property owned by a spouse before marriage; property acquired in exchange for property acquired before marriage; income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1); and property acquired by a spouse at any time by gift, bequest, devise or descent.

This Court has construed this section to mean that gifts by one spouse to another of property that would otherwise be classified as marital property are the separate property of the recipient spouse. This Court has also found that the portion of a spouse's pension or other retirement benefit attributable to creditable service prior to the marriage is separate property.

[5]

Tenn.Code Ann. § 36–4–121(b)(1) defines “marital property” as:

all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage ... including income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation and the value of a vested pension, retirement or other fringe benefit rights accrued during the period of the marriage.

In accordance with this statute, marital property includes the increase in value of separate property “if each party substantially contributed to its preservation and appreciation.” *Ellis v. Ellis,* 748 S.W.2d 424, 426–27 (Tenn.1988); *Crews v. Crews,* 743 S.W.2d 182, 189 (Tenn.Ct.App.1987). This Court has also held, in unpublished opinions, that marital property includes the increase in value of a spouse's pension during the marriage.

2.

The Retirement Benefits

The trial court determined that all the funds in Dr. Batson's IRA account and Keogh plan and all of Mrs. Batson's retirement funds were separate property. Its decision is based on findings that the parties “owned” these accounts prior to the marriage and that neither Dr. Batson nor Mrs. Batson “substantially contributed to the preservation or appreciation of such financial holdings” during the marriage.

The court's findings are factually flawed and legally incorrect. They overlook (1) the distinction between the pre-marriage value of a party's retirement benefits and the increase in value of these benefits during *857 the marriage, (2) the evidence that the value of Mrs. Batson's retirement funds was significantly increased during the marriage due to Dr. Batson's investment activities, and (3) the evidence that Dr. Batson contributed to both his Keogh plan and his IRA during the marriage.

Dr. Batson testified that the value of his Keogh plan prior to the marriage was $72,000 and that its value had increased to $195,957.58 at the time of the divorce. The trial court found that the $123,957.58 increase in the value of the Keogh plan was not due to Dr. Batson's efforts. However, Dr. Batson conceded, and his tax returns confirm, that he made sizeable contributions to both his Keogh plan and his IRA during the marriage. He testified at trial that he contributed an average of $760 per month to his Keogh and IRA, and his tax returns show that from 1980 through 1985, he contributed $23,321.17 to his Keogh plan and $4,000 to his IRA.

For her part, Mrs. Batson concedes in her brief that the $13,365 increase in the value of her retirement during the marriage is marital property. She liquidated her $7,000 retirement account when she left state service in 1980. Dr. Batson invested the funds for her, and at the time of the divorce, they had increased to $20,365. It is difficult to argue that the increase in Mrs. Batson's retirement funds was not substantially due to Dr. Batson's efforts.

The General Assembly amended Tenn.Code Ann. § 36–4–121(b)(1) in 1983 to provide that "marital property" includes "the value of vested pension, retirement or other fringe benefit rights accrued during the marriage."[3] The pension provision is not modified by the "substantial contribution" requirement preceding it. Therefore, pension benefits earned by a spouse during the marriage are marital property even though the other spouse did not contribute directly to their preservation or appreciation.

Our grammatical construction of Tenn.Code Ann. § 36–4–121(b)(1) is reinforced by the modern view that

"[retirement] benefits to be paid in the future represent delayed compensation for work performed over the years of employment. To the extent earned during the marriage, the benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution.

3 *Family Law & Practice* § 37.07[1], at 37–81 (1988). *See also* I. Baxter, *Marital Property* § 11:2 (Cum.Supp.1988).

The trial court specifically found that Mrs. Batson made "substantial contribution[s] to the marriage in her capacity as a homemaker, wife and stepmother." Accordingly, we find that the increases during the marriage in the value of Dr. Batson's Keogh plan and IRA should have been classified as marital property. By the same token, the increase in the value of Mrs. Batson's retirement funds should also have been classified as marital property.

3.

Dr. Batson's Accounts Receivable

Dr. Batson had $31,360.60 in accounts receivable from his medical practice at the time of the divorce. Even though the memorandum opinion does not deal with them specifically, we presume that the trial court included them as part of Dr. Batson's "medical practice" which it classified as Dr. Batson's separate property.

Mrs. Batson insists that the accounts receivable are marital property. Dr. Batson disagrees on the grounds that he had more accounts receivable prior to the marriage and that Mrs. Batson contributed nothing directly to the value of his medical practice. We do not find Dr. Batson's arguments convincing.

[7]

The accounts receivable of a spouse's professional practice will be considered *858 to be marital property if both spouses contributed substantially to earning them. *Smith v. Smith,* 709 S.W.2d 588, 591 (Tenn.Ct.App.1985). However, a spouse's contributions need not be direct in order to be considered substantial. Tenn.Code Ann. § 36–4–121(b)(1) provides that "substantial contribution[s]" may be "indirect contribution[s] of a spouse as homemaker, wage earner, parent, or family financial manager." Thus, in *Smith v. Smith,* this Court recognized that the wife's efforts as a wife, homemaker and mother contributed to the value of the husband's law practice. *Smith v. Smith,* 709 S.W.2d at 591.

[8]

The trial court found as a matter of fact that Mrs. Batson made a substantial contribution to the marriage in her capacity as a homemaker, wife and step-mother, tending to all the usual things a homemaker, wife and step-mother must tend to in order to avail her husband of the time to pursue his social relationships and professional activities to support the family, including the acquisition and sale of real estate.

We expressly concur in this finding and conclude that it provides an ample basis for treating Dr. Batson's accounts receivable as marital property.

4.

The Marianelli Note

The trial court failed to deal specifically with the Marianelli note—the note payable to Dr. and Mrs. Batson that was part of the proceeds from the sale of the house on Davidson Road. Dr. Batson insists that the note is his separate property because he used his separate funds to purchase the Davidson Road house and because Mrs.

Batson gave up her interest in the note when they reconciled in the fall of 1983. We disagree.

9

We have already found that the purported reconciliation agreement is not enforceable. We now find that Mrs. Batson made sufficient contributions to the marriage to justify classifying the Davidson Road house and any proceeds from the sale of the house as marital property.

Even though Dr. Batson used his own funds to purchase the house on Davidson Road, the title was placed in his and Mrs. Batson's names as tenants by the entirety. There is no indication in the record that Dr. Batson ever treated the Davidson Road house as if it were his separate property. If anything, the contrary is true.

Another panel of this Court recognized recently that separate property may become part of the marital estate if its owner treats it as if it were marital property. Professor Clark describes the doctrine of transmutation as follows:

[Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses. The rationale underlying both these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

2 H. Clark, *The Law of Domestic Relations in the United States* § 16.2, at 185 (1987).

In light of the status of the title of the Davidson Road house, and in the absence of proof that Dr. Batson clearly intended that the house would remain his separate property, we find that the house was marital property. Since the Marianelli note is part of the proceeds from the sale of marital property, it too is marital property and subject to equitable division.

*859 5.

The Income From Dr. Batson's Separate Holdings

10

Mrs. Batson also insists that the income from Dr. Batson's margin accounts, his medical practice, and his rental property should have been classified as marital

property. These funds were treated as marital property during the marriage. In light of the trial court's finding that Mrs. Batson made substantial contributions to the marriage, the income Dr. Batson received during the marriage should have been considered to be marital property.

6.
Gifts of Marital Property

[11]

Tenn.Code Ann. § 36–4–121(b)(2) provides that "property acquired by a spouse at any time by gift" is separate property. Dr. Batson and Mrs. Batson agree that in the fall of 1983, she gave Dr. Batson the Boatman note in return for the condominium on Acklen Avenue. Both these assets were acquired during the marriage and were, therefore, marital property. However, by making gifts to each other, the Boatman note became Dr. Batson's separate property and the Acklen Avenue condominium became Mrs. Batson's separate property.

C.
Equitable Division of the Marital Property

[12]

Tenn.Code Ann. § 36–4–121(a) provides that marital property should be divided equitably without regard to fault. It gives a trial court wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly owned property. *Fisher v. Fisher,* 648 S.W.2d 244, 246 (Tenn.1983). Accordingly, a trial court's division of the marital estate is entitled to great weight on appeal, *Edwards v. Edwards,* 501 S.W.2d 283, 288 (Tenn.Ct.App.1973), and should be presumed to be proper unless the evidence preponderates otherwise. *Lancaster v. Lancaster,* 671 S.W.2d 501, 502 (Tenn.Ct.App.1984); *Hardin v. Hardin,* 689 S.W.2d 152, 154 (Tenn.Ct.App.1983).

[13]

A trial court's division of marital property is to be guided by the factors contained in Tenn.Code Ann. § 36–4–121(c). However, an equitable property division is not necessarily an equal one. It is not achieved by a mechanical application of the

statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case.

14

Tenn.Code Ann. § 36–4–121(c)(1) permits trial courts to consider the duration of the marriage. In cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place. *In re Marriage of McInnis,* 62 Or.App. 524, 661 P.2d 942, 943 (1983).

15

When relatively short marriages are involved, each spouse's contributions to the accumulation of assets during the marriage is an important factor. *In re Marriage of Peru,* 56 Or.App. 300, 641 P.2d 646, 647 (1982). When a marriage is short, the significance and value of a spouse's non-monetary contributions is diminished, and claims by one spouse to another spouse's separate property are minimal at best. *In re Marriage of Wallace,* 315 N.W.2d 827, 830–31 (Iowa Ct.App.1981).

16

In light of the proof in the present case, we have determined that the Batsons' marital property need not be divided equally and that the parties should, in large measure, be restored to their pre-marriage financial condition. Our conclusion is based upon the following considerations:

(1) At the time of the marriage, Dr. Batson's net worth was more than ten times larger than Mrs. Batson's net worth, and his annual income was nine times larger. *860 (2) The parties were married for only a little more than five years prior to their separation in June, 1985.
(3) The Batsons supported themselves during the marriage primarily on Dr. Batson's income. Mrs. Batson's financial contributions were comparatively small either because she was not working or because she was using her income to support and educate the children from her second marriage.
(4) A large part of the marital property consists of the increase in the value of the Batsons' retirement accounts. Liquidating these accounts would diminish their value.
(5) Dr. Batson has had the responsibility to collect his accounts receivable and the Marianelli note, and their continued value may depend upon his continued efforts.

(6) Mrs. Batson's non-monetary contributions to the marriage are best considered as part of the award for separate maintenance and support.

[17]

Mrs. Batson insists that she has received too little credit for her contributions to the marriage as a wife, homemaker, and stepmother. We do not agree. A spouse's non-monetary contributions as a homemaker are relevant not only to the division of the marital property [Tenn.Code Ann. § 36–4–121(c)(5)] but also to an award for maintenance and support [Tenn.Code Ann. § 36–5–101(d)(9)]. In light of the nature of the Batsons' marital property, we have determined that Mrs. Batson's contributions as a homemaker are better recognized by making an award for maintenance and support.

The following table depicts the manner in which the Batsons' marital property should be divided:

Adjusted Property Division

Separate Property

	Husband		Wife
1.	Real Property	$119,000	1.
2.	Pre-divorce Keogh plan	72,000	2.
3.	Boatman note	44,265	3.
4.	Medical Practice		4.
a.	building	$500,000	
b.	equipment & computer	85,000	

				585,000
5.	Clifford Trust corpus	28,000		
	TOTAL	$848,265		

Marital Property

1.	Elmington condo	133,000		1.
2.	1983 Cadillac	13,000		2.
3.	Increase in Keogh	123,957	.58	3.
4.	Increase in IRA	6,325		
5.	Accounts receivable	31,360	.60	
6.	Margin accounts	49,061		
7.	Household Property	5,000		
8.	Marianelli note	35,699	.36	
	TOTAL	$397,403	.54	

Adjusted Property Division Separate Property Husband Wife1. Real Property $119,000 1. Pre-marriage $ 7,000 retirement2. Pre-divorce Keogh plan 72,000 2. Prop. in Exh. 34,000 513. Boatman note 44,265 3. Prop. in Exh. 26,000 524. Medical Practice 4. Acklen Ave. 66,000 condo a. building $500,000 b. equipment & 85,000 computer -------- 585,0005. Clifford Trust corpus 28,000 --------- --------- TOTAL $848,265 $133,000 Marital Property1. Elmington condo 133,000 1. 1981

Cadillac $ 5,0002. 1983 Cadillac 13,000 2. Increase in 13,365 retirement3. Increase in Keogh 123,957 .58 3. household goods 2,8004. Increase in IRA 6,3255. Accounts receivable 31,360 .606. Margin accounts 49,0617. Household Property 5,0008. Marianelli note 35,699 .36 ---------- --------- TOTAL $397,403 .54 $ 21,165

*861 The adjusted property division leaves the parties with approximately the same net worth they had prior to the marriage and preserves, in large measure, the relationship between their respective net worths that existed in December, 1979.

IV.

The Separate Maintenance Award

Mrs. Batson correctly points out that the trial court awarded her the Boatman note as part of the division of the marital property and then awarded it to her again as alimony *in solido.* We have already pointed out that the Boatman note is Dr. Batson's separate property because Mrs. Batson gave it to him in the fall of 1983. Thus, under our view of the case, Mrs. Batson is not entitled to the note. However, we have also determined that the trial court correctly concluded that Mrs. Batson is entitled to an award for her maintenance and support.

18

The factors used to determine the proper amount of maintenance and support are found in Tenn.Code Ann. § 36–5–101(d) (Supp.1988). As a general matter, the courts set the amount of a support award based on the needs of the innocent spouse and on the ability of the obligor spouse to pay. *Fisher v. Fisher,* 648 S.W.2d 244, 246–47 (Tenn.1983); *Barker v. Barker,* 671 S.W.2d 843, 847 (Tenn.Ct.App.1984). If one spouse is economically disadvantaged compared to the other, the courts are generally inclined to provide some type of support.

19

Compared with Dr. Batson, Mrs. Batson will be economically disadvantaged following the divorce. He has received more separate property and has been awarded a substantial portion of the marital property. Mrs. Batson's earning capacity is far less than Dr. Batson's, and there is little likelihood that it will improve. With the exception of her retirement funds, she has received no income-producing property. Dr. Batson, on the other hand, is a sophisticated investor and has received assets that will augment his earning power if they are managed properly.

There is little likelihood that Mrs. Batson will be able to maintain the standard of living she enjoyed during the marriage. She is presently fifty-five years old and earns approximately $17,600 as an employee of the Tennessee Department of Human Services. It does not appear that her earning capacity will improve substantially or that she will accumulate capital assets in the future.

Mrs. Batson provided valuable contributions during her marriage to Dr. Batson in her role as wife, stepmother and homemaker. While she used marital funds to house and educate the children of her second marriage, Dr. Batson agreed to these expenditures. However, her non-monetary contributions to the marriage have not been fully reflected in the manner in which the Batsons' marital property has been divided because of the nature of the marital property.

While Mrs. Batson shares in the responsibility for the failure of the marriage, her conduct did not cause the divorce. Dr. Batson's alcoholism and his antagonism toward Mrs. Batson's children were the precipitating causes. It was Dr. Batson's conduct that caused the trial court to award Mrs. Batson the divorce on the grounds of cruel and inhuman treatment.

After reviewing the proof in light of the factors contained in Tenn.Code Ann. § 36–5–101(d), we have determined that Mrs. Batson should receive an award for her maintenance and support in an amount roughly equal to the combined value of the Boatman and Marianelli notes at the time of the divorce hearing. Therefore, we make an award of $75,000 to Mrs. Batson for her future maintenance and support. Upon remand, the trial court shall determine the manner in which Mrs. Batson will receive these funds as long as they have been paid in full within five years after the mandate is issued. In accordance with Tenn.Code Ann. § 36–4–121(e)(2), the *862 award shall be secured by a lien in Mrs. Batson's favor on the Elmington condominium or property of similar value.

V.

Award for Legal Expenses

[20]

Trial courts are permitted to make additional awards to defray the legal expenses resulting from a divorce proceeding. *Palmer v. Palmer,* 562 S.W.2d 833, 838–39 (Tenn.Ct.App.1977). These decisions, like those involving support and maintenance, are within the trial court's discretion. *Fox v. Fox,* 657 S.W.2d 747, 749 (Tenn.1983); *Hardin v. Hardin,* 689 S.W.2d 152, 154 (Tenn.Ct.App.1983). This Court is not inclined to second-guess the trial court unless the evidence preponderates against its decision.

21

Dr. Batson takes issue with the trial court's decision to require him to pay $7,500 of the $9,627.68 in legal expenses Mrs. Batson incurred in the trial court. He insists that she has adequate funds with which to pay these expenses. We do not agree. The additional funds awarded to Mrs. Batson for her maintenance and support are intended to provide her an additional source of income. Mrs. Batson need not be required to defray her legal expenses by spending assets that will provide her with a source of income in the future. *See Harwell v. Harwell,* 612 S.W.2d 182, 185 (Tenn.Ct.App.1980).

22

Mrs. Batson also requests this Court to make an additional award to defray the legal expenses she has incurred on appeal. Trial courts have the discretion to make awards for appellate legal expenses. *Seaton v. Seaton,* 516 S.W.2d 91, 93–94 (Tenn.1974). On remand, the trial court may, in its discretion, make an additional award to Mrs. Batson for her legal expenses if it determines that an additional award is justified.

VI.

The judgment of the trial court, as modified in this opinion, is affirmed. The costs of the appeal are taxed in equal proportions to Jack Miller Batson and Mary Neal Klausner Batson, and their respective sureties for which execution, if necessary, may issue.

LEWIS and CANTRELL, JJ., concur.