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A THEORY FOR "JUST" DIVISION OF MARITAL PROPERTY IN MISSOURI

JOAN M. KRAUSKOPF*

I. INTRODUCTION

In a proceeding for dissolution of marriage or legal separation the Missouri Divorce Reform Act provides that "the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors."[1] What pole stars are there for a court seeking to divide the property as it "deems just"? What principles guide its exercise of discretion so that it will not be abused? The statute lists only four relevant factors.[2] No basic principles are stated. No published legislative history reveals the background of this statute. The power to divide marital property and even the concept of marital property are new in Missouri law. Therefore, prior decisions cannot form a discretionary framework.

However, statutes do not appear with the complexity and thoroughness of this section without a background. That background reveals two major guiding principles inherent in the statute: first, property division should reflect the concept of marriage as a shared enterprise similar to a partnership; and, second, property division should be utilized as a means of providing future support for an economically dependent spouse.

II. MARRIAGE AS A SHARED ENTERPRISE

A. *The Partnership Theory of Marriage*

The original Uniform Marriage and Divorce Act was approved by the Commissioners on Uniform Laws in August, 1970.[3] The following winter Senator Albert Spradling, who was himself a Commissioner, introduced into the Missouri legislature a modified form of the Uniform Act.[4] The

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1. § 452.330.1, RSMo 1973 Supp.
2. The factors as set forth in section 452.330.1, RSMo 1973 Supp., are:
   (1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
   (2) The value of the property set apart to each spouse;
   (3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and
   (4) The conduct of the parties during the marriage.
3. HANDBOOK OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS 111 (1970) (hereinafter cited as HANDBOOK); FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 1 (1974) (hereinafter cited as DESK GUIDE).
4. S.B. 11, Seventy-sixth General Assembly; Public Information Committee, The Missouri Bar, Press Release, Feb. 2, 1971; Thayer, *Dissolution of Marriage Under Missouri's New Divorce Law: Introduction,* 29 J. Mo. B. 496, 497-98 (1973).

Board of Governors of the Missouri Bar endorsed this bill. The property division section was identical to that in the Uniform Act.[5] The succeeding year, after a similar bill failed, the Family Law Committee of the Missouri Bar worked to eliminate the criticisms of the Uniform Act.[6] The product of their work became the Divorce Reform Act,[7] which was sponsored by Representatives Harold Holliday and Richard Martin in the House and by Senator Spradling in the Senate.[8] The property division section of this Act, as finally passed in 1973, is almost the same as the 1970 Uniform Act.[9]

The Commissioners stated that their "original proposal [for the division of property in the Uniform Act] was in substance . . . a community property rule."[10] The Act's definition of marital property[11] corresponds to that of community property in the eight community property jurisdictions.[12] The same system for classifying marital and separate property can be traced back to the earliest laws of Spain.[13]

Why would the National Conference of Commissioners on Uniform Laws, composed principally of persons from common law states, recommend a community property model for property division at divorce? The Commissioners did not wish to foist the entire community property regime upon common law jurisdictions, but they did want to incorporate the shared enterprise or partnership theory of marriage—the heart of community property law—as a major guiding principle in dividing property at divorce. Because marriage, as another study group wrote, "is a partnership to which each spouse makes a different but equally important contribution,"[14] the Commissioners recommended that the "distribution of prop-

5. UNIFORM MARRIAGE AND DIVORCE ACT § 307 (1970), *quoted in* HANDBOOK, *supra* note 3, at 220 (hereinafter cited as UMDA HANDBOOK).

6. Thayer, *supra* note 4, at 498.

7. H.B. 315, Seventy-seventh General Assembly; §§ 452.300-.415, RSMo 1973 Supp.

8. Thayer, *supra* note 4, at 498.

9. The major modification is the reference to the conduct of the parties in the Missouri statute. *See* statute quoted note 2 *supra*; UMDA HANDBOOK, *supra* note 3, at 220.

10. DESK GUIDE, *supra* note 3, at 57.

11. Section 452.330.2, RSMo 1973 Supp., and section 307 of the Uniform Marriage and Divorce Act, HANDBOOK, *supra* note 3, at 220, both define "marital property" as:

> all property acquired by either spouse subsequent to the marriage except:
> (1) Property acquired by gift, bequest, devise or descent;
> (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;
> (3) Property acquired by a spouse after a decree of legal separation;
> (4) Property excluded by valid agreement of the parties; and
> (5) The increase in value of property acquired prior to the marriage.

12. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 114-23 (1971) (hereinafter cited as DEFUNIAK & VAUGHN).

13. *Id.* at 8-10.

14. Professor Robert Levy of the University of Minnesota prepared a preliminary analysis of existing divorce laws and suggested issues for the consideration of the Commissioners. He began his analysis of property provisions with the statement quoted in the text from the report of the 1963 Committee on

erty upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a [business] partnership."[15]

The underlying premises of marriage as a partnership are thoroughly described in the standard work on community property by DeFuniak and Vaughn.[16] The theory of community property is that "with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity."[17] In the community property states it is expected that "during marriage the time and attention of husband and wife should be directed toward furthering the goals—economic, moral, social—of the marriage."[18] Property acquired during the marriage is community property

> because it is acquired by the labor and industry of members of a form of partnership, that is, a marital partnership . . . and whatever is earned or gained by one marital partner during the existence of the marital partnership must accrue to the benefit of both marital partners.[19]

B. *Defects of the Common Law Approach*

There is widespread dissatisfaction with the common law principles governing property division at marriage dissolution. A number of studies, including those by Professor Levy for the Commissioners on Uniform Laws,[20] the President's Commission on the Status of Women,[21] and the Law Commission of Great Britain,[22] have pointed out the shortcomings of the common law approach. Under the common law no property rights arise during marriage by virtue of the marriage itself. Since the Married Women's Property Acts were enacted giving the wife control over her separate property, there has been a complete separation of assets. Only at death, through dower, curtesy and, more recently, statutory forced shares, does one spouse acquire any interest in the property of the other by operation of law. Although this law of property during marriage and at death has its adherents[23] and critics,[24] the Commissioners and the Missouri legis-

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Civil and Political Rights of the President's Commission on the Status of Women. *See* R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 164 (1968) (hereinafter cited as LEVY).

15. HANDBOOK, *supra* note 3, at 178. *See also* Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies,* 23 AM. J. COMP. L. 1, 23 (1975).

16. DEFUNIAK & VAUGHN, *supra* note 12.

17. *Id.* at 2.

18. *Id.* at 20.

19. *Id.* at 128.

20. LEVY, *supra* note 14, at 135-40.

21. REPORT OF COMMITTEE ON CIVIL AND POLITICAL RIGHTS OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN (1963).

22. LAW COMMISSION OF GREAT BRITAIN, PUBLIC WORKING PAPER NO. 42, FAMILY PROPERTY LAW (1971) (hereinafter cited as LAW COMMISSION).

23. Rheinstein, *The Transformation of Marriage and the Law,* 68 NW. U.L. REV. 463 (1973).

24. Karowe, *Marital Property: A New Look at Old Inequities,* 39 ALBANY

lature were concerned solely with issues at the time of divorce.[25] At that moment the common law recognized no property interests by virtue of the marriage alone. In the absence of a statute, the courts of many states, including Missouri, had no power to order transfers or divisions of property. For those couples who had titled their property jointly an equal division at divorce took place. Although equal division in those circumstances could sometimes be unfair, at least the parties had created the situation by choice.

Real inequities can exist when the property is titled only in the name of the wage-earning husband because, as one commentator has written, the common law system emphasizes the

> fortuitous or calculated taking of title and ignores the wife's contributions to the family. . . . The wife may contribute to the family by sharing the bread-winner role with her husband, by being a housewife and mother, or by combining such functions. At least when the family is a functioning unit, the wife's contributions should be regarded as equal to those of the husband, whether they consist exclusively of services in the home or also involve supplementing the family income.[26]

Professor Levy, in writing for the Commissioners, agreed with this analysis. He pointed out:

> [T]he wife who spends almost all her married life in homemaking and child rearing contributes significantly to the family's economic welfare by making it possible for the husband to earn income and amass property during the marriage. . . .[27]

The common law system is based on the assumption that the wife's place is in the home.[28] Although it fosters the homemaker's role as proper and necessary, the common law provides no economic reward for the wife's contributions to the family assets or for her lost opportunity to develop earning power outside the home. The system ignores the fact that the wife's entire economic worth is absorbed into the marital unit.[29] The wife, as one author states,

> will have no earnings during [the marriage] nor the prospect of

L. REV. 52 (1974); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974).

25. The definition of marital property is "[f]or purposes of sections 452.300 to 452.415 only." § 452.330.2, RSMo 1973 Supp.

26. Foster, *Preface*, in I. BAXTER, MARITAL PROPERTY xiii (1973).

27. LEVY, *supra* note 14, at 165, *citing* Spheeris v. Spheeris, 37 Wis.2d 497, 155 N.W.2d 130 (1967).

28. Daggett, *Division of Property Upon Dissolution of the Marriage*, 6 LAW & CONTEMP. PROB. 225 (1939); Karowe, *supra* note 24, at 73; Krauskopf & Thomas, *supra* note 24, at 582-84; Kulzer, *Property and the Family, Spousal Protection*, 4 RUTGERS-CAMDEN L.J. 195, 215-17 (1973); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956).

29. Johnston, *Tax and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1036 (1972).

making any when the marriage ends. The law's treatment of her, although equal to that accorded her husband, does not put her on a par with him—he, in fact, earns.[30]

To redress this imbalance, the Law Commission of Great Britain in 1971 recommended:

> that the law should step in, and ensure that each spouse is entitled to a share in certain family property, irrespective of which spouse acquired it. This . . . would acknowledge the partnership element in marriage and would do no more than extend to the relatively uncommon case of the family which needs the support of the law the practice of happy family life.[31]

A Missouri case illustrates the injustice likely to occur when the court has no power to control disposition of the property by the husband or to order any of it transferred to the wife. In *State ex rel. George v. Mitchell*[32] a wife sued for divorce, alleging that personal property in the possession of the husband (including livestock, farm equipment, household furniture, and "one large lot of canned fruit") had been "acquired by and through the joint efforts of plaintiff and defendant during their married life together."[33] She asked that her husband be temporarily enjoined from disposing of this property to prevent him from "fraudulently depriving plaintiff of her rights therein as the wife of defendant."[34] The court refused the injunction, stating that the only rights she had in her husband's personal property were those which would materialize upon his demise. The court did not even discuss the possibility that she might have acquired some interest in this property, but assumed it all belonged to the husband.[35] Even if she could later obtain an order for gross alimony she would have to take her chances along with other judgment creditors in enforcing it.

Another objectionable feature of the common law approach is of growing importance as more women become wage earners—it ignores the wife's actual financial contribution to the acquisition of family assets titled solely in the husband's name. Over one-third of married women living with their husbands work outside the home and many more work at one time during their marriage.[36] The few existing empirical studies of family financial affairs indicate that spouses use their incomes interchangeably for family support and expenditures.[37]

30. Younger, *Community Property, Women and the Law School Curriculum,* 48 N.Y.U.L. REV. 211, 213 (1973).
31. LAW COMMISSION, *supra* note 22, at 8.
32. 230 S.W.2d 117 (Spr. Mo. App. 1950).
33. *Id.* at 118.
34. *Id.*
35. The usual common law presumption is that the husband owns all the household property. DiFlorido v. DeFlorido, 331 A.2d 174, 178 (Pa. 1975). However, in *DiFlorido* the court held that the Pennsylvania Equal Rights Amendment prevented application of that "one-sided presumption" and it presumed joint ownership in the absence of other evidence. *Id.* at 179.
36. LEVY, *supra* note 14, at 165.
37. A. JACOBS & R. ANGELL, A RESEARCH IN FAMILY LAW 469 (1930).

Nevertheless, these contributions, both direct and indirect, are often not recognized by common law courts at the time of divorce. For example, a New York court recently held that it was bound to follow the rigid title theory even though the wife presented evidence of her financial contributions to the family assets, all of which were titled solely in the husband's name.[38] The court explained that determining interests solely on title often led to harsh results both for wife and husband, and that the parties would be better served if the court had the power to award lump sum alimony or distribute assets without regard to title. This result illustrates why Levy pointed out: "It is unfair to deny divorce judges authority to parcel out what can only be considered the family's property—even if one of the spouses is formally listed as the property's owner."[39] His suggestion to the Commissioners was that both service and financial contributions to the acquisition of assets should be considered if the Uniform Act embodied a conception of marriage as a partnership enterprise. The Act could then direct the trial judge's attention to considerations more relevant to the division of property than the technical state of the title.

Another factor that impelled the Commissioners' decision to give courts power to divide property upon divorce is also related to the shared enterprise concept. Although often unstated, there was a widespread recognition among members of the bar that fault considerations, particularly the defense of recrimination, gave wives settlement leverage for obtaining a share of the property which they helped to amass during the marriage.[40] Indeed, it is probable that fault regimes "have persisted because they tend to equalize the bargaining positions of divorcing husbands and wives."[41] To remove those doctrines without also giving the courts the power to divide property would reflect a disastrous lack of appreciation for the contributions of the non-working spouse.

38. Popper v. Popper, _____ N.Y.S.2d _____ (Sup. Ct. 1975). A similar New York decision in 1970 indicated no sympathy for the wife whose earnings had been devoted to the family for almost 40 years but whose husband was held entitled to all investments because they were titled in his name. The court remarked that what the wife "really seeks is a community property division under the guise of equitable relief." Fischer v. Wirth, 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (1971).

39. LEVY, *supra* note 14, at 165. Levy criticizes the "unreal presumptions and petty distinctions" to which courts have resorted to determine property interests using resulting trust and presumption of gift theories. *Id.* at 165 n.358. For Missouri law, see Nelson, *Purchase-Money Resulting Trusts in Land in Missouri,* 33 Mo. L. REV. 552, 567-94 (1968).

40. Those present at the hearings in the Missouri legislature on various "no-fault" divorce bills may recall witnesses testifying that they feared "easy divorce" would result in great injustice to the faithful housewife of many years and that, therefore, divorce against her will by a less than innocent spouse would be wrong. This concern was so strong in England that its Divorce Reform Act permits the court to refuse a divorce if it would cause economic hardship to the respondent. Divorce Reform Act 1969, c. 55, § 4(1); Matrimonial Causes Act 1973, c. 18.

41. LEVY, *supra* note 14, at 165.

Krauskopf: Krauskopf: Theory for Just Division of Marital Property in Missouri

For example, in *Stauffer v. Stauffer*[42] a 65-year-old crippled wife sued for separate maintenance. The court described the 33-year marriage as "an American saga of hard work, frugality, and accumulation."[43] They operated a farm on which the wife cooked and washed for hired hands, worked in the fields, and even helped to clear land. Through their joint labors, they acquired land and personalty worth half a million dollars—all titled in the husband's name alone. The wife obtained a separate maintenance order for a meager $5,600 a year.[44]

Under the fault system Mrs. Stauffer might have been able to prevent a divorce with the defense of recrimination until a settlement produced a fair division of the assets. By preventing a divorce entirely, she would be able to obtain at least her statutory forced share of her husband's property if he died first. But under a "no fault" divorce system, without court power to divide property or without the shared enterprise theory to guide a court with that power, Mrs. Stauffer would have no title to show for her lifelong investment and no assurance of future support more secure than that of an ordinary judgment creditor.

C. *Acceptance of the Partnership Theory*

The Commissioners' desire to inculcate partnership concepts of marriage into the common law is not an aberration peculiar to them. Indeed, it is such a widespread and current value that it is fair to assume that the Missouri legislature also had that intent in enacting the Uniform Act section. The notion is alive, well, and growing by leaps and bounds, not only in the United States, but in many other countries as well. As early as 1959, a German writer said that throughout the western world

> it is generally recognized that the family is a sociological unit, and the work of the housewife is to be remunerated on a level with the professional work of the husband, whatever it may be, to balance the natural inequalities in the economic functions of husband and wife. The social developments of the past decades have strengthened the necessities towards the wife's just, clear and solid economic share in the gains made by the husband during marriage. Since it is a fact that even working-class families store up considerable savings and invest large sums of money in houses, cars, furniture, clothing, furs, television, etc., the economic participation of the spouses has been paid more and more attention.[45]

Research indicates that divorcing persons commonly agree to divide their property equally.[46] Various study commissions have concluded that

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42. 313 S.W.2d 597 (Spr. Mo. App. 1958).
43. *Id.* at 598.
44. *Id.* at 602.
45. Muller-Freienfels, *Equality of Husband and Wife in Family Law,* 8 INT. & COMP. L.Q. 249, 261 (1959).
46. Hopson, *The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level,* 11 KAN. L. REV. 107 (1962). The small number of cases in-

the traditional common law approach to property acquired by the spouses during marriage is no longer acceptable.[47] Finally, the past few years have witnessed a deluge of law review articles critical of the failure of legislatures and courts to recognize the shared enterprise nature of marriage in dealing with family property.[48]

Particularly strong evidence of acceptance of this value is the legislation passed both in the United States and elsewhere which reflects concern for more equitable division of family assets. Several continental countries have created a system of equal division of the increase in assets during marriage.[49] English courts have recently received the power to divide property even where it is titled only in one spouse's name.[50] Colorado, Kentucky, Maine, and Arizona, in addition to Missouri, have passed property division sections modeled on the Uniform Act.[51] The New Jersey legislature has given its courts the power to divide all property acquired during marriage, without regard to its source.[52] The New Jersey Supreme Court declared that although the statute did not necessarily adopt community property principles,[53] it

> seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than

vestigated in this study explains its description as a "pilot" study and renders its findings only tentative. More field research is needed to determine how divorcing persons actually divide their property.

47. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF COMMITTEE ON CIVIL AND POLITICAL RIGHTS 18 (1963); CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 5 (1968); REPORT OF CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN 20, 64 (1974); 3 ONTARIO LAW REFORM COMMISSION 506 (1969); LAW COMMISSION, *supra* note 22.

48. Foster & Freed, *Marital Property Reform in New York,* 8 FAM. L.Q. 169 (1974); Johnston, *supra* note 29; Karowe, *supra* note 24; Kay, *Making Marriage and Divorce Safe for Women,* 60 CAL. L. REV. 1683 (1972); Krauskopf & Thomas, *supra* note 24; Kulzer, *supra* note 28; Rheinstein, *supra* note 23; Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 CAL. L. REV. 1169 (1974).

49. C. CIV. art. 1400-91, 1569-80 (1965) (France); Law of June 18, 1957 (West Germany). For explanations of the French community and the German and Scandanavian deferred communities, see Foster & Freed, *supra* note 48; Glendon, *supra* note 15; Rheinstein, *supra* note 23.

50. Matrimonial Proceedings and Property Act 1970 c. 45, § 4, *codified in* Matrimonial Causes Act 1973 c. 18, § 24 (1).

51. ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1973); COLO. REV. STAT. ANN. § 46.1-13 (1972); KY. REV. STAT. ANN. § 403.190 (Supp. 1974); ME. REV. STAT. ANN. tit. 19, § 722-A (Supp. 1975).

52. N.J. REV. STAT. § 2A:34-23 (Supp. 1975).

53. Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974).

> economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute.[54]

The influence of the movement toward reliance upon partnership marriage principles has been reflected also in the court decisions of those common law states which have long had power to divide property, or to order gross alimony. For example, prior to the passage of the Uniform Act in Kentucky, its courts already had expanded by judicial decision their power to divide all property acquired during the marriage "according to what is just and reasonable."[55] The court treated property obtained during the marriage as acquired by "team effort" whether the wife was a wage earner and homemaker, confined her activities to homemaking exclusively, or worked actively as a business associate with her husband. The Wisconsin Supreme Court recently awarded a homemaker 48 percent of the couple's property,[56] relying on its own leading case of *Lacey v. Lacey*[57] for the proposition that marriage "is literally a partnership, although a partnership in which contributions and equities of the partners may and do differ from individual case to individual case."[58] The court added,

> The contribution of a full-time homemaker-housewife to the marriage may well be greater or at least as great as those of the wife required by circumstances or electing by preference to seek and secure outside employment.[59]

Oklahoma[60] and Nebraska[61] courts have characterized orders for the payment of substantial lump sums of money to the wife as divisions of property based on her contributions to her husband's earning power by helping pay his way through professional school.

D. *Limitations on the Power to Divide Property*

The Uniform Act and the Missouri Divorce Reform Act allow only the division of "marital property." The court's power to divide property was not extended to all property (including separate property) owned by the spouses because the shared enterprise or partnership theory is inherently applicable only to property acquired during the marriage through the efforts of the spouses. Limiting the class of divisible property emphasizes the intent to adopt partnership principles, but it also raises potential problems.

The ABA Family Law Section opposed this provision of the Uniform Act because it feared the necessity of using complex and unfamiliar

54. Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974).
55. Colley v. Colley, 460 S.W.2d 821, 826-27 (Ky. 1970).
56. Parsons v. Parsons, 68 Wis. 2d 744, 229 N.W.2d 629 (1975).
57. 45 Wis. 2d 378, 173 N.W.2d 142 (1970).
58. Parsons v. Parsons, 68 Wis. 2d at _____, 229 N.W.2d at 634 (1975).
59. *Id.*
60. Diment v. Diment, 531 P.2d 1071 (Okla. 1974).
61. Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973).

community property principles to distinguish between marital and separate property.[62] As a result, the amended Uniform Act offers alternative sections.[63] Alternative A permits the division of all property. Alternative B is the former marital property section modified for use in community property states. The Family Law Section apparently hoped to protect the homemaker through a statutory presumption that "each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife."[64] Unfortunately, this language was deleted from the final draft without explanation.

Introduction of technical community property doctrines to identify divisible property may indeed accomplish little and lead to some unjust results in common law jurisdictions which already allow division of all property.[65] However, there is a noticeable propensity in the courts of those states to make strikingly similar distinctions between "separate" and "marital" property, and to award the separate property to the appropriate spouse.[66] There seems to be a basic feeling that it is indeed equitable to give back to each spouse the property he acquired before the marriage or by gifts during the marriage. To this extent, the disadvantages of the limitation to marital property are insignificant. Most of the separate property issues litigated under Alternative B may arise anyway under Alternative A in the context of what is an "equitable" division of all the property. If Missouri courts adopt the partnership theory, the apparently technical scheme of section 452.330 will have accomplished its purpose without needless complexity.

62. Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S.D.L. Rev. 601, 607 (1973). However, the Law Commission of England after studying various community and deferred community systems concluded that such arguments against a community property regime should not be determinative. It said that the question to be decided was "whether it would lead to a greater measure of justice to give effect to the idea that marriage is a partnership, by sharing the assets acquired during the marriage, regardless of which spouse contributed to their acquisition. This question cannot be avoided on the ground that community is too difficult." Law Commission, *supra* note 22, at 310.

63. Uniform Marriage and Divorce Act § 307 (1973); Handbook of the National Conference of Commissioners on Uniform Laws 286, 312 (1973); Desk Guide, *supra* note 3, at 32.

64. *Proposed Revised Uniform Marriage and Divorce Act* § 307, 7 Fam. L.Q. 135, 152 (1973).

65. Judge Ralph Podell of Milwaukee, Wisconsin was the leading spokesman for the Family Law Section. The supreme court of his state is one of those few common law jurisdictions already clearly adopting partnership marriage concepts; therefore, it has little to gain from the marital property limits. Judge Podell pointed out that a woman would be relegated to relying on alimony alone if the husband owned assets worth ten million dollars which all were acquired prior to the marriage. This may seem inequitable to a wife of a 35-year marriage, but it certainly prevents fortune hunters from marrying solely to obtain a chance at the assets after a relatively short period. The inequity could be reduced by modifying the statute, as was done in Colorado, to include in marital property the increase in value of property owned prior to marriage. Colo. Rev. Stat Ann. § 46-10-113 (4) (1972).

66. *See* Note, *Property, Maintenance, and Child Support Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D.L. Rev. 558, 566 (1973).

A last significant question concerning the shared enterprise nature of marriage as a guiding principle is: Why did not the Commissioners or the Missouri legislature simply require an equal division of the marital property unless the parties agreed otherwise? That would be the solution to division of the profits and surplus of a business partnership,[67] and it is advocated strongly by some partnership marriage devotees.[68] In his recommendations to the Commissioners, Professor Levy said that property division should serve not only to protect capital contributions but also to permit courts to recognize that the parties were partners.[69] However, he opposed mandatory equal division because he recognized that legislatures may believe that there are socially desirable considerations other than equality—*e.g.*, the conduct of the parties during the marriage,[70] relevant to a just division of property. The Task Force on Family Law and Policy of the Citizen's Advisory Council on the Status of Women pointed out that not only are both parties present to show their respective contributions to the family assets but also the duration of marriage, economic circumstances, or age of the parties may be such that a fixed equal division would not be fair.[71] The Commissioners deemed the most socially important consideration the economic dependency or self-sufficiency of the spouses.[72] An automatic equal division of property would ignore that factor entirely.

III. Division of Property as a Form of Support

The second major guiding principle which Missouri courts should follow in determining a "just" division of marital property is the need for future support by the spouses. The Commissioners stated they intended the courts to use property division "as the primary means of providing for the future financial needs of the spouses."[73] This function was justified by the New Jersey Supreme Court as follows:

> Hitherto future financial support for a divorced wife has been available only by grant of alimony. Such support has always been inherently precarious. It ceases upon the death of the former husband and will cease or falter upon his experiencing financial misfortune disabling him from continuing his regular payments. This may result in serious misfortune to the wife and in some cases will compel her to become a public charge. An allocation

67. § 358.180 (1), RSMo 1969 (Uniform Partnership Law).
68. Foster & Freed, *supra* note 48.
69. Levy, *supra* note 14, at 365 n.357.
70. § 352.330.1 (4), RSMo 1973 Supp.
71. Report of the Task Force on Family Law and Policy of the Citizen's Advisory Council on the Status of Women 5 (1968).
72. *Id.*
73. Handbook, *supra* note 3, at 178. This comment refers to the property division section of the 1970 Uniform Act. The 1973 amendment to the Uniform Act required a change in the prefatory note to indicate that all property of either spouse would be divided to provide needed support. *See* Handbook of the National Conference of Commissioners on Uniform Laws 284 (1973).

of property to the wife at the time of the divorce is at least some protection against such an eventuality.[74]

The situation is especially acute for the older dependent wife whose husband is about to retire with all the property, except perhaps the marital home, titled in his name. She will no longer have the bargaining edge of recrimination to prevent the divorce and will lose fringe benefits such as medical coverage and the spouse's share under his retirement plan.[75] A woman of her generation has very likely developed no earnings skills because she has devoted herself to homemaking during their marriage. The combination of this woman's contributions and needs may be such that a "just" division of the marital property would be to award nearly all to her. Because the incidence of divorce among older persons has increased substantially, it is appropriate that special concern be evidenced for the older, economically dependent woman. However, the economic disadvantages of both spouses should always be considered. For example, the court should bear in mind whether this wife, as is true of most women, has less earning capacity than men, whether this husband is in fact unskilled or incapacitated, and whether there is sufficient property to allow the custodian of the children to remain home with them. The second and third factors in § 452.330.1 require the court to consider all separate property and economic circumstances.

IV. EQUAL DIVISION AS STARTING POINT

It is clear that neither the Uniform Act nor the Missouri statute *requires* an equal division of marital property and that both would *allow* an equal division. There is a question whether any particular percentage division should be used as a starting point. Most common law jurisdictions having the power to divide all property have rejected starting point percentages in the past.[76] Recent cases in those jurisdictions—even in states amenable to partnership notions—continue to reject starting points.[77]

A court having the power to divide all property of either spouse without regard to its source should not utilize a starting point percentage. The major reason for awarding one spouse's separate property to the other spouse is to satisfy the latter's economic needs. Requiring the owner of separate property to overcome a starting point presumption would be like including all of a business partner's individually owned property in the partnership assets unless he could affirmatively show that it was

74. Rothman v. Rothman, 65 N.J. at 228-29, 320 A.2d at 501; *accord,* Woliner v. Woliner, 132 N.J. Super. 216, 333 A.2d 283 (1975).

75. However, she will be entitled to Social Security benefits on his earnings record if they were married twenty years and he continues to contribute to her support. 42 U.S.C. § 416(d)(1) (1974).

76. *See* cases cited in 27B C.J.S. *Divorce* § 295 (1959).

77. *In re* Briggs, 225 N.W.2d 911 (Iowa 1975); *In re* Cooper, 225 N.W.2d 915 (Iowa 1975); Cook v. Cook, 495 P.2d 591 (Mont. 1972); Durfee v. Durfee, 465 P.2d 161 (Okla. 1970); Lacey v. Lacey, 173 N.W.2d 142 (Wis. 1970).

not acquired in the course of the partnership business. The partnership principle is irrelevant to separate property, and it is thus inherently unfair to apply an equal division starting point in this situation. The spouse claiming a share of the other's separate property should be forced to establish his need without the aid of starting point percentages.

Community property states, even where an equal final division is not required, have adopted an equal division as a starting point.[78] When the court is dealing only with the assets obtained due to the effort and industry of the parties during the marriage, a starting point percentage is justified. A 50-50 starting point reflects the basic partnership assumption of equality, but allows other relevant considerations, if established, to influence an unequal division.

States such as Missouri with a common law background whose statutes limit the division of property to that acquired during the marriage (other than by gift, devise, or inheritance) are in neither group.[79] Whether the courts of Missouri, Kentucky, Colorado, or Maine will develop equal division of the marital property as a starting point depends upon how strongly they embrace the concept that assets acquired by the labor and industry of the spouses should be viewed as the assets of a marital partnership.[80] The partnership concept of marriage would be given primary value by selecting equal division of marital property as a starting point. Divergence from the presumption would depend upon the strength of other relevant factors such as actual contributions, economic need, and conduct of the parties.

V. Conclusion

Missouri courts are now engaged in the process of giving content to the legislative direction to make a "just" division of property upon dissolution of marriage. In developing judicial guidelines to implement the statute, the courts should recognize that the partnership theory of marriage is the fundamental tenet underlying the property division section of the Divorce Reform Act.

The concept of marriage as a shared enterprise is a much needed departure from the common law system, and remedies many of its deficiencies. For example, by using shared enterprise considerations Missouri courts may now take account of contributions of all types—by the homemaker as well as the wage earner—to the accumulation of the family's

78. Hatch v. Hatch, 23 Ariz. App. 487, 534 P.2d 295 (1975); Thomas v. Thomas, 525 S.W.2d 200 (Tex. Civ. App. 1975).

79. New Jersey finds itself in a truly unique situation. The supreme court has held that property acquired prior to marriage is not subject to division, but that all property acquired during the marriage, including that acquired by gift or inheritance, is subject to division. Painter v. Painter, 65 N.J. at 217, 320 A.2d at 480.

80. The Kentucky Supreme Court rejected a starting point percentage before its new property division statute was enacted. Colley v. Colley, 460 S.W.2d 821 (Ky. 1970).

assets. The introduction of the marital property concept into Missouri law should have a beneficial result in protecting spouses from the possibly dire consequences of titling in one spouse's name property which was acquired during the marriage by the joint effort of both.[81]

Although the division of marital property is analogous to the division of assets at the dissolution of a business partnership, the statute permits the court the necessary flexibility to adjust the property division according to the actual economic needs of the parties. This not only compensates for the loss of fault defenses as a bargaining tool, but also provides a more secure future for the economically dependent spouse.

Recognition of the partnership theory of marriage will put Missouri into the mainstream of the increasing national and international acceptance of the fact that marriage, as practiced by most persons, is literally a partnership. The intelligent use of the partnership principle will enable the court to fulfill its duty to make a "just" division of property.

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81. Recognition of the partnership nature of marriage may have significant tax advantages. In United States v. Davis, 370 U.S. 65 (1962), the Supreme Court held that the transfer of appreciated property to the wife pursuant to a divorce settlement resulted in a taxable gain to the husband. Under the applicable state law, Mrs. Davis had no interest in the property before the transfer. The result in Missouri before the enactment of section 452.330 would clearly have been the same. *See* text accompanying notes 32-35 *supra.*

A recent decision considered the effect of COLO. REV. STAT. ANN. § 46-1-13 (Supp. 1971), which is modeled, like the Missouri statute, on section 307 of the Uniform Marriage and Divorce Act. The Tenth Circuit affirmed a district court opinion holding that a judicial division of appreciated property in Colorado did not fall within the *Davis* rule. Imel v. United States, 523 F.2d 853 (10th Cir. 1975), *aff'g* 375 F. Supp. 1102 (D. Colo. 1974). The lower court had certified to the Colorado Supreme Court the question of the nature of the wife's property interest, if any, in marital property titled solely in the husband's name. The state court held:

> [A]t the time the divorce action was filed there vested in the wife her interest in the property in the name of the husband [by virtue of the statute].
>
> . . . .
>
> [T]he transfer involved here was a recognition of a species of common ownership of the marital estate by the wife resembling a division of property between co-owners.

In re Questions Submitted by United States District Court, 517 P.2d 1331, 1332, 1334 (Colo. 1974). Although the consequences of the property division were considered under the prior Colorado statute, COLO. REV. STAT. ANN. § 46-1-5 (1963), the district court indicated its belief that the Uniform Act section was "nothing more than a legislative recognition of pre-existing Colorado law." Imel v. United States, 375 F. Supp. at 1113-15 & n.11. *Imel* suggests that predictions that the Missouri property division section would not avoid the *Davis* rule are overly pessimistic. *See, e.g.,* Gunn, *The Federal Income Tax Effects of the Missouri Version of the Uniform Divorce Act,* 62 WASH. U.L.Q. 227 (1974).