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LAW AND THE HOUSEWIFE: PROPERTY, DIVORCE, AND DEATH

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The conversion of women into a crypto-servant class was an economic accomplishment of the first importance.[1]

INTRODUCTION

This article is an examination of property distribution within the family, or more precisely, between husband and wife.

Although familial living patterns are now different from what they once were, or were thought to be, and will certainly continue to change, the traditional model, which is assumed in many existing laws, still predominates. This model, of course, posits the husband as breadwinner and the wife as homemaker. The first position leads to the relatively independent accumulation of property; the second does not.

Recent Developments

The current movement for equality between the sexes does not seek, nor will it result in, an abolition of the role of homemaker or housewife. It does urge that it not be assumed that all women will be homemakers or housewives and that no men will be similarly engaged.[2] The househusband, however, is

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The excellent assistance of Patsy Freeman is most gratefully acknowledged. In a more general fashion, ideas developed through discussions with students in various courses on decedents' estates and gender-based discrimination find expression here. The author, of course, remains fully responsible for any errors.

1. J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 35 (1973).

2. E. JANEWAY, MAN'S WORLD — WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY (1971), challenges perceptions of a strict labor division within the family, as does Rossi, *Equality between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607 (1964).

Such role distinctions persist today as evidenced by the dialogue of Howie and Sally appearing in a recent "Doonesbury" comic strip:

Sally: Howie, are you ever going to get married?

Howie: I sure am, Sally. I'm planning on being very successful when I grow up. And, you *gotta* have a wife if you're gonna be successful!

Sally: How come?

Howie: So that when you're out making a name for yourself, you'll have someone to clean the house, do the cooking, and raise the kids!

Sally: A wife will do all that stuff?

Howie: Uh-huh. For free, too!

still rather rare, for there are probably more disincentives to a male's assuming that role than there are for a female's aspirations to the professions. This article therefore proceeds along traditional lines in designating, for the most part, the homemaker as a woman. If the Equal Rights Amendment (ERA) is adopted, gender-based laws regulating property distribution within the family may be recast in terms of function, rather than gender, so that whoever assumes the role of homemaker (if indeed anyone does) would suffer the disadvantages of existing practices, or receive the benefits of new laws that may be enacted.[3]

As this article was being prepared, the ERA was again defeated in Florida.[4] Although the reasons for its defeat are unclear, fears that advantages enjoyed by women would be lost and that their freedom to be housewives and mothers would be jeopardized appear to be important factors. This unthinking response to a serious issue is not atypical. Lawyers and legislators commonly display a lack of logic in their conceptions of woman's role within the family.[5]

Presently, rhetoric to the contrary notwithstanding, the housewife is the most vulnerable, least protected, and least privileged of all American workers.[6]

Sally: Really?

Howie: Sure! A wife's a pretty good deal — I can't wait for mine!

Sally: Gee . . . Maybe I should get one, too.

Howie: Well, try to get a pretty one — they never get traffic tickets.

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3. See generally Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872, 936-54 (1971). The general view of the ERA's effect is that benefits now granted women would be extended to men and that disadvantageous legislation would be repealed.

4. *See* Annals of the Florida Senate, April 25, 1975.

5. For accounts of male bias, see Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970); Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033 (1972); Johnston and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971); Kulzer, *Property and the Family; Spousal Protection*, 4 RUTGERS-CAMDEN L.J. 195 (1973).

6. "Women are still expected to do things because of love and/or duty. The very thought of paying women for their housekeeping services is horrifying anathema. Even in the labor market they are not supposed to be paid very much for services that are 'only natural for women anyway.'" J. BERNARD, WOMEN AND THE PUBLIC INTEREST: AN ESSAY ON POLICY AND PROTEST 115 (1971).

Another characterization is found in J. GALBRAITH, *supra* note 1, at 33: "Menially employed servants were available only to a minority of the preindustrial population; the servant-wife is available, democratically, to almost the entire present male population. Were the workers so employed subject to pecuniary compensation, they would be by far the largest single category in the labor force. The value of the services of housewives has been calculated, somewhat impressionistically, at roughly one fourth of the Total Gross National Product. The average housewife has been estimated (at 1970 rate for equivalent employments) to do about $257 worth of work a week or some $13,364 a year. If it were not for this service, all forms of household consumption would be limited by the time required to manage such consumption. . . . The servant role of women is critical for the expansion of consumption in the modern economy. That it is so generally approved, some recent modern dissent excepted, is a formidable tribute to the power of the convenient social virtue."

Galbraith does not do justice to the long-standing recognition of inequities suffered by wives. For much earlier accounts, *see, e.g.*, J. MILL, THE SUBJECTION OF WOMEN (1869);

Only those who are or have become emblems of prestige and affluence to wealthy husbands can benefit even marginally by current laws and practices.[7] Thus, the reasons most often offered for defeat of the ERA — the loss of privileges to women and the consequent decline of the family — are without basis in fact. If the concern is for the patriarchal family, its decline started some years ago, and the ERA will not necessarily affect that sociological phenomenon. As for the privileges, they do not exist.[8] Nor would the amendment lessen a woman's freedom to be a wife and mother.[9] It would forbid classification of women generally as if none of them were anything but housewives or ever desired to be.[10] At the same time the amendment may foster recognition of a husband's essential and much neglected role within the family and with regard to his children,[11] which should logically strengthen the family. It is in this context that the role and definition of housewife — or homemaker — will

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M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN (1792). For an account of the 19th Century feminist debates, see F. BASCH, RELATIVE CREATURES: VICTORIAN WOMEN IN SOCIETY AND THE NOVEL 3-15 (1974); C. DALL, THE COLLEGE, THE MARKET AND THE COURT; OR, WOMAN'S RELATION TO EDUCATION, LABOR AND LAW (1967). For a summary of the early feminist movement in America, see J. HOLE & E. LEVINE, THE FIRST FEMINISTS, NOTES FROM THE THIRD YEAR 128 (1973). The bibliography is extensive and would include, *e.g.*, E. FLEXNER, CENTURY OF STRUGGLE (1959); W. O'NEILL, THE WOMAN MOVEMENT: FEMINISM IN THE UNITED STATES AND ENGLAND (1969).

7. *See* T. VEBLEN, THE THEORY OF THE LEISURE CLASS 182 (1934). Veblen also notes that "according to the ideal scheme of the pecuniary culture, the lady of the house is the chief menial of the household." *Id.*

8. See generally notes 27-51 *infra* and accompanying text.

9. Currently, many women have no other choice. Opportunities in the labor market are still highly circumscribed, and the earnings gap between men and women is wide. *See, e.g.*, WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS 18; MANPOWER REPORT OF THE PRESIDENT, 1972; ECONOMIC REPORT OF THE PRESIDENT, JANUARY 1973, at 103 (showing that in 1971 women earned only 59.5% of the median salary of male faculty at institutions of higher learning). Clearly, remedial legislation has not had a significant impact in the labor market with regard to equal employment of women. For an example of changing judicial perception of older laws that have served to keep women "in their place," see the United States Supreme Court majority decision in Stanton v. Stanton, 95 S. Ct. 1373 (1975) (declaring unconstitutional different ages of majority for women and men), stating: "If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she can hardly be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." *Id.* at 1378. Women themselves are resisting this role-typing. Despite the still formidable obstacles facing women in employment, there is a decline in the percent of females married and in husband-wife families, while male and female primary households have increased. A. FERRIS, INDICATORS OF TRENDS IN THE STATUS OF AMERICAN WOMEN 53, 60, 108-15 (1971).

10. As Galbraith noted: "A tolerant society should not think ill of a woman who finds contentment in sexual intercourse, child-bearing, child-rearing, physical adornment and administration of consumption. But it should certainly think ill of a society that offers no alternative . . . ." J. GALBRAITH, *supra* note 1, at 235.

11. A tolerant society should not think ill of a man who would like to live and work at home and be with his children. In this respect men too have had little choice. Women, however, have usually been confined to but one occupation, while men have been precluded from only one.

be examined, and legal measures considered that would reflect the importance of the occupation as well as its economic value.

It is ironic that at the time ratification of the ERA was rejected by the Florida Legislature, a bill was introduced into the Florida Senate that would accomplish some of the Amendment's purposes and that certainly reflects a basic commitment to equal rights.[12] While entirely consistent with the ERA, Senate Bill 630 was designed to strengthen rather than weaken the family and greatly enhance the position of housewives (and househusbands) facing divorce.[13] Senate Bill 630 has been incorporated into this article,[14] and its provisions analyzed in the context of prevailing laws and in the more general context of equal property rights for men and women. Although S.630 was not adopted during the 1975 legislative session, its provisions merit attention.

The Present Problem: The Propertyless Housewife

Underlying the traditional marriage are certain assumptions that find expression in the laws of most states. These include the husband's position at the head of the family and as its breadwinner, and the wife's subservient position as a provider of domestic and child-care services.[15] Closely tied to the relative positions of the spouses are property laws. Generally speaking, if property is not voluntarily placed in some form of co-tenancy,[16] it is owned by the person

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12. Fla. S. 630 (Reg. Sess. 1975, introduced by S. Scarborough).

13. Regardless of legislative purpose, it is difficult to assert that any "no-fault" system "strengthens" the family. If no-fault must exist, however, legal recognition of the housewife's economic value may mitigate some of the economic disincentives to marriage caused by easier divorce.

14. The text of the bill is contained in the appendix.

15. *See generally* Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 CALIF. L. REV. 1169 (1974). From an economic viewpoint, however, the wife's position as manager of the household should not be subservient. Galbraith states that "the woman, as the administrator, should have the decisive voice on the style of life, for she shoulders the main burden. Or, if decisions are made jointly, the tasks of administration — cleaning, maintenance and repair of dwellings, artifacts, vehicles or planning and management of social manifestations — should also be equally shared." J. GALBRAITH, *supra* note 1, at 234. Although many couples may in fact govern their lives in this way, the law has not yet taken cognizance of it.

For a discussion of decision-making patterns within the family, see R. CAVAN, THE AMERICAN FAMILY 407-09 (3d ed. 1964), indicating that sociological studies have shown that "decisions and responsibilities regarding money for family use rest most heavily upon the husband, those concerning daily household expenses and children are primarily part of the wife's role, while other decisions are almost equally shared." *Id.* at 408. The overall view, however, was that the husband's dominance rating exceeded that of the wife. *Id.* at 409.

16. Many spouses hold property in joint tenancy so that the survivor will receive the whole without the necessity of probate and administration. With variations, tenancy by the entirety, available only to persons married to each other, accomplishes the same thing, adding protection against creditors in several jurisdictions. Checking and savings accounts, bonds, stocks, and similar instruments may be held in co-ownership despite common cautionary advice provided by the estate planning industry. *See, e.g.,* TRUST DEP'T, THE BANK OF NEW JERSEY, YOU . . . YOUR ESTATE . . . YOUR FAMILY (1972); TRUST DEP'T, ATLANTIC BANK, PLAIN TALK ABOUT JOINT OWNERSHIP; New York State Bar Ass'n Panel, *Joint Property: Its Virtues and Vices,* 3 TRUSTS & ES. 446 (1972).

who acquired it.[17] Thus, the spouse who does not have the means with which to acquire property will own little. Traditionally, this has been the position of the wife.[18]

The economic disparity between the spouses comes to public attention only when the marriage is terminated by death or divorce and the economically disabled spouse must be provided for.[19] If the parties to divorce have not reached

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17. Except in community property states, no form of co-ownership is created automatically by marriage. See notes 33-34 *infra*.

18. *Cf.* Kahn v. Shevin, 416 U.S. 351 (1974). For an economist's description of the situation, see J. GALBRAITH, *supra* note 1, at 35:

"The common reality is that the modern household involves a simple but highly important division of labor. With the receipt of income, in the usual case, goes the *basic* authority over its use. This usually lies with the male. Some of this authority is taken for granted. The place where the family lives depends overwhelmingly on the convenience or necessity of the member who makes the income. And both the level and nature or style of expenditure are also extensively influenced by its source . . . . More important, in a society which sets store by pecuniary achievement, a natural authority resides with the person who earns the money. This entitles him to be called the *head* of the family.

"The administration of the consumption resides with the woman . . . . The conventional wisdom celebrates this power; it is women who hold the purse strings. In fact this is normally the power to implement decisions, not to make them. Action, within the larger strategic framework, is established by the man who provides the money. The household, in the established economics, is essentially a disguise for the exercise of male authority."

Statistical studies demonstrate the propertyless state of the housewife. Although the percentage of females with no money income declined from 1956 to 1968 (while the percentage of males in this category was relatively constant), "persons with no money income are young people and women, chiefly housewives. Females are much more likely to be without money income than males." A. FERRIS, *supra* note 9, at 149.

19. Alimony was originally considered a continuation during a separation of the duty to support, and in many jurisdictions it was carried over to divorce. See C. VERNIER, 2 AMERICAN FAMILY LAWS §104 (1932); Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROB. 197, 197-206 (1939). This was not always the case; the hurdles faced by women seeking divorce during the 19th century were such that "of 200 divorces adjudged [in England] before 1857, roughly 6 were at the request of the wife." F. BASCH, RELATIVE CREATURES 23 (1974) (citing Thomas, *The Double Standard*, 1959 J. OF THE HISTORY OF IDEAS 201). The Matrimonial Causes Act of 1857 (20 & 21 Vict., c. 85) reformed divorce laws by liberalizing the grounds and lowering the costs of divorce, thus making divorce available to women (who tended to be, by reason of the *jure uxoris*, purposely kept propertyless) and more particularly, to poor women. The male, however, was still supreme with respect to "custody of children, the grounds and initiative for separation, and mutual property. The Act's one improvement worthy of note concerning the rights of the wife was the protection of her earnings in the event of separation." F. BASCH, *supra*, at 25.

Yet adultery, even after the 1857 reform, was a more heinous offense of the wife than of the husband. If the husband was the adulterer, the wife needed to prove "desertion, cruelty, rape, buggery or bestiality" to establish grounds for divorce; adultery alone by the wife was sufficient ground. *Id.* at 24. Basch comments: "Whatever the complexity of the elements entering into the double standard, the social conequences resulting from the woman's adultery, as Lord Cransworth asserted during the debates, were the risk of 'spurious offspring,' who would flaw inheritance in a capitalist society based on respect for private property." *Id.* at 25. *See also* L. KANOWITZ, WOMEN AND THE LAW 94 (1969). Before it was amended by Fla. Laws 1971, ch. 71-241, §10, at 1323, FLA. STAT. §61.08 denied alimony to an adulterous wife and was sustained against a constitutional challenge in Pacheco v. Pacheco, 246 So. 2d 778 (Fla. 1971).

some agreement about property division or the decedent has not made a will, the law will direct the disposition of the property.[20] Although this imposed distribution may differ depending on the cause of the termination, from the viewpoint of the spouse who by reason of her social role is relatively propertyless, the effects of death or divorce are similar.

Divorce in a growing number of states is now available virtually on the demand of one of the parties.[21] From the beginning of the movement for liberalization of the grounds for divorce, it was apparent that the long-awaited reform would result in a loss of bargaining power to the partner who probably most needed it. The wife, often ill-equipped to be or to become economically self-sufficient[22] by reason of long years spent in the home, or lack of training, or both, had been provided bargaining leverage by the requirements regarding proof of fault and by the frequent availability of defenses that, if asserted, would preclude either party from obtaining a divorce.[23] This recognition resulted in the inclusion in many new divorce laws of provisions for equitable

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The opinion noted that the adulterous wife and mother is particularly a cause of "domestic discord, family disruption and social scorn." *Id.* at 781.

20. The distribution can be effected through the court's discretion to decree a property distribution, in the case of divorce, or through the application of the intestacy statutes or, where applicable, the spouse's "forced" or "elective" or "indefeasible" share. *See, e.g.*, for divorce: COLO. REV. STAT. ANN. §14-10-113 (1973); FLA. STAT. §61.08 (Supp. 1975); KY. REV. STAT. ANN. §403.190 (Supp. 1973); MO. REV. STAT. §452.330 (Supp. 1975); N.J. STAT. ANN. §2A:34-23 (1952); for intestacy and the spouse's share: ILL. ANN. STAT. ch. 3, §§11, 16, 18 (Smith-Hurd Supp. 1974) (intestacy, elective share, dower); N.J. STAT. ANN. §§3A:4-2, 3A: 35-2 (1951) (dower); N.Y. EST. POWERS & TRUSTS LAW §5-1.1 (McKinney 1954) (spouse's share); 20 PA. STAT. ANN. tit. 20, §301.11 (1972) (spouse's share). Florida has adopted a spouse's elective share. FLA. STAT. §§732-111, 732.201 (Supp. 1974). Other methods of property division include community regimes (applicable to both death and divorce), see notes 34-35 *infra*, and the British family maintenance system (applicable at death), see note 29 *infra*.

21. Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAM. L. 443 (1974).

22. Stated most baldly, the propertyless spouse (wife) could threaten to contest any proceeding unless a favorable settlement could be achieved. Fault on her part would weaken her position, of course, but the prospect of a lengthy, painful proceeding would still be a powerful weapon in settlement negotiations. It appears that this weapon has been quite important to the propertyless spouse, because most divorces have been precipitated by the husband, though he may not appear as plaintiff. *See generally* W. GOODE, WOMEN IN DIVORCE (1965). Given economic realities, divorce is generally against the interests of women, who ". . . work for no pay but with the expectation of security — that is, that their husbands will continue to 'support' them." K. DAVIDSON, R. GINSBURG & H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 175-81 (1974) (quoting CRONAN, MARRIAGE, NOTES FROM THE THIRD YEAR: WOMEN'S LIBERATION 62-65 (1971)) [hereinafter cited as K. DAVIDSON]. The National Organization for Women (NOW) has pointed out that reform in divorce and property distribution will work equitably only if the economic situation of women in the market place — and particularly older women — is considerably improved. *See* K. DAVIDSON, *supra*, at 245 n.19 (citing the REPORT OF THE MARRIAGE AND FAMILY COMMITTEE OF THE NATIONAL ORGANIZATION FOR WOMEN, SUGGESTED GUIDELINES IN STUDYING AND COMMENTS ON THE UNIFORM MARRIAGE AND DIVORCE ACT 4 (1971). At its 1973 National Convention, NOW refused to state its position on no-fault divorce legislation "until economic safeguards for the dependent spouse and children are incorporated into new divorce legislation." 6 NOW ACTS #1, at 11 (1973). See K. DAVIDSON, *supra*, at 245 n.20.

23. *See* Foster & Freed, *supra* note 21, at 446.

property division by the court,[24] which could decree what the parties could no longer achieve through bargaining. What is "equitable" will vary from case to case, but a tendency toward a roughly even division seems to be evolving in some places.[25] Alimony may accompany the division depending on the jurisdiction and the circumstances of the case.[26]

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24. *See* UNIFORM MARRIAGE AND DIVORCE ACT §307. Essentially, Florida may be considered a "pure no-fault" state because traditional fault grounds were substituted by the standard of "irretrievable breakdown." FLA. STAT. §61.052 (1973) (retaining, however, mental incompetence as a ground for divorce). By contrast, New Jersey has retained grounds of adultery, cruelty, and desertion, and also added separation for 18 months as grounds for divorce. N.J. STAT. ANN. §2A:34-2 (Supp. 1975). The added "separation" ground qualifies New Jersey as a no-fault state. For an analysis of "fault" and "no-fault" see Freed & Foster, *Economic Effects of Divorce*, 7 FAMILY L.Q. 275 (1973). The retention of fault as a ground for divorce, however, does not necessarily mean fault will affect the property division. Likewise, the substitution of "irretrievable breakdown" does not remove fault as an element of property division. New Jersey and Florida provide interesting illustrations of this point. New Jersey provides for distribution of property on termination of the marriage by divorce without regard to fault. The court is given power to divide equitably all real and personal property acquired during marriage. N.J. STAT. ANN. §2A:34-23 (1951). Fault is not a factor. Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974). By contrast, although Florida may technically be classed as a pure no-fault state by reason of the "irretrievable breakdown" ground, fault may be important in the determination of property division. No general power to divide property is expressed, except within the provision for alimony. FLA. STAT. §61.08 (1973). Alimony may be temporary (rehabilitative) or permanent and the court may award alimony in periodic payments or a lump sum. Lump sum alimony is, in essence, analogous to a property division. The court may consider adultery and "any factor necessary to do equity and justice between the parties" in determining the amount of alimony. *Id.*

25. In New Jersey, for example, the pronouncements of the New Jersey supreme court on property distribution reflect a recognition of the true partnership aspect of marriage — that both spouses have contributed to their joint wealth, and that on the union's termination, each is entitled as a matter of right to his or her own property no matter in whose name it is held. *See* Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974); and accompanying decisions, Scalingi v. Scalingi, 65 N.J. 180, 320 A.2d 475 (1974); Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974). Although some years ago, Strauss v. Strauss, 148 Fla. 23, 25, 3 So. 2d 727, 728 (1941) expressed a similar recognition, more recent decisions in Florida have not followed suit. In holding that a 48 year old woman suffering from alcoholism had had ample time (2 years) to rehabilitate herself, the court in Beard v. Beard, 262 So. 2d 269 (1st D.C.A. Fla. 1972), noting the existence of the women's liberation movements, asserted that "women are as well educated and trained" as men and observed that whether the marriage continues or is severed "the woman continues to be as fully equipped as the man to earn a living. . . ." *Id.* at 272. The opinion seems to confuse the goals of the equal rights movement with present reality. The case not only failed to mention the employment disadvantages suffered by all women, but also failed to recognize the disadvantages suffered by those who have been out of the job market for some years. See generally note 6 *supra*. Even less consideration is given to the economic value of housewifery. Although some decisions appear to recognize a partnership relationship in awarding special equity, in reality these courts misuse the term. To deserve such consideration the wife must have held two jobs — that of housewife and that of participant in her husband's business or in another wage earning capacity; her husband, however, has held only one job: that of "breadwinner." *See* Steinhauer v. Steinhauer, 252 So. 2d 825 (4th D.C.A. Fla. 1971). For a review of recent decisions illustrating this trend, see O'Flarity, *Trends in No-Fault-No-Responsibility Divorce*, 49 FLA. B.J. 90 (1975).

26. Alimony may accompany a property division in New Jersey; Florida appears to regard all property distributions attending divorce as some form of alimony. Furthermore, alimony

In dramatic contrast stand the laws of intestate succession and spousal protection, which govern property distribution when a marriage is terminated by the death of one of the partners. The share decreed by law for the survivor is fixed, often at less than half, and unless the decedent has been generous, there

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often has punitive aspects and fault is commonly an element. *See* Scalingi v. Scalingi, 65 N.J. 180, 320 A.2d 475 (1974); Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 141-45 (1974). Viewed functionally, however, alimony bears no relation to fault.

When regarded as a continuation of the husband's duty to support, see note 19 *supra*, fault on the part of the wife may diminish her share since her fault may indeed be seen as an estoppel or repudiation of a contract. By contrast, fault on the part of the husband may result in increased payments by him. If alimony is in fact a continuation of the duty to support, logically it should not increase with the husband's fault.

Fault is an unrealistic way to analyze divorce and its accompanying economic arrangements, particularly when seeking a useful legal response. *See* Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974). Legally cognizable "fault" may have been due to a long series of intolerable acts on the part of the "innocent" spouse. *Id.* Even if fault were assignable, however, the fact remains that contributions by each spouse to the marriage are valuable and each spouse is entitled to a return on his or her efforts. A judge's views on the future employability of the wife should not enter into this initial question, particularly since those views have tended to be shortsighted. *See, e.g.*, Beard v. Beard, 262 So. 2d 269 (1st D.C.A. Fla. 1972), involving a marriage of 20 years and three children during which the wife was employed for approximately four and one-half years. The court said: "The fortuitous circumstances created by recitation of the marriage vows neither diminishes her capacity for self-support nor does it give her a vested right in her husband's earnings for the remainder of her life." *Id.* at 272. The award of $100 a week alimony was reversed and converted to rehabilitative alimony, terminating with the filing of the judge's opinion. *See also* note 25 *supra*.

Whatever the circumstances of that case, the court's statement overlooked the following factors: a wife provides services in the home for which she is not paid and because of which she has lost whatever opportunities for independence might have been available in the marketplace. By reason of her services, on the other hand, the husband has been left free to further himself in his career. In effect, she has invested in his economic independence with her labor, sacrificing while doing so, even the diminished opportunities available to women generally. She has not acquired salable skills while doing housework or in raising children, or, in Galbraith's term, managing consumption. See J. GALBRAITH, *supra* note 1. *See* Statement of Paul A. Samuelson, Professor of Economics, Massachusettes Institute of Technology, *Hearings before the Joint Economic Comm. on Economic Problems of Women*, 93d Cong., 1st Sess., Pt. 1, at 59 (1973). Furthermore, she will be entering the job market at an advanced age, difficult in itself; and as one of the last hired, she may be one of the first fired, leaving her with little job security.

The failure of courts to take account of these simple and easily documented facts in making an "equitable" award is perhaps a manifestation of the one-sided view attributable to all levels of the judiciary (although not, certainly, to all courts or judges). See Note *supra*. Sometimes, however, a form of "backlash" is unabashedly revealed. *See, e.g.*, Brown v. Brown, 300 So. 2d 719 (1st D.C.A. Fla. 1974) (dissenting opinion). *Beard, supra*, appears to be a textbook example of this manifestation. It is cited and quoted in K. DAVIDSON, *supra* note 22, at 243-44. In B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 704 (1975) the editors note: "While this decision may have been fair under all the circumstances, the remarks of the court in making the decision illustrated the tendency of male judges to deny the economic costs that the traditional marriage role has placed on women faced with divorce after many years of marriage."

Alimony is now available to husbands as well as wives. Lefler v. Lefler, 264 So. 2d 112 (4th D.C.A. Fla. 1972) (lump-sum alimony). Certainly availability ought not to be sex-determined.

is no opportunity to redress the imbalance through resort to the courts.[27] Moreover, there is no provision for temporary or continuing payments comparable to alimony.[28]

It is here asserted that the principle at issue is the termination of a joint enterprise that is, among other things, economic, and that the property distribution should not be affected by the cause of termination.

THE COMMON LAW TRADITION: PROPERTY AND MARRIAGE

> In herself the woman was nothing: "[T]hey are . . . from their own constitution, and from the station they occupy in the world . . . relative creatures."[29]

Since the middle of the last century, property has generally been regarded as owned by whoever has lawfully acquired it, without regard to marital status. Before then, however, the married woman lost, by reason of her marriage, virtually all control over any property that might be given to her, or that she might earn.[30] Control, indeed ownership, was vested in the husband.[31] Al-

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The court said: "Although this [FLA. STAT. §61.08 (1971)] represents a radical departure from the historical concept of alimony as an award based on the common law obligation of the husband to support his wife . . . it nonetheless is in keeping with the present trend toward assuring complete equality between the sexes." *Id.* at 113. The award, however, was tied to the husband's need and the wife's ability to pay. The court made no mention of whether the husband had supported the wife (she had worked 23 years as a schoolteacher), had done the housework, or in any other way contributed to the upkeep of the home — factors that affect a wife's alimony. Although recognizing that alimony was now available to husbands, the court held that this plaintiff should not receive it; there was no finding that he could not provide for his own necessaries.

Certainly, guidance is needed in this area. See O'Flarity, *supra* note 25. One possible approach would be to provide that if either spouse primarily assumed domestic duties during marriage, he or she should be entitled to alimony on dissolution as if a pension, unless or until earnings exceed a certain realistic minimum. Although the objecting spouse would have to prove that the claimant was not so entitled, the presumption would run in favor of the claimant who was primarily responsible for domestic services and child-rearing. *Compare* Fla. S.630 (Reg. Sess. 1975, introduced by S. Scarborough), at notes 96-110 *infra* and accompanying text.

27. *Cf.* the British family maintenance system, a flexible device permitting the court to make "reasonable provisions" for a spouse or qualifying dependents if the decedent's will does not. See Inheritance (Family Provision) Act, 1 & 2 Geo. 6, c. 45 (1938); Intestates' Estates Act, 15 & 16 Geo. 6 & Eliz. 2, c. 64 (1952) (extending the original to intestate estates).

28. States with family maintenance or allowance provisions offer less far-ranging relief than the British system. See note 27 *supra*. Florida's statute, §733.20, was seen as relief from immediate necessities during the estate administration and was analogized to a temporary alimony award. *In re* Anderson's Estate, 149 So. 2d 65 (2d D.C.A. Fla. 1963), and was not an absolute right, nor could the estate be held open to provide support for the surviving spouse until death or remarriage. Aldrich v. Aldrich, 163 So. 2d 276 (Fla. 1964). This provision in the 1975 Florida Probate Code is §632.403.

29. BASCH, *supra* note 6, at 5.

30. *Id.* at 16-25. The *jure uxoris*, or estate by the marital right, existed in husbands until the passage of the Married Women's Property Acts during the second half of the nineteenth century. *See, e.g.*, FLA. STAT. §708.08-10 (1973); N.J. REV. STAT. §37:2-12 (1937). Florida did not abolish distinctions between the property rights of married men and women until the constitution of 1968 rendered obsolete provisions of FLA. STAT. ch. 708 that had maintained

though vestiges remain even now,[32] the mid-nineteenth century's Married Women's Property Acts abrogated the husband's *jure uxoris*[33] so that generally, in common law states, the married woman now owns and controls her own property, a significant advance toward diminishing the gross inequality between spouses in the Anglo-American tradition.[34] But this important right has

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such distinctions. FLA. CONST. art. X, §5. For a discussion of the remaining impact of the *jure uxoris*, see STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 214-15 (1964); Johnston, *Sex and Property: The Common Law Tradition. The Law School Curriculum and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1057-79, 1089-92 (1972). It is interesting to note that those who opposed property rights for married women cited (as do opponents of the Equal Rights Amendment today) the grave danger that such a revolutionary concept would pose to the traditional family structure. Johnston, *supra*, at 1063-64.

31. See F. BASCH, *supra* note 6, at 16-21 (providing an interesting summary); Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 2 (1936).

32. See note 30 *supra*. In most places married women may now legally own, earn, receive and convey property. For an account of the property rights of married women in ancient societies, see S. DE BEAUVOIR, THE SECOND SEX 82-138 (1953). *See also* K. MILLET, SEXUAL POLITICS 33-36, 39-43 (1970). On pre-Norman law in England, generally much more favorable to women than Norman law, see Foster, *Preface* to I. BAXTER, MARITAL PROPERTY at v (1973); C. KENNEY, EFFECTS OF MARRIAGE ON PROPERTY 10 (1879); Buckstaff, MARRIED WOMEN'S PROPERTY IN ANGLO-SAXON AND ANGLO-NORMAN LAW, 4 ANNALS 233 (1893). On the development of marital property in post-conquest England, see Johnston, *supra* note 30. More recently, English law has again tended to be more favorable to married women. Family maintenance legislation is a flexible device that permits courts to make reasonable provision for a spouse or qualifying dependents if the decedent's will does not. *See* Inheritance (Family Provision) Act, 1 & 2 Geo. 6, c. 45 (1938); Intestates' Estates Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64 (1952) (extending the original act to intestate estates). For comment on this system, see W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960); Atkinson, *Protection of the Surviving Family: A Forward to the British System*, 35 N.Y.U.L. REV. 981 (1970) (this volume contains other articles on the subject); Laufer, *Flexible Restraints on Testamentary Freedom — A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955). A family maintenance scheme was considered in New York but rejected because, among other things, it was thought to be unsuited to the state's litigious population and, perhaps more importantly, disruptive to the estate planning industry. STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 159-78, 211-13 (1964). *See also* Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 543 (1970).

More recently the Law Commission in England published a working paper on Family Property Law advocating that England adopt a community-property regime; the recommendation stemmed from a developing consciousness of "grosser injustices inflicted by the common law upon married women in property matters." LAW COMMISSION, PUBLISHED WORKING PAPER NO. 42, FAMILY PROPERTY LAW 1 (1971).

33. The term used herein refers to the 42 states that do not have a community-property regime, that is, all states except Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. *See* I. BAXTER, MARITAL PROPERTY (1973) (on the property consequences of marriage generally); de Funiak, *The New Community Property Jurisdictions*, 22 TUL. L. REV. 264 (1947) (on the development of community-property regimes in this country).

34. Community property, by contrast, is said to consider "woman an individual and marriage a partnership in which both spouses have obligations and duties. That being so, husband and wife, as partners, are considered entitled to share equally in the gains and acquisitions of the partnership during its existence." de Funiak, *supra* note 33, at 264.

meaning only if there is property to own and control. Acquisition may be through gift, inheritance, or purchase with money earned. Putting aside questions regarding gift and inheritance, what are the married woman's prospects of "earning" property?[35]

The woman who has devoted her life to caring for home, husband, and children will not have independent means to accumulate property. Legally, her husband must support her, but he need not give up any control over his own assets or transfer any of them to her.[36] Housewives are not paid and have no

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Although on the surface community-property regimes in America accord some recognition to the value of housewifery, in fact, until recently all control over the community property was vested in the husband. Recent amendments now permit each spouse to control his or her own property or earnings, subject to the interest of the other; however, many feel this to be a halfway measure. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872, 947-48 (1971); *Community Property: Symposium on Equal Rights*, 48 TUL. L. REV. 561 (1974); Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORDER 163, 172. Community property management statutes that have been amended to vest control in either spouse are: ARIZ. REV. STAT. ANN. §25-214(B) (Supp. 1973); CAL. CIV. CODE §§5125, 5127 (West Supp. 1975); N.M. STAT. ANN. §57-4A-8 (Supp. 1975); TEX. FAM. CODE §5.22(b) (1975); WASH. REV. CODE ANN. R.C.W. §26.16.038 (Supp. 1974).

A true community-property system might be one that would vest joint control over community assets no matter who acquired the property. Such a system might tend, however, to preserve discrimination against the working wife, though in a mitigated form. The earnings of a working wife are regarded as community property and, before the recent amendments, were therefore subject to her husband's control. Even under amendments entitling each spouse to control her or his own earnings, however, the working wife may still be at a relative disadvantage if she is primarily responsible for the upkeep of the home. The managerial control granted by the law does not in fact coincide with actual managerial functions.

35. See notes 25-26 *supra*. *See also* Johnston, *supra* note 30, at 1036: "Suppose, for instance, a state should declare that henceforth all property accumulated by either spouse shall belong solely to her or him individually, subject to no claim by the other. Even though this regulation is facially sex-neutral, it would obviously operate to the substantial detriment of those women who had already been systematically conditioned to conform to the homemaker stereotype."

As Professor Johnston later points out, the married women's acts "did not deprive the husband of his common law right to avail himself of a profit or benefit from his wife's services. The law has never recognized the wife's right to compensation from her husband on account of the peculiar nature of her services for him whether done in or outside of the household. While he may not, as a matter of right, require her services outside of the household, yet such services as she does render him, whether within or without the strict line of her duty, belong to him. If he promises to pay her for them it is a promise to make her a gift which she cannot enforce by a suit against him." Since work-saving household appliances and effective contraceptives were unavailable, most married women were compelled to continue spending the greater part of their time and energy in uncompensated household and child-raising activities. "Their continued economic dependence on their husbands was assured, as was its correlative: male dominance of the marital unit." *Id.* at 1066 (citing W. BULLOCK, THE LAW OF HUSBAND AND WIFE IN NEW YORK 99 (1897)).

36. *See The Equal Rights Amendment and Alimony and Child Support Laws*, REPORT OF THE CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN IN 1971, app. C, at 38 (1972), where it is stated: "The rights to support of women and children are much more limited than is generally known and enforcement is very inadequate. A married woman living with her husband can in practice get only what he chooses to give her. The legal obligation to support can generally be enforced only through an action for separation or di-

right to payment;[37] nor are they beneficiaries of various social insurance programs.[38] Benefits others take for granted — pension plans and disability insurance, for example — are not available. Those wives who do have paid employment[39] may receive the usual benefits, but often they are less than those available to men.[40] Although the working wife is now entitled to keep and control her own earnings and in many places has no obligation to support her

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vorce, and the data available, although scant, indicates that in practically all cases the wife's ability to support herself is a factor in determining the amount of alimony; that alimony is granted in only a very small percentage of cases; that fathers, by and large, are contributing less than half the support of the children in divided families; and that alimony and child support are very difficult to collect." *See also Recognition of Economic Contribution of Homemakers and Protection of Children in Divorce Law and Practice*, REPORT OF THE CITIZEN'S ADVISORY COUNCIL ON THE STATUS OF WOMEN, WOMEN, app. F, at 66 (1974).

37. J. BERNARD, *supra* note 6, at 115; J. GALBRAITH, *supra* note 1, at 30-31. Galbraith asserts: "The convenience social virtue ascribes merit to any pattern of behavior, however uncomfortable or unnatural for the individual involved, that serves the comfort or well-being of, or is otherwise advantageous for, the more powerful members of the community. *The moral commendation of the community for convenient and therefore virtuous behavior then serves as a substitute for pecuniary compensation.* Inconvenient behavior becomes deviant behavior and is subject to the righteous disapproval or sanction of the community. . . . [T]he ultimate success of the convenient social virtue has been in converting women to menial personal service." *Id.* (emphasis added).

Bernard puts it another way: "Women are still expected to do things because of love and/or duty. The very thought of paying women for their housekeeping services is horrifying, anathema." *Id.* J. BERNARD, *supra* note 6, at 115.

The Victorian male (or some Victorian males) viewed the situation differently. Thus, W. R. Greg said: ". . . they (female servants) are attached to others and are connected with other existences, which they embellish, facilitate and serve. In a word, they fulfill both essentials of a woman's being: *they are supported by, and minister to, men.*" Greg, *Why Are Women Redundant?*, LITERARY & SOC. JUDGMENTS 280, 303 (1869) (quoted by F. BASCH, *supra* note 6, at 5).

The idea of women as "other" and as defined by and having meaning only in relation to men is fully explored in S. DE BEAUVOIR, THE SECOND SEX (1953).

38. For a discussion of housewives and the Social Security system see Weitzman, *Legal Regulation of Marriage: Tradition and Change — A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169, 1190-92 (1974) and authorities cited therein.

39. The working wife, however, is at a disadvantage under the Social Security system, for she pays a full social security tax "but the benefits she earns as an independent worker are not added to those she would be entitled to as a spouse. The family thus pays a double tax when she works, but she collects for only a single worker." Weitzman, *supra* note 38, at 1191. She is also at a disadvantage under the Internal Revenue Code, which actually ". . . encourages married women not to work outside the home. Since noncash income is not taxed, the Internal Revenue Code in effect exempts income earned as a homemaker while taxing income earned in almost every other job." Opening Statements of Representative Martha Griffiths, *Hearings Before the Joint Economic Comm. on Economic Problems of Women*, 93d Cong., 1st Sess., pt. 2, at 221 (1973). Yet, if a married woman works, she often may not deduct the most ordinary and necessary business expense she incurs — that of hiring her replacement at home. Weitzman, *supra* note 38, at 1191. For situations in which deductions may be taken, see INT. REV. CODE OF 1954, §214. *See generally* Cooper, *Working Wives and the Tax Law*, 25 RUTGERS L. REV. 67 (1970).

40. See Dahm, *Unemployment Insurance and Women*, 5 UNEMPLOYMENT INS. REV., Feb., 1968, at 6; Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277 (1971).

husband,[41] she is still in a less favorable position than her spouse. The history of discrimination against women in employment is well documented.[42] Despite corrective legislation,[43] employed women earn much less than men and the wage gap is widening, in part because women are concentrated in low-paying occupations.[44] The married woman, like other women, is disadvantaged by employment patterns that have still not been corrected.

Almost by definition, the married working woman has two jobs, and often three. Because the movement of over 40 percent of all wives[45] into the work force has not made significant inroads into the division of labor within the family, the wife still has primary or sole responsibility for the care of the home.[46] The number of hours spent on the various chores involved has been documented.[47] Under such circumstances, it is obvious that there is a cor-

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A serious discrepancy being actively litigated is the lack of full health and disability coverage for women. Full coverage insures all bodily functions; yet maternity coverage, even if available, may have to be separately purchased. By contrast, none of the conditions caused by the male reproductive system are singled out for special treatment. To date, there is no Constitutional requirement that pregnancy and its attendant normal disabilities be covered by state insurance systems. Geduldig v. Aiello, 417 U.S. 484 (1974). Title VII guidelines, however, require coverage and thus far the federal courts have tended to uphold them. *See, e.g.*, Vinyard v. Hollister, 8 F.E.P. Cas. 1009, 64 F.R.D. 580 (N.D. Cal. 1974); Sale v. Waverly-Shell Rock Bd., 390 F. Supp. 784 (N.D. Iowa 1975). *Contra*, Communication Workers of America v. ATT, 513 F.2d 1024 (2d Cir. 1975).

One of the inequities of the Social Security Act has recently been declared unconstitutional. Section 402(g) granted survivors' benefits based on the earnings of a deceased husband and father, but not on the earnings of a deceased wife and mother. 42 U.S.C. 3402(g) (1964). The Supreme Court, in Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975), held that this statutory scheme violated the right to equal protection secured by the fifth amendment. Mr. Justice Brennan, speaking for the majority, observed: "Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. See Kahn v. Shevin, 416 U.S. 351, 354 n.7 . . . (1974). But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Id.* at 1231-32.

41. See DAVIDSON, *supra* note 22, at 139-40.

42. For recent discussions, analyses and compilations of authorities, see generally B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES ch. 2, at 191-560 (1975) [hereinafter cited as B. BABCOCK]; K. DAVIDSON, *supra* note 22, ch. 3, at 419-812.

43. On the federal level, this includes the Equal Pay Act of 1963, 29 U.S.C. §206 (1964); Exec. Order No. 11246, 3 C.F.R. 169 (1974); The National Labor Relations Act, 29 U.S.C.A. §141 *et seq.* (1970); Title VII of the Civil Rights Act of 1968, 18 U.S.C. §241 (1970), 42 U.S.C. §360 (1970). The post Civil War Civil Rights Acts, 42 U.S.C. §§1981, 1983, 1985(3) (1970), may be used to remedy sex-based discrimination. Also relevant are the OFCC Sex Discrimination Guidelines, 41 C.F.R. §60-20 (1975), and the EEOC Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-.10 (1975).

44. *See* J. LYLE & J. ROSS, WOMEN IN INDUSTRY 3-10 (1973).

45. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT 222 (94th ed. 1973).

46. *See* R. TSCHIGANE & N. DODGE, ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 80-84 (1974), observing that the burden of household work has remained almost unchanged over recent decades. *See also* Glendon, *Is There a Future for Separate Property?*, 8 FAMILY L.Q. 315, 321 (1974); Weitzman, *supra* note 38, at 1196.

47. A summary of available data and source material may be found in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 42, at 572-75 and 658-72. The editors report:

responding lack of time available to such women for career training, overtime, or other avenues of advancement.

The bearing and rearing of children, of course, is the third task performed by working married women. Not only is this occupation demanding, but the woman who has children is likely to have to interrupt her paid employment for child-bearing and rearing.[48] Moreover, these activities tend to occur at a time when others are most actively advancing their careers.[49] Yet there is no economic recognition accorded the socially necessary functions assumed by mothers.[50]

The married woman's economic situation may be generalized as essentially propertyless. The wife who does not work is unable to acquire property independently; if she later seeks employment (after the children enter school, for example), she will find employment increasingly difficult to obtain.[51] Further,

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"[A] notable finding is that time spent by husbands on household work averaged only 11.2 hours per week, and did not increase with the hours of their wives' paid employment. On the other hand, the more hours women worked outside the home, the longer their average working day. If time spent on volunteer work as well as paid employment and household tasks is counted, the working week averaged about 63 hours for fulltime homemakers and 70 hours for women employed 30 or more hours a week. Men averaged a working week of about 64 hours." *Id.* at 573.

48. She must, of course, leave work to give birth. Until recently, lengthy enforced leaves could be imposed, often, as evidenced in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring), to keep visibly pregnant women out of sight. *LaFleur* and its companion case, Cohen v. Chesterfield County School Bd., 414 U.S. 632 (1974), held that such regulations violate the fourteenth amendment.

Once a woman decides to have children, her absence from the workforce is likely to continue during their preschool years. *See, e.g.*, U.S. DEP'T OF LABOR, WOMEN'S BUREAU BULLETIN No. 3119, WOMEN WORKERS TODAY 2 (1971). *See also* R. TSCHIGANE & N. DODGE, *supra* note 46, at 114.

49. For the mother, however, ". . . the fifteen or so years she has spent in child-rearing have weakened her skills and her self-esteem as a worker. Realistically fearing failure in the job market, she may remain at home to experience the 'loneliness and stagnation' of the empty nest period." K. DAVIDSON, *supra* note 22, at 192.

50. Contrast to the extensive benefits programs available to veterans. *See generally* 38 U.S.C. §§1650, 1801, 2001, 2011 (1970), and 50 U.S.C. App. §459 (1970), for reemployment rights after separation from service.

51. ". . . [T]he woman who shows on her resume that she has been out of the labor market awhile raising young children for a few years is very heavily penalized." Statement of Paul A. Samuelson, Professor of Economics, Massachusettes Institute of Technology, *Hearings Before the Joint Economic Comm. on Economic Problems of Women*, 93d Cong., 1st Sess., pt. 1, at 59 (1973).

See also statement of B. Bergmann, *Hearings Before the Joint Economic Comm. on Economic Problems of Women*, *supra*, at 70. Bergmann testified that according to the Bureau of Labor Statistics, in the first quarter of 1973 women's unemployment rate was 24% higher than the men's rate. Yet even this differential understated the extent of female unemployment: "In that first quarter, BLS found that 241,000 men and 400,000 women were not looking for jobs even though they still wanted work, because they had become convinced that no job was available. [BLS does not classify these as "unemployed."] . . . When an adjustment is made to . . . include these discouraged would-be workers as unemployed . . . the women's unemployment rate comes out to be 35 percent higher than the men's. . . ." *Id.*

Bergmann believed there was still an understatement of women's unemployment problems "because of the attitudes of both men and women concerning roles appropriate to them.

even if successfully employed, a wife is still likely to be disadvantaged by reason of her dual or triple roles and the continuing discrimination against women in employment. By obvious contrast, the domestic duties of the husband are slight, his employment opportunities are considerably greater, and his consequent ability to acquire and control property is immeasurably greater.

Against this background of factors that serves to keep wives propertyless, the duty to support imposed on husbands is perhaps not unreasonable.[52] Wives, after all, have invested in their husbands' careers through their efforts at home and with the children, which free husbands to realize their capabilities and still enjoy the benefits of family life. Nevertheless, the so-called duty to support is perhaps the least enforced duty known to the law.[53]

PROPERTY AND DIVORCE

The Tradition

The nineteenth century had so narrowly defined woman as wife that her "failure" in that role, made manifest by separation or divorce, brought on her "oppression . . . by the entire legal and social apparatus."[54] Until 1857, in England, the husband's right to his wife's property survived both separation and his own desertion.[55] Even some of those who justified the husband's con-

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When a woman who wants to work outside the home can't find work she may find it psychologically easier to tell the survey worker that she is taking care of her home than that she has been unsuccessful in her search for work. This is socially unacceptable for a man." *Id.*

52. This duty to support in fact serves to preserve the patriarchal hierarchy within the family. See J. GALBRAITH, *supra* note 1, at 38; Weitzman, *supra* note 38, at 1180-87. Weitzman points out, however, that ". . . if married women are not less financially competent than their husbands initially, the financial restrictions imposed on them would certainly have the effect of making them so, for it is more difficult for a married woman to develop financial competence when social and legal restrictions serve to keep her financially dependent on men — and limit her from gaining the very experience she needs." *Id.* at 1182-83.

The Equal Rights Amendment would neither abolish the duty to support nor forbid women from becoming housewives. Its adoption would merely result in a "functional definition of support obligations, based on current resources, earning power, and nonmonetary contributions to the family welfare. . . ." Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872, 946 (1971). For example, "if one spouse were a wage earner and the other spouse performed uncompensated domestic labor for the family, the wage-earning spouse would owe a duty of support to the spouse who worked in the home." *Id.*

53. This is a fact often overlooked by "[a]larmists [who] claim: [T]he Equal Rights Amendment would change the institution of the family as we know it by weakening the husband's duty of marital support in an ongoing marriage. This concern is based on a misunderstanding of the role laws about support actually play. Many courts flatly refuse to enter a support decree when the husband and wife are living together. In most cases the husband, as head of the family, is free to determine how much or how little of his property his wife and children will receive." Brown, Emerson, Falk & Freedman, *supra* note 52, at 945.

For a discussion of the unenforceability of the duty to support generally, see Weitzman, *supra* note 38, at 1184; and for a discussion of the duty to support, and the reciprocal duty of the wife to render services in the home, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 181-86, 189-218 (1968).

54. F. BASCH, RELATIVE CREATURES: VICTORIAN WOMEN IN SOCIETY AND THE NOVEL 16 (1974).

55. *Id.* at 20.

trol of the wife's property during the marirage found "iniquitous" his continuing control "of the proceeds of the work of a wife whom he might have deserted, betrayed or ill-treated."[56] The wealthy classes could escape these strictures of the law through settlements, trusts, and antenuptial contracts,[57] but the less well-off could not.[58] This fact may account for the delay in reform. Ultimately, the Married Women's Property Acts restored to all women their own property, which they could keep on divorce.[59] The difficulty then and now, of course, is the inability of most married women to acquire and retain property.[60]

As a practical matter, the propertyless state of most wives requires that some provision be made for them on divorce.[61] Most commonly, this is alimony: a continuation of the duty to support,[62] which does not drastically alter prevailing concepts of property as individually owned by the husband who acquired it. Alimony in the form of periodic payments is not likely to provide adequate capital to enable a divorced wife to establish herself in a new home and to begin a new life.[63] Yet, unless the marital property were jointly owned, or a property distribution agreed on, a court historically could not or would not require the property-owning spouse to surrender his own assets.[64] Without any

56. *Id.* Clark observes: "A realist might be pardoned for thinking that the rules were the result of male economic, social and legal power." H. CLARK, *supra* note 53, at 219.

57. Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1052-67 (1972), concluding at 1057: "[A] wife still bound by the duty of obedience to her husband might achieve a measure of financial independence from him; but she stood to lose her assurance of support out of his real property during her widowhood. Given a strong initial bargaining position and expert legal advice, she could successfully bargain with her husband or prospective husband over property rights. In the absence of resources and a skilled advocate, however, she had no choice but to be bound by the harsh common law." The importance of a good bargaining position is a theme that will recur in this article. For members of all classes, interest in individualized marital contracts has been greatly heightened in recent years as an alternative to the traditional marriage. *See generally* Weitzman, *supra* note 38.

58. *See* F. BASCH, *supra* note 54 at 21.

59. See H. CLARK, *supra* note 53, at 222-29; Johnston, *supra* note 57, at 1061-70.

60. See notes 9, 35, 39 and 47-51 *supra*, and accompanying text.

61. This has not always been the rule. See authorities cited in notes 54 and 55 *supra*. Even now, "the general rule prevails that absent a statute to the contrary a wife at fault cannot be awarded permanent alimony when her husband obtains the divorce." Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 142 (1974). The rationales for alimony or other forms of property distribution vary; they may be based on need, entitlement, or innocence of fault. H. CLARK, *supra* note 53, at 442. Occasionally, fear is expressed that the wife will become a public charge. *See* Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974) (involving persons of considerable wealth).

62. For the origins of alimony, *see* M. PAULSEN, W. WADLINGTON & J. GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 529 (1970); Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROB. 197, 197-201 (1939). See also notes 19, 20 *supra*.

63. Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

64. *See* Painter v. Painter, 65 N.J. 196, 213, 320 A.2d 484, 493 (1974), construing New Jersey's new "no-fault" legislation: "The general purpose of the legislation is clear. The courts are now empowered to allocate marital assets between the spouses, regardless of ownership. This was not the case before the enactment of the statute." Absent such express statutory authority, decrees ordering transfers of property between spouses cannot be made. H. CLARK,

enforceable legal right to the marital property, the propertyless spouse had only one bargaining instrument: the concept of fault. The leverage supplied by the concept of fault as a ground for divorce enabled the propertyless spouse to obtain more from a divorce-hungry partner than would otherwise be the case.[65] "Fault" enabled the vast majority of property settlements to be negotiated.[66]

The New Divorce Laws

Negotiation is made immeasurably more difficult for the wife by the removal of fault as a ground for divorce, for she has nothing to offer in return for a property settlement.[67] To compensate for this loss, some no-fault systems provide that the judge may order an equitable property division.[68] Fault may enter into this determination in some jurisdictions,[69] but under the Uniform Marriage and Divorce Act, which is the prototype of the new no-fault laws, it is not an element,[70] and in a number of states fault plays no part in the property distribution, although it may be a factor in the award of alimony.[71]

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supra note 53, at 449. "But if the court is adjudicating the property rights of the parties qua property rights, no statutory authority is needed, the matter lying well within the court's general equity powers." *Id.* An award of lump sum alimony may be identical to a property division. *Id.* Property rights also may be adjudicated under the general equitable powers described above. In Florida a showing of "special equity" may result in an order to transfer property, but such a showing is dependent upon the contributions or performance by the claiming spouse beyond "ordinary marital duties." *See* Heath v. Heath, 138 So. 796 (Fla. 1932). *See also* Eakin v. Eakin, 99 So. 2d 854 (Fla. 1958); Steinhauer v. Steinhauer, 252 So. 2d 825 (4th D.C.A. Fla. 1971). Other relevant cases include Welsh v. Welsh, 35 So. 2d 6 (Fla. 1948); Straus v. Straus, 148 Fla. 23, 3 So. 2d 727 (1941); Carlton v. Carlton, 78 Fla. 252, 83 So. 87 (1919); and Roberts v. Roberts, 283 So. 2d 396 (1st D.C.A. Fla. 1973) (distinguishing between lump sum alimony and special equity).

65. See note 21 *supra*. This has engendered considerable male resentment against alimony and property distributions and has probably contributed to the myth of the "alimony drone" —whose widespread existence has not been supported by statistical data. *See* B. BABCOCK, *supra* note 42, at 692-97. *See also* Weitzman, *supra* note 38, at 1185-87, noting that alimony is awarded in fewer than 10% of divorce cases.

66. Foster & Freed, *supra* note 21, at 446.

67. There is persuasive evidence indicating that no matter which party actually files for divorce, it is more often the husband who wishes to terminate the marriage. See W. GOODE, WOMEN IN DIVORCE (1965).

68. Section 307 of the Uniform Marriage and Divorce Act (as amended in 1973) directs the judge, in Alternative A, to "equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both." For a summary of standards to be considered in ordering property distributions, see Freed & Foster, *Economic Effects of Divorce*, 7 FAMILY L.Q. 280 (1973).

69. For example, the conduct of the parties is relevant to property divisions in Michigan. *See* Freed & Foster, *supra* note 68, at 283.

70. Section 307 of the Uniform Marriage and Divorce Act (as amended in 1974) expressly excludes marital misconduct as a factor.

71. Fault is not a factor in New Jersey property distributions. *See, e.g.*, Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974); Chalmers v. Chalmers, 65 N.J. 186, 320 A.2d 478 (1974). Fault may be taken into account, however, in awarding alimony. *See, e.g.*, Scalingi v. Scalingi, 65 N.J. 180, 320 A.2d 475 (1974) (an award of $75 per week for wife's support in addition to

Under the new systems, distribution standards other than fault may be judicially or legislatively set. An example of the first method may be found in New Jersey. After finding that a statutory direction of "equitable distribution" was not unconstitutionally vague, the Supreme Court of New Jersey approved a list of factors that may "properly be taken into account by a matrimonial judge in determining in a case how the distribution may most fairly be made":

> Guideline criteria over the broad spectrum of litigation in this area include: (1) respective age, background and earning ability of the parties; (2) duration of the marriage; (3) the standard of living of the parties during the marriage; (4) what money or property each brought into the marriage; (5) the present income of the parties; (6) the property acquired during the marriage by either or both parties; (7) the source of acquisition; (8) the current value and income producing capacity of the property; (9) the debts and liabilities of the parties to the marriage; (10) the present mental and physical health of the parties; (11) the probability of continuing present employment at present earnings or better in the future; (12) effect of distribution of assets on the ability to pay alimony and support; and (13) gifts from one spouse to the other during marriage.[72]

Additional criteria from the Uniform Marriage and Divorce Act cited by the New Jersey court include:

> (1) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as a homemaker;
> (2) value of the property set apart to each spouse; and,
> (3) the economic circumstances of each spouse when 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.[73]

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an equal distribution of the marital assets at termination of a 35-year marriage was held not unreasonable or arbitrary, where the husband was found to be the marital wrongdoer). Florida, by contrast, though not providing for property distribution, does consider fault material in alimony determination. *See* FLA. STAT. §61.08 (1973).

72. Painter v. Painter, 65 N.J. 196, 211, 320 A.2d 484, 492 (1974).

73. *Id.* Since this case, the Uniform Act has been amended. See note 68 *supra.* It presently provides: "In making the apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit." UNIFORM MARRIAGE & DIVORCE ACT §307 (amended 1974). This detailed list of considerations corrects several oversights of the original §307. For example, Weitzman noted that "even the Uniform Marriage and Divorce Act, which represents the enlightened vanguard in family law, makes no provision for the custodial parent to be compensated for time and labor in taking care of the children." Weitzman, *supra* note 38, at 1195. Section 307, as amended, also provides greater guidance to judges.

These factors are illustrative, but not exhaustive.[74]

Noteworthy is the absence of fault in the two compilations. Two reasons for this omission have been offered in another New Jersey opinion. First, "fault may be merely a manifestation of a sick marriage. The spouse who by his or her actions gives cause or grounds for divorce may not be responsible for the breakdown of the marriage. . . ."[75] The second reason reflects a reevaluation of property within the family:

> [T]he statutory provision for equitable distribution of property is merely the recognition that each spouse contributes something to the establishment of the marital estate even though one or the other may actually acquire the particular property. Therefore, when the parties become divorced, each spouse should receive his or her fair share of what has been accumulated during the marriage. The concept of fault is not relevant to such distribution *since all that is being effected is the allocation to each party of what really belongs to him or her.*[76]

This judicial recognition that each spouse contributes to the material wealth of the family and thus in some sense owns a part of that wealth is novel in a common law state,[77] and the similarity to community property concepts

74. See Freed & Foster, *supra* note 68, at 277, noting the "belated but growing recognition that the roles of wife as homemaker, wife, and mother, should be deemed 'partnership activity' and should entitle her to a share of the family assets accumulated during the marriage." *Cf.* Glendon, *Is There a Future for Separate Property?*, 8 FAMILY L.Q. 315 (1974), noting the decline of the "housewife marriage" and raising the question of whether current reforms might have the "tendency . . . to channel women into positions of economic dependence." *Id.* at 321. Perhaps it might be more accurate to ask whether the new provisions *maintain* women in dependent positions; nevertheless, the question is well-taken. To the extent that laws support the traditional patriarchal family, by making subservience more tolerable and less risky for women, progress toward equality of the sexes may in fact be impeded. Simone de Beauvoir asserted over twenty years ago that the common welfare of both husbands and wives requires the prohibition of marriage "as a career for women." S. DE BEAUVOIR, THE SECOND SEX 482 (1953).

75. Chalmers v. Chalmers, 65 N.J. 186, 193, 320 A.2d 478, 482 (1974).

76. *Id.* at 194, 320 A.2d at 483 (emphasis added).

77. See Painter v. Painter, 65 N.J. 196, 214-15, 320 A.2d 484, 493-94. Some 34 years ago, however, the Florida supreme court recognized the value of the community property model in property distribution at divorce: "In the southwest where community property is recognized, the husband and wife share equally in all property accumulated during coverture. There is a perfectly sound basis for this rule and it will be applied in this State when the circumstances warrant." Strauss v. Strauss, 148 Fla. 23, 27-28, 3 So. 2d 727, 728 (1941). Apparently this pronouncement has been seldom followed. See O'Flarity, *Trends in No-Fault—No Responsibility Divorce*, 49 FLA. B.J. 90, 92-93 (1975). It appears, however, that the Family Law Section of the Florida Bar is prepared to consider community property in conjunction with a proposed family law code. *Id.*

From time to time, the idea of community property has infiltrated common law jurisdictions, and the present interest may be permanent. The first incursion occurred about 30 years ago when several common law states adopted community property regimes to procure for their citizens the tax advantages enjoyed by married residents of community property states. When the Revenue Act of 1948, ch. 168, §303, 62 Stat. 110 (1948), now INT. REV. CODE OF 1954, §6013, authorized income splitting by married couples in common law states, the community property system was repealed or declared unconstitutional in those states that had newly enacted it. *See* de Funiak, *The New Community Property Jurisdictions*, 22 TUL. L.

did not go unnoticed by the court.[78] In effect, the New Jersey courts are now empowered to allocate marital assets between the spouses regardless of ownership, which was not the case before the enactment of the statute.[79]

This new power with respect to property distribution is the result of the inadequacy of alimony, which, as a means of support, has always been "inherently precarious" because it ceases on the death of the former husband and usually ceases or falters if he experiences serious financial misfortune.[80] More important, however, the New Jersey supreme court reiterated the property distribution as the righting of "what many have felt to be a grave wrong."[81] The court said:

> [The new statute] 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.[82]

Different considerations, however, appear to apply to the award of alimony, including, even in New Jersey, consideration of fault. This may be due in part to the fact that alimony is the manifestation of someone else's duty to care for the wife; property settlements are a recognition of the wife's right to secure distribution of property rightfully hers.

As a continuation of the duty of support, alimony in its traditional form consists of periodic payments by one former spouse, usually the husband, to the other until the remarriage or death of the recipient.[83] Although alimony has been criticized as unfair to husbands and as reinforcing the dependency of wives,[84] because of the acutely limited employment opportunities of women,

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REV. 264 (1947); Note, *Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332 (1950).

78. This recognition was expressed in that part of the *Painter* decision identifying the divisible property. The question was whether property acquired by gift or inheritance during coverture, in addition to the earnings of husband and wife, came within the statute. The court held that it did, and while noting that community regimes exclude such property from their definition of community property, declined to follow suit cautioning that "[w]e do not wish to be taken as suggesting that there is anything wrong with adopting a rule of community property law." Painter v. Painter, 65 N.J. 196, 216, 320 A.2d 484, 494 (1974). The court went on to recognize that "[t]he statute we are considering, providing as it does for a fair allocation of marital assets upon divorce, is to some extent a recognition of [the community theory that the accumulations of property during marriage are as much the product of the activities of the wife as those of the titular breadwinner]. But it nevertheless remains true that community property law is very different from our law of property. Its genius is not that of the common law. Its adoption should not occur unwittingly, but only after study and deliberation." *Id.* at 216, 320 A.2d at 494-95.

79. *Id.* at 213, 320 A.2d at 493.

80. Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974).

81. *Id.*

82. *Id.*

83. *See generally* H. CLARK, *supra* note 53, at 420-87.

84. *See, e.g.*, Ploscowe, *Alimony*, 383 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCIENCE 13 (1969).

alimony was and is a needed, if highly inadequate, response to economic inequity. The need is especially acute where there is no property division or little property to be divided. If the wife has custody of the children and is unable to work because of limited or expensive day care facilities, alimony will often be necessary since child support payments will seldom enable her to maintain a home for them and herself.[85] Even with a property distribution, however, alimony will often be necessary when the marriage was of long duration and the wife is of middle or later years. Her disadvantage in the marketplace increases with her age, and even if she has been working, her opportunities for advancement will have been more circumscribed than her husband's.[86]

Quite apart from the question of need, however, is the question of entitlement. The long-overdue recognition of marriage as a partnership cannot be confined to property division. The partner who has managed the home, its consumption, and its maintenance, as well as provided services to those who lived there, has invested not only in the accumulations of the marriage but also in the career of the earning partner. This career may well be regarded as an "asset of the partnership" that is subject to being divided.[87] Further, the nonearning spouse has worked for nothing, as a matter of legal entitlement, except for support, and so should be entitled to some additional remuneration for her (or his) efforts. Need and entitlement should not be affected by fault, whether the husband's or the wife's.

Despite evolving recognition of the economic contributions of the nonearning or lesser-earning partner, who is in most instances the wife, alimony awards to her appear to be increasingly limited.[88] At the same time they have

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85. See Weitzman, *supra* note 38, at 1195. The Uniform Marriage and Divorce Act has recently been amended to direct matrimonial judges to take the fact of child custody into account. See notes 68, 73 *supra*.

86. See notes 26, 39, 49 *supra; cf.* Kahn v. Shevin, 416 U.S. 351 (1974).

87. It has been asserted that "[o]ne must distinguish, first of all, between the property aspects of the husband-wife relationship and its purely personal, non-monetary elements." Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U.L. REV. 463, 464 (1973). The fact remains, however, that in the traditional marriage structure, it is the husband who is economically independent and the wife who is not. When the marriage is dissolved and the husband continues in his career while the wife must develop new means of earning a living, it is little consolation to be told that after all, her support of her husband in his career was a matter of purely personal devotion for which the law accords no recognition. The socialization of women towards a dependent and supportive role that maintained men in an independent and dominant position is only beginning to be recognized by the courts. *See* Stanton v. Stanton, 421 U.S. 7 (1975).

88. This appears to be the situation in Florida. Indeed, it was argued, albeit unsuccessfully, before the first district that the bench and bar considered that alimony had virtually been eliminated. Brown v. Brown, 300 So. 2d 719 (1st D.C.A. Fla. 1974).

Elsewhere, alimony awards to wives generally have been regarded as declining. Ironically, the movement of women towards some measure of economic independence has been used as a rationale for denying support to those women who have elected the traditional role. *See, e.g.*, Phillips v. Phillips, 1 App. Div. 2d 393, 394-95, 150 N.Y.S.2d 646, 649 (1956); White v. White, 226 Pa. Super. 499, 313 A.2d 776 (1973). More recently, the second wave of the women's movement has been used by some judges as a reason to deny a wife alimony, although she may have disapproved of the movement until her divorce. The dissenting judge in *Brown, supra*, was moved to comment: "Alimony came about during the era that women in general and

become theoretically and actually available to husbands.[89] To the extent that these trends reflect a turning away from stereotypical role perceptions and constitute a genuine encouragement to women to become self-supporting, they are certainly reasonable. What appears to be happening, however, is that equality is accepted as a principle when the question is the extension of benefits to the husband and as a justification for limiting benefits to wives, even though they are still living in an unequal world.

Examples of this tendency may be found in Florida. Florida does not have both property division and alimony, at least not as such. Rather, section 61.08 of the Florida Statutes presently provides:

> In a proceeding for the dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded such spouse. In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.[90]

"Lump sum" alimony may operate in the same way as a property division, so that under the statute a result similar to that obtainable in New Jersey is possible, with the exception of the adultery provision. In New Jersey, fault may affect only alimony;[91] in Florida, fault may affect both lump sum and periodic alimony. In either state, of course, the fault provisions will work most often against the wife, since it is the wife who usually is the recipient of alimony.

Rather than encourage judicial provision for divorced wives, the Florida statute seems to have done the reverse. Alimony appears to have been limited to temporary or rehabilitative grants[92] that, although better than nothing, will hardly be adequate even to begin to establish a middle-aged woman in a reasonably self-supporting career. The realities of sex and age discrimination, to say nothing of lack of experience, seem seldom to be recognized, and although there are exceptions,[93] the economic contributions of the housewife go unremarked.

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wives in particular were placed on a pedestal by male chauvinists. Women apparently found being worshipped on a pedestal to be distasteful and commenced a virtual worldwide drive to be removed from their place of superiority to a position of equality. Why one enjoying a position of superiority would intentionally seek a lower position of equality eludes the writer, but it is a fact of social history." 300 So. 2d at 727. For a general review of recent Florida decisions, see O'Flarity, *supra* note 77, at 90.

89. Thirty-three states now permit alimony awards to the husband. Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 135 (1974).

90. FLA. STAT. §61.08 (1973).

91. See notes 72-73 *supra* and accompanying text.

92. O'Flarity states that in Kennedy v. Kennedy, 303 So. 2d 629 (Fla. 1974), the Florida supreme court put "its stamp of approval on the trend, most apparent in the First and Fourth Districts, to curtail alimony for a wife to a minimum necessary to get her back into the job market, or to eliminate it all together if she is employable, regardless of other factors such as the duration of the marriage and property accumulated." O'Flarity, *supra* note 77, at 90.

93. The first district, in Brown v. Brown, 300 So. 2d 719 (1st D.C.A. Fla. 1974), took pains

If some form of alimony is not awarded, the only property that will be divided on divorce is that which is held jointly. This means that the housewife who has not been employed and who has not inherited money with which to acquire her own property is at the sufferance of her husband with respect to what, if anything, she will own. If he decides that she will own nothing, she might obtain some relief in the dissolution proceeding if she can prove a special equity. This will result in an award to her of some of the property held in her husband's name. The "equity," however, is indeed "special." It requires that the wife show that she has assumed functions beyond those expected of housewives in the acquisition of the property in question. In other words, she must have done more than is expected or required.[94] By contrast, the husband who acquired the property is entitled to keep it even though its acquisition followed the performance of his normal function: some form of paid employment. The wife must have been a housewife plus; the husband need have been only the breadwinner.

Thus, a housewife facing divorce is totally dependent on her husband's sense of moral obligation or a favorable exercise of judicial discretion. In short, she has no property rights. And unless she has been specially informed, she is unlikely to realize this until the time comes to consult an attorney. She therefore will not have been able to take protective measures, which could range from establishing herself in a job that will support her to insisting on an antenuptial contract.[95]

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to point out that "we have before us a factual situation which is still prevalent even in this modern day of women's liberation, *i.e.*, a wife who has foregone pursuing a professional career and the accumulation of a personal estate in order to be a fulltime mother and homemaker while the husband remains in the market place providing for the material needs of the family and accumulating a sizable personal estate. For these reasons, the time has come for us to pause and pursue an in-depth consideration of the law of alimony in Florida." *Id.* at 722.

94. Yet, even when she does do more than is expected or required, she may not be entitled to special equity. *See, e.g.*, Rey v. Rey, 279 So. 2d 360 (4th D.C.A. Fla. 1973); Steinhauer v. Steinhauer, 252 So. 2d 825 (4th D.C.A. Fla. 1971). *See also* note 25 *supra*.

95. Antenuptial and postnuptial contracts have recently enjoyed considerable attention. Although once thought to be the province of the very wealthy and the twice-married, *see* H. CLARK, *supra* note 53, at 27, they are now seriously considered by and recommended for all persons contemplating marriage. This renewal of interest has attended the growing perception by women that prevailing laws and expectations surround marriage work very much to their disadvantage. *See generally* Weitzman, *Legal Regulation of Marirage: Tradition and Change—A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169 (1974). The widely held view that contracts purporting to go beyond the regulations of property disposition at death and to invade or change the duties of the parties are invalid, H. CLARK, *supra*, at 28, is challenged by Weitzman and others. See Weitzman, *supra*, at 1236-49. *See also* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *Sex Discrimination and the Law, Causes and Remedies* 647-58 (1975). Prenuptial and separation agreements are also receiving attention in recent probate revisions. *See* UNIFORM PROBATE CODE §2-204 (1969); FLORIDA PROBATE CODE (Fla. Laws 1974, ch. 74-106 [hereinafter cited as FPC]) §732.702. The use of prenuptial agreements is anticipated to occur primarily in second or later marriages, but the statutes do not so restrict their use. See Fenn & Koren, *The 1974 Florida Probate Code—A Marriage of Convenience*, 27 U. FLA. L. REV. 1, 39 (1974). The 1975 amendment to FPC §732.702(1) (1974) changed the requirement of a "full disclosure" in postnuptial agreements

Florida Senate Bill 630

The Florida supreme court has not yet offered guidance on the standards applicable to alimony decisions,[96] and the present legislative grant of wide discretion to the courts has not resulted in compensating wives for their loss of bargaining power in the no-fault dissolution process. Perhaps to remedy this situation, a bill has recently been introduced in the Florida senate.[97] It would amend section 61.08 to provide rather detailed standards for the courts to follow in making alimony determinations. These standards relate to the needs, the ability to pay, and the expected earnings of the parties. They are particularly sensitive to, and realistic about, the position of the wife and, if adopted, will halt a seemingly growing tendency to leave her with little or nothing.

It should not go unremarked that the bill is by its terms applicable to both men and women, so that its protection would be available to a man who fulfilled a homemaker's functions. In this functional, as opposed to stereotyped, approach to family roles, it is totally consistent with the Equal Rights Amendment.[98] Furthermore, while consistent with the Amendment, the bill belies its opponents' professed fears that equality of rights for men and women would somehow destroy the traditional family. Senate Bill 630 reinforces rather than threatens the family by mitigating the present economic risk to the woman (or man) who embraces the role of homemaker.

In general outline, the bill directs the court to award alimony to the spouse "who, in the judgment of the court, will have a lower expected annual income than the other . . . after the dissolution of the marriage,"[99] under certain carefully delineated circumstances. In the first such circumstance, the spouse with the lower expected income (called the secondary earner) is entitled to alimony "only if he or she has less income earning ability at the time of dissolution of the marriage than he or she would otherwise have had due to a decision by the secondary earner to forego opportunities to increase his or her earning ability in favor of family or marital considerations."[100] A showing of any of the following will constitute prima facie proof of such a loss: "relinquishment of an educational goal in favor of the educational goals or employment advancement of the primary earner[;] [r]elinquishment of an employment opportunity to enhance the marriage or family life of the parties or to enable the primary earner to accept an employment opportunity[;] [and] [r]elinquishment of an opportunity to develop full income earning potential due to a disproportionate assumption of household responsibilities."[101]

The distinction between "primary" and "secondary" earners is important.

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to a "fair disclosure." Antenuptial agreements need not be attended by any disclosure. Fla. Laws 1975, ch. 75-220.

96. *See* O'Flarity, *supra* note 88, at 90.

97. Fla. S. 630 (Reg. Sess. 1975, introduced by S. Scarborough). See Appendix, *infra*.

98. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872, 937 (1971).

99. Fla. S. 630, §§1, 2(d) (Reg. Sess. 1975, introduced by S. Scarborough).

100. *Id.* §4(a).

101. *Id.* §4(a)(1), (2), (3).

The suggestion in some opinions has been that, if the wife worked, she is not entitled to alimony because she has proved herself to be capable of self-support.[102] Little account has been taken of the lower salaries usually paid to women or the fact that their career development may have been impaired because of their simultaneous assumption of household responsibilities. In contrast, the bill provides that if the secondary earner happens to be the husband, he too is protected. Whichever spouse is the primary earner, that is, the one who "will have a higher expected annual income than the other party to the marriage after the dissolution,"[103] shall not be entitled to alimony. It is, of course, possible that the higher earner will also have assumed the greater proportion of home responsibilities and because of this might be thought to have a claim to alimony from the secondary earner; the bill, however, would preclude such an award. Alimony to the secondary earner, on the other hand, is by no means a foregone conclusion. The secondary earner may make out a prima facie case, as provided by the bill, or convince the court in some other manner that her or his position has been the result of opportunities abandoned in favor of family or marital considerations.

The situations apparently contemplated by the provisions on prima facie proof are readily imagined. For example, it is not uncommon for a young woman to forego college in order to finance her husband's education, only to find that when he has attained his goals he feels that he has "outgrown" her. The relinquishment of employment opportunity provision would cover the situation in which a wife has to leave her job because of her husband's transfer or acceptance of a job opportunity elsewhere. She may leave her job to bear and rear children, or to develop a social life necessary to the husband's business.[104] With the obvious exception of bearing children, each of these roles can

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102. *See, e.g.*, Beard v. Beard, 262 So. 2d 269 (1st D.C.A. Fla. 1972). The parties' assets were divided but an award of permanent periodic alimony was reversed on facts showing that the wife had demonstrated her ability to support herself by having been employed at some point during her 21-year marriage. It appeared, however, that after paying alimony the husband would have less income than the wife on which to support himself and his minor daughter. Nevertheless, the possibility of the husband improving his position was not taken into account, although the wife was clearly expected to improve hers.

See also Thigpen v. Thigpen, 277 So. 2d 583 (1st D.C.A. Fla. 1973). During the 24 years of marriage, the wife had demonstrated her ability as an office manager for 15 years prior to dissolution and was therefore denied alimony. Again, the assets were divided evenly; however, the facts showed that the wife had been employed before the birth of her child and again after the child entered school, this time in her husband's company. At the time of the divorce she was 49 years old and unemployed. She was further afflicted with an allergy caused, the court was careful to note, by a cosmetic. Under the circumstances, her prospects for employment were far from rosy. Compare, however, the court's treatment of *Thigpen* in Brown v. Brown, 300 So. 2d 719, 725 (1st D.C.A. Fla. 1974).

103. Fla. S. 630 §2(c) (Reg. Sess. 1975, introduced by S. Scarborough).

104. It is sometimes suggested that wives of wealthy husbands may not deserve much in the way of alimony and indeed, that they may even owe their husbands money upon divorce. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 695 (1975). In another sense, however, the value of the services of wives of affluent men may in fact be worth quite a lot. *See, e.g.*, J. GALBRAITH, *supra* note 1, at 32: "With higher income the volume and diversity of consumption increase and therewith the number and complexity of the tasks of household management. The distribution of time between the various tasks

be filled by either sex. A third aspect of a prima facie case, disproportionate assumption of household responsibilities, is also reversible, but may, perhaps for that very reason, cause some difficulty. It is almost always the wife who assumes the greater share of household responsibilities, which a court may regard as "proportionate" because in line with general expectations. On the other hand, a husband's relatively minor contributions may be regarded as "disproportionate" because he is doing "woman's work." It should perhaps be made clear that what is traditionally regarded as the wife's role in the home is in fact a "disproportionate assumption of household responsibilities."

If the above standards are met, and alimony is awarded to the secondary earner, rehabilitative alimony may be ordered to enable the secondary earner to increase income through educational or other training.[105] It is not clear, however, whether such alimony may be awarded only if a prima facie case of loss of earning ability is made out. Indeed, it is not clear that a person who could not make out a prima facie case would be entitled to alimony. For example, the term "relinquishment" might be taken to assume the presence of training or ability in the first instance. The secondary earner who is not able to establish such training or ability could be denied alimony. Nevertheless, even if a prima facie case is not made out, alimony may be awarded as a matter of discretion if it can be shown that the secondary earner is physically or mentally incapable of providing for his or her own financial support.[106]

The question that arises with respect to the "relinquishment" provision stems from the following likely fact situation: a woman, while young, plans for and becomes the "traditional" housewife. Although fully competent, both mentally and physically, she faces divorce in her middle years. She cannot in honesty say she has "relinquished" anything, because she placed primary importance on her ambition to be a wife and mother. Her situation in terms of establishing a new life, however, is not promising when she faces divorce if she must assert either "relinquishment" or mental and physical incompetency in order to receive compensation for her contributions to the marriage.

Such an interpretation seems at variance with the general purposes of the bill. Nevertheless, it is a possible reading and, if made, would signal to young women that unless they prepare themselves for a paid task, they will not be seen to have relinquished anything that merits protection when their unpaid career (housewifery) is terminated by divorce. Thus, in a very indirect fashion the bill would simultaneously encourage at least some preparation for economic self-sufficiency on the part of women and reinforce the breadwinner-

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associated with the household, children's education and entertainment, clothing, social life and other forms of consumption becomes an increasingly complex and demanding affair. In consequence, and paradoxically, the menial role of the woman becomes more arduous the higher the family income, save for the small fraction who still have paid servants. . . . Convention forbids external roles unassociated with display of homely virtues that are in conflict with good household management. She may serve on a local library board or on a committee to consider delinquency among the young. She may not, without reproach, have full-time employment or a demanding avocation. To do so is to have it said that she is neglecting her home and family, *i.e.*, her *real* work. She ceases to be a woman of acknowledged virtue."

105. Fla. S. 630 §§5(a), (b), (c) (Reg. Sess. 1975, introduced by S. Scarborough).

106. *Id.* §6.

housewife model of marriage by mitigating some of the economic risk the latter role entails. What the bill fails to do, however, is directly to reflect the economic contribution of housewifery per se. Instead, it simply attempts to compensate for what "real" benefits have been relinquished to make that contribution.

Even if the conditions of a prima facie case of relinquishment have not been made out, there is another ground on which alimony may be awarded to the secondary earner. The court may determine that the secondary earner "should not seek full-time employment after the dissolution of the marriage in order to provide a better home life for the child or children."[107] This provision raises several questions. For example, does the judge have the power to order a parent who is awarded or otherwise has custody of the children not to work full-time? What weight should be given to the custodian's own determinations of what is best for the children, and for herself or himself? If the court disagrees with the parent's belief that the children need her or his presence in the home, can alimony be denied on that ground? If the economic situation is such that part-time employment will not yield enough income for self-support, even when alimony is added, can alimony be discontinued if the parent obtains full-time employment? An answer favorable to the custodial parent cannot be assumed, particularly if that parent is the mother, for judges often overlook the fact that a wife who has child custody and receives child support must also support herself.[108] Child support payments will themselves seldom cover the cost of baby-sitters or adequate day care. If the father has custody this may not be crucial because his salary may cover the added costs, but the mother's salary is less likely to be sufficient. Thus, even the proposed bill may be inadequate until the inequities between male and female salaries are corrected.

The bill's failure to ameliorate all of the risks faced by housewives[109] may in the long run be salutary. Simone de Beauvoir once suggested that the only way in which equality of the sexes could ever be achieved was through the prohibition of housewifery as a "career" for women.[110] A very effective way of achieving this is, of course, to render that position so risky that few will undertake it. A true revolutionary in these matters might applaud the present Florida case law as a means of hastening, rather than delaying the millenium, for not until wives realize the precariousness of their position will they begin to protect themselves. The tragedy presently is that so few in fact realize it.

Those who wish to reinforce traditional family structures as well as those who believe that the choice to make and manage a home should not be penalized should seek to compensate the spouse who assumes the role of homemaker and thus to assure that a greater number of persons will do so. If the

107. *Id.* §7.

108. *See* Weitzman, *supra* note 92, at 1195. Compare Beard v. Beard, 262 So. 2d 269 (1st D.C.A. Fla. 1972) (the father's custody of his minor daughter was a reason for reversing the award of alimony to the wife). *See also* UNIFORM MARRIAGE AND DIVORCE ACT §307 (revised 1974), note 70 *supra*. Problems of enforcement also remain.

109. For the methods by which alimony awards may presently be enforced, see H. CLARK, *supra* note 53, §§14.10-.11 (1968). For data on their general ineffectiveness, see Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 190 (1971).

110. S. DE BEAUVOIR, THE SECOND SEX 482 (1953).

housewife marriage is worth saving, equality of personal and economic worth must be recognized. Otherwise, alternatives will be more attractive to large numbers of persons, mainly women, who presently bear the risk of penury; the traditional model will become too risky to be bearable, even to those who would otherwise prefer it.

Senate Bill 630 is an important proposal. Although unwieldly, it has the great virtue of identifying and cataloging, with a view to correcting, the economic disadvantages of housewifery. If it, or something like it, were enacted, the condition of housewives facing divorce in Florida would be greatly improved. Whether such a bill or even the New Jersey approach goes far enough, however, will be discussed after a consideration of marital property distribution at death, an inevitable event dissolving marriages not previously ended by divorce.

PROPERTY AND DEATH

Death brings the ultimate and inevitable dissolution of a marriage. It has generally, but not always, been attended by some provision for the survivor.

Historical Antecedents

Land. Some form of community property probably existed in England before the Norman Conquest.[111] Had this treatment of property survived the invasion, greater equality between spouses than has since existed in the Anglo-American tradition would have resulted. With feudalism came the gradual submersion of married women as legally and economically independent persons,[112] and their property came under the total control of their husbands.[113] The support of their families, effective antenuptial agreements, and property settlements helped some women to escape such harsh results of marriage, but only those with sufficient bargaining power would be numbered among them.[114]

111. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 522 (5th ed. 1956), suggesting, however, that the impression of family ownership may be conveyed by the network of the rules of inheritance. Yet there is evidence that "[u]nder the old Anglo-Saxon law, wives were on a parity with husbands with regard to property matters and the privilege of divorce. . . . However, after the Norman Conquest there was an atavistic return to the principle of subordination. The Norman-English regime of marital property which emerged rejected the community property concept as it developed elsewhere in Europe so that even today the two systems have substantially different notions as to what constitutes marital property." Foster, *Preface* to I. BAXTER, MARITAL PROPERTY at vi (1973).

112. *See* Foster, *supra* note 111 at vi. Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033, 1044 (1972).

113. The *jure uxoris,* or estate by the marital rights, existed in husbands (although by the sixteenth century it could be diminished through the wife's separate estate in equity) until the passage of the Married Women's Property Acts during the second half of the nineteenth century. Johnston, *supra* note 112, at 1045-46, details the extent of the right. The wife's tangible personalty (except paraphernalia and pinmoney) became her husband's property; he acquired sole possession and control (but not title) over her realty, with rights to the income and no duty to account. He could alienate his interest without her permission.

114. *Id.* at 1052; F. BASCH, RELATIVE CREATURES: VICTORIAN WOMEN IN SOCIETY AND THE NOVEL 21 (1974).

The situation of the less affluent classes is more difficult to ascertain, for recorded history is mostly that of the rich and powerful.[115] There are suggestions, however, that as a practical matter the instinct toward a community system may have existed among those classes in which both men and women produced tangible goods, at least until the industrial revolution.[116]

It has been noted that in England, and therefore in America, the law of the wealthy became the law for all.[117] The law of the landed classes has thus ultimately shaped the disposition of property at death. According to that law, spouses were not heirs of one another.[118] Property descended along bloodlines,[119] and realty was the only significant kind of property.[120] As a result, although personalty could be bequeathed to a spouse,[121] realty could not be devised until 1540.[122] Until then, realty would descend upon the death of the

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115. E. JANEWAY, MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY (1971), shows that before the industrial revolution, husbands and wives both worked at home and were equally regarded as important contributors to the economy of the household. *Id.* at 13-26. *See also* Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607 (1964).

116. *See* Stocker, *Zur Kritik des Familenvermogensrechts*, 13 NEUE JURISTICHE WOCHENSCHRIFT 553, 554 (1972) (cited and quoted by Glendon, *Is There a Future for Separate Property?*, 8 FAMILY L.Q. 315, 319 n.12 (1974)). The industrial revolution moved economically productive activity from the home to the factories. J. GALBRAITH, *supra* note 1, at 33-34 echoes the same theme: "In preindustrial societies women were accorded virtue, their procreative capacities apart, for their efficiency in agricultural labor or cottage manufacture or, in the higher strata of the society, for their intellectual, decorative, sexual or other entertainment value. Industrialization eliminated the need for women in . . . cottage employments . . . ; in combination with technological advance it greatly reduced their utility in agriculture. Meanwhile rising standards of popular consumption, combined with the disappearance of the menial personal servant, created an urgent neeed for labor to administer and otherwise manage consumption."

The working class wife employed in a factory was particularly victimized. See F. BASCH, *supra* note 114, at 20-21.

117. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 2 (1936). The development of the law progressed in the reverse direction on the European continent; the community property system of the poor filtered upward. *Id.*

The married woman in America, however, appears to have been slightly better off than her English sister in the area of legal rights and abilities. See Johnston, *supra* note 112, at 1057-61. *Compare* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, pt. 2, at 211-14 (Reeve text, rev. by F. Brown, P. Bradley ed. 1966).

118. T. ATKINSON, LAW OF WILLS 40 (1953).

119. *Id* at 37-39.

120. Land, equal to power and family wealth, was for centuries the only important source of income. See A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 223 (2d ed. 1969).

121. With respect to personal property, the spouse and children were entitled to a share of the estate, which the testator could not otherwise bequeath. The testator enjoyed testamentary freedom over the remainder. After the fourteenth century, the forced share of spouse and children disappeared, and testamentary freedom became the norm. T. ATKINSON, *supra* note 118, at 15-16, 41. *See also* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 734-36, 743-46 (5th ed. 1956).

122. To offset some of the harsher results of primogeniture, the use was often resorted to as a type of surreptitious will until the Statute of Uses, 27 Hen. 8, c. 10 (1535), and the Statute of Wills, 32 Hen. 8, c. 1 (1540) (permitting devises of realty).

owner to the eldest son,[123] who would then control the estate.[124] Under such circumstances, some provision for the homeless widow had to be made, and it early took the form of dower.

Dower was certainly necessary, although its origins seem clouded.[125] Because feudal wives lost control of any property they might have owned, they were either returned to their families when widowed, or they had to be given some other place to live. That other place was, for the landed classes at least, the dower house.[126] Dower was, and is, a marital estate by which the widow received a life estate in one-third of the lands held by her husband in an estate of inheritance during coverture.[127] Without her consent, this right could not be defeated by an inter vivos transfer, nor, when wills of realty were recognized, by will.[128]

The husband had an equivalent estate: curtesy.[129] It would be difficult to characterize it as protective. Rather, it seems to have developed from the husband's wardship over the wife and over any children of the marriage,[130] for curtesy was conditioned on issue having been born alive.[131] It extended to all of the wife's lands but, like dower, was a life estate only.[132]

Dower was considerably weakened in England by the Dower Act of 1833,[133] which limited the widow's right to land that was still held at the husband's death, and of which he had not made some other disposition by will.[134] Thus, the husband's power of alienation was greatly heightened. This, coupled with the still prevailing *jure uxoris*, virtually removed all property rights from the married woman. It is not surprising that pressure for the Married Women's

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123. T. ATKINSON, *supra* note 118, at 39.

124. Since the *jure uxoris* permitted the husband to control his wife's lands, she might have little of value on his death. See note 113 *supra*.

125. It is not clear whether the original purpose of dower was protective, for its early history is "singularly obscure." T. PLUCKNETT, *supra* note 111, at 566. Its origin is so ancient that neither Coke nor Blackstone was able to trace it. *See* 2 W. BLACKSTONE, COMMENTARIES*129.

126. The custom was to set aside a dower house for the widow, to which she would retire on the marriage of her eldest son. See A. CASNER & W. LEACH, *supra* note 120, at 262-63.

127. By the time of Edward I, dower attached to land acquired by the husband even after marriage, and the portion of one-third seems to have been established. T. PLUCKNETT, *supra* note 111, at 566.

128. T. ATKINSON, *supra* note 118, at 105.

129. *Id.* at 105.

130. T. PLUCKNETT, *supra* note 111, at 568-69.

131. On the necessity of the birth of live issue, Pollock and Maitland comment: "To this, so we think, points the requirement that a child capable of inheriting from the wife shall be born — born and heard to cry within the four walls. This quaint demand for a cry within the four walls is explained to us in Edward I's day as a demand for the testimony of males — the males who are not permitted to enter the chamber where the wife lies, but stand outside listening for the wail which will give the husband his curtesy." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 418 (2d ed. 1959) (footnote omitted).

132. T. ATKINSON, *supra* note 118, at 105.

133. 3 & 4 Will. 4, c. 105 (1933) (repealed).

134. Dower "ceased to be of practical importance" at this time. T. PLUCKNETT, *supra* note 111, at 568.

Property Acts increased.[135] At about the same time, the migration of many people into the cities and factories resulted in greater numbers of landless families for whom the marital estates had no meaning. Wives in the working classes were thus totally propertyless, even with respect to their own wages.[136]

Personalty. Personalty, although until recent times a relatively unimportant form of wealth, seems to have been partially distributed to the surviving spouse of an intestate at a rather early time.[137] Atkinson notes:

> In cases of intestacy it became clear that the wife and children were entitled to their reasonable portions but there was controversy as to whether the law, the church or the kindred were entitled to the dead man's part of which he might dispose by will. The lord lost his claim at an early date, but the struggle between the church and the family remained and there was much temporizing of result.[138]

The question was decided in 1670 when the Statute of Distribution was enacted.[139] It provided that in case of intestacy a widow would receive a third of her husband's personalty if there were children and one half if there were not.[140] As Atkinson puts it: "The Statute did not contemplate the situation of intestacy in case of a married woman because all her personalty became her husband's upon marriage."[141]

Effect of the Married Women's Acts. The nineteenth century Married Women's Act enabled women to own, acquire, and dispose of their personal properties by will or otherwise. But the act also stated:

> Clearly, neither legislators nor judges read the married women's property acts as conferring upon married women a property right, enforceable against their husbands in the value of their own labor within the home. In this highly significant respect, the common law remained intact — and still does today: the wife is obligated to perform household services for which her only quid pro quo is her husband's duty to support. In view of the universal assumption that married women would spend most of their time in household pursuits, this denial of compensation inevitably kept wives in economic dependence upon their breadwinner-husbands, who were out tending to the world's business. Meanwhile, the husband's earnings remained his separate property, subject only to his duty to support the wife. All of the "practical" and protectionist justifications for the marital unity-male dominance straitjacket proceed from the assumption that this form of female servitude is the only way to organze the basic social unit, the nuclear family.[142]

135. Opposition in England to the wife's legal non-existence arose in the 1850's. F. BASCH, *supra* note 114, at 17.

136. They could not control their own wages, even after a legal separation or desertion by the husband, until 1857. *See* F. BASCH, *supra* note 114, at 20-21.

137. T. ATKINSON, *supra* note 118, at 41.

138. *Id.*

139. 22 & 23 Car. 2 c. 10 (1670).

140. *Id.*

141. T. ATKINSON, *supra* note 118, at 42.

142. Johnston, *supra* note 12, at 1071.

To the extent that this is still true, and it would seem to be, the housewife who predeceases her husband will have little property to leave him.[143] If she does own property, however, at least some of it will be his, no matter what its source, unless she has succeeded in making some other disposition. She will receive a portion of his property, if he makes no will, and if he has not succeeded in making some other disposition. These results follow the statutory heirship of spouses, in cases of intestacy, with respect to both real and personal property and follow dower or its modern substitute, the spouse's indefeasible share. Their protection for the housewife, however, is still rather marginal, as is illustrated in practical terms by postulating first, a husband who succeeds in minimizing his wife's share of his estate, and second, a wife who accomplishes the same thing. In most cases, the widow will be considerably more disadvantaged than the widower, who has had the opportunity to earn money and may still be able to do so.[144] Even if he cannot, however, he is likely to be the recipient of retirement benefits and the owner of property he managed to accumulate during his working years. Housewifery, it must be repeated, yields no such pension and no wages with which to accumulate savings.

The widow's jeopardy was crystallized by the gradual weakening of dower, already described. When England finally abolished dower in 1925,[145] the resulting freedom to dispose completely of property so as to deprive both the widow and the children led ultimately to the Inheritance (Family Provision) Act of 1938.[146] A similar pattern may be found in this country.[147] Where dower has been abolished, it has been replaced, sooner or later, with some form of indefeasible share for the surviving spouse.[148] Equality of the sexes in this area predated by far its intrusion into others. Most jurisdictions in this country

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143. A disparity between males and females in probated estates has been reported suggesting that "females are disproportionately represented among those who have no property to be administered. Perhaps the longevity of the sex contributes to this condition." M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 71 (1970).

144. *See* Kahn v. Shevin, 416 U.S. 351 (1974). The Married Women's Property Acts however, resulted in someplaces, in the assimilation of dower and curtesy, and in others enabled the wife to defeat curtesy by deed or will. *See* STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 215 (1964); 1 AMERICAN LAW OF PROPERTY §5.57 (A. J. Casner ed. 1952). Tenancies by the entirety were also affected in varying ways. *See, e.g.*, King v. Greene, 30 N.J. 395, 153 A.2d 49 (1959).

145. Administration of Estates Act, 15 & 16 Geo. 5, c. 23, §45 (1925).

146. Inheritance (Family Provision) Act, 1 & 2 Geo. 6, c. 45 (1938); Intestates' Estates Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64 (1952) (extending the original act to intestate estates).

147. States that have abolished dower have replaced it with some form of share for the surviving spouse. North and South Dakota were exceptions, but North Dakota has recently enacted the Uniform Probate Code, which includes provisions for an indefeasible share from an augmented estate. See N.D. CENT. CODE §30.1-01-01 *et. seq.* (special Supp. 1975), UNIFORM PROBATE CODE.

148. New York's experience is illustrative, if, perhaps, extreme. *See generally* STATE OF NEW YORK, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE (1964). Dower survives in only nine or ten jurisdictions in its original form. *See* 2 R. POWELL, THE LAW OF REAL PROPERTY ¶213(1), at 170.17, ¶213(2), at 170.21-.22 (P. Rohan ed. 1974).

have tended to grant the husband and wife equal rights in the other's estate, although there have been exceptions.[149]

Equality of right at death, however, has not affected the rather rigid division of labor within the family, wherein one spouse is firmly ensconced in a position of economic superiority. It may be that remedial measures, half-hearted as they have been in the property area, have tended to reinforce the husband's economic and legal superiority by granting him considerable freedom in the disposition of his property while seeming to be protective of the propertyless wife who has equivalent, if hollow, rights of disposition over her property. The laws that seem to be protective of wives, or more particularly, widows, in fact tend to perpetuate a basically inept and helpless caricature of women,[150] from whom control over whatever property is left to her must be carefully kept. Her share, conventional wisdom suggests, should be kept in trust.[151]

Modern Legislation

Dower. The jurisdictions that retain dower do so in forms that range from those virtually identical with the estate as known by Edward I to virtual equivalents of an "indefeasible share." An example of the first is New Jersey.[152]

149. The wife has traditionally been the favored spouse in terms of a statutory share at death. *See, e.g.*, T. ATKINSON, *supra* note 118, at 109 (statutory modifications of dower). Most spousal protection schemes seem to have been enacted with her in mind. *See generally* Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970); Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U.L. REV. 377 (1929) (the legislation by its terms tends to apply to both widows and widowers). Florida only recently changed its dower provisions and made them applicable to widowers, as well as widows. See FLA. STAT. §731.34, *as amended*, Fla. Laws 1973, ch. 73-107, 31, *codified as* FLA. STAT. §731.34 (1973). The 1975 Florida Probate Code abolished dower and curtesy, §732.111, excepting a preexisting right in widows. See §732.213. An elective share, exercisable by a "surviving spouse" has been substituted. See §§732.201-.205-15. Fla. Laws 1974, ch. 74-106.

150. See Clark, *supra* note 149, at 513, 544. There is also the fear, however, that the surviving spouse (widow) will marry again and by will or intestacy divert her deceased husband's property away from his bloodline and to her new husband. A related fear is that the surviving spouse, if a stepparent, will divert the property away from the decedent's children or seek to augment her or his share at their expense. *Id.* at 531; Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1047-48 (1966). The Uniform Probate Code seeks to allay both fears in its provisions on intestacy (under §2-102, if the decedent is survived by issue who are not also issue of the survivor, the surviving spouse receives only half of the estate) and on the spouse's share of the augmented estate (section 2-202 excludes from the capture provisions transfers occurring before a marriage, making it possible for a person to provide for children by a prior marriage without concern that such provisions will not be upset by a later marriage).

151. Placing the spouse's share in trust will also prevent her or him from diverting it to a second partner, or to children by a prior marriage. The long standing use of the trust and other estate planning devices to "protect" the widow from responsibility and control is beginning to receive attention. *See, e.g.*, B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 614-19 (1974); Kulzer, *Property and the Family: Spousal Protection*, 4 RUTGERS-CAMDEN L.J. 195, 221 (1973).

152. N.J. STAT. ANN. §3A:35-1 (1953); for curtesy, see N.J. STAT. ANN. §3A:35-2 (1953); see note 124 *supra*.

Florida exemplified the practice of calling an indefeasible share dower[153] until recent legislation made substantial changes.[154]

Dower in New Jersey is available to both wife and husband, curtesy having been made the equivalent of dower.[155] It is an estate in realty only, and arises only in lands held during coverture in an estate of inheritance. The surviving spouse has a life estate in one-half of such lands.[156] This estate is not affected by inter vivos transfers unless consented to or by a will unless there is a devise of realty in lieu of dower.[157]

In Florida what was called dower was, in effect, an elective share, and the spouse claiming it had to elect against the will. The right, which extended to both realty and personalty, entitled the survivor to one third, absolutely.[158] After 1973, both widows and widowers could claim dower.[159] The new Florida probate code replaces it with an elective share (30 percent) of all property of the decendent, wherever located, that is subject to administration, with the exception of realty outside Florida.[160]

Florida and New Jersey provide interesting contrasts in property distribution at death and divorce. To date, it would appear that New Jersey accords greater recognition to the divorced spouse than to the widow; Florida does just the reverse. Certainly dower in New Jersey is a most inadequate and inefficient means of postponed compensation or, in more traditional terms, protection for a surviving widow. It has no meaning whatever for legions of apartment dwellers. It does not affect personalty, which by and large has tended to replace realty as significant wealth, and it yields only a life estate. The right

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153. FLA. STAT. §731.34 (1971).

154. Fla. Laws 1973, ch. 73-107, §1. The Florida Probate Code was substantially amended in 1974. The changes are fully analyzed in Fenn & Koren, *supra* note 95. Further amendments were made in 1975. Fla. Laws 1975, ch. 75-220, *to be codified as* FLA. STAT. §§732.111, .201.

155. N.J. STAT. ANN. §§3A:35-1, -2 (1953).

156. Because the life tenant bears the responsibility for maintenance, interest payments on the mortgage if there is one, taxes, and any other carrying charges and expenses, a spouse may prefer to take a gross sum in lieu of dower or curtesy. *Compare* Shilowitz v. Shilowitz, 115 N.J. Super. 165, 278 A.2d 517 (1971), *with In re* Flasch, 51 N.J. Super. 1, 143 A.2d 208 (App. Div. 1958). This is not, however, a matter of right. *See, e.g.*, Bruten v. Miller, 28 N.J. Super. 531, 101 A.2d 24 (1953); Katz v. Farber, 4 N.J. 333, 72 A.2d 862 (1950); Potter v. Watkins, 104 N.J. Eq. 13, 144 A.27 (1928).

157. N.J. STAT. ANN. §3A:37-1 (1953).

158. In addition, the survivor is entitled to homestead, exempt property and family allowance. "Dower" was free from liability for debts of the decedent (other than secured debts), and expenses of administration. FLA. STAT. §§731.34, .36 (1973). However, the new law bases the elective share on the estate subject to administration (exclusive of realty outside of Florida) after the value of all valid claims has been deducted. FPC §732.207 (1975).

159. See note 149 *supra*.

160. FPC §732.201 (1975). For a comparison of the dower provisions of the old probate code and the 1974 predecessor of the elective share in the 1975 Florida law, see Fenn & Koren, *supra* note 95, at 36-38. The Florida Probate Code as first enacted in 1974, provided for a share of the net distributable estate, which was defined as "the assets of the estate after payment of taxes, claims, family allowance, exempt property and expenses of administration." FPC §732.201 (repealed). Under either provision, the statutory share of the surviving spouse can be readily minimized, through various kinds of non-probate transfers on the part of the property-owner.

to live in a fraction of a house for life is scant recompense for a near lifetime of caring for that house and its occupants.[161]

Florida does considerably better for surviving spouses. It provides not only homestead rights[162] but also an elective share in the estate (formerly "dower") that covers both realty and personalty. The relatively recent extension of the dower right to widowers (the new law benefits "surviving spouses") is an indication that the legislators were originally concerned only with the widow, presumably a housewife.[163] This contrasts tellingly with the apparently prevailing attitude toward the "failed" wife whose marriage has been dissolved. Even the surviving spouse, however, may claim only a third of the estate subject to administration.[164] Thus, even the economic condition of the widow is totally a matter of her husband's discretion, for he can easily minimize her statutory share.[165] This provision, combined with the divorce laws, renders housewifery a very hazardous occupation. Together, they may hasten its extinction.

Whatever form dower takes, whether the now inadequate common law form or the more reasonable statutory version formerly in force in Florida, the fact remains that it is essentially a share of somebody else's property.

The Intestate Share. Although personalty was distributable at an earlier date, an intestate share of realty for a surviving spouse is of fairly recent origin.[166] An underlying assumption of most intestacy laws appears to be that it is the wife who will succeed to property either because she has no property to pass to her husband, should he survive her, or because she will more likely be the survivor.[167]

The intestate share, like dower, varies.[168] It is generally affected by the presence of children[169] and more recently, in an attempt to reflect predominant

161. It is not always clear whether the underlying rationale of devices such as dower and the indefeasible share is protection or compensation. If protection, there is considerable evidence that it is unnecessary. *See, e.g.*, Clark, *supra* note 149; Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). *But see* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960), noting that a simple elective share amounts to very little protection at all. If any of the devices are regarded as compensation, it may be too little, too late.

162. FLA. CONST. art. X, §4; FLA. STAT. §731.27 (1973), *as amended*, Fla. Laws 1975, ch. 75-220, *to be codified as* FLA. STAT. §732.401.

163. See FPC §732.111 (1975). This is reflected in other provisions of Florida law. *Cf.* Kahn v. Shevin, 416 U.S. 351 (1974).

164. See note 160 *supra*.

165. This was the New York experience. See note 173 *infra*.

166. T. ATKINSON, *supra* note 118, at 40, 41.

167. *See id.* at 42.

168. *See* 7 R. POWELL, *supra* note 148, at ¶995 n.9.

169. "Approximately a third of the jurisdictions fix the fraction [of the surviving spouse's intestate share] (with minor variations) at a one-half share where the intestate leaves no more than one stirpes of descendants. . . .

"Approximately one-fourth of the jurisdictions fix the fraction at either one-third or one-half of the total assets without reference to the number of descendant stirpes. . . . A small group of states fix the share at either one-fourth of the assets or a child's share." *Id.* Prior to the 1974 Florida Probate Code, Florida was in the last category, the surviving spouse "taking

patterns in will-making, by the size of the estate. Studies have indicated that most spouses leave much more than typical intestacy statutes have provided for the surviving spouse, who may be expected to leave what is left to any children.[170] The intestate share, however, is not a vested right; it depends on the volition of the property owner who may, by a will, divert the property to other takers. To prevent this, most jurisdictions have enacted statutes purporting to guarantee a minimum indefeasible share to the spouse.

The Indefeasible or Elective Share. The indefeasible share is generally the same or less in amount than the intestate share.[171] More recent legislation provides that it may be claimed in both testate and intestate estates and is measured by the "augmented estate";[172] that is, the estate as computed by taking into account various inter vivos transfers that are not permitted to affect the spouse's share.[173] This augmented share has occasioned considerable comment.[174] Most recently, despite or perhaps because of whatever impetus for its adoption may have been caused by the Uniform Probate Code, such broad "capture" provisions have been challenged.[175] Opponents contend that the provisions are unnecessary because most spouses voluntarily[176] provide for the survivor by will. In many instances, lifetime transfers are reasonable and neces-

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. . . as if he or she were one of the children." FLA. STAT. §731.23(1) (1973). The new code gives the surviving spouse at least half of the intestate estate. See FPC §732.102 (1974), *as amended*, Fla. Laws 1975, ch. 75-220. For a comparison of the old and 1974 Florida Probate Code provisions, see Fenn & Koren, *supra* note 95, at 7-9.

170. UNIFORM PROBATE CODE §2-102; FPC §732.102 (1974). All the evidence demonstrates that the spouse is the preferred taker, even over children, and in ordinary circumstances, will be left everything outright. For studies in this area, *see generally* M. SUSSMAN, J. CATES & D. SMITH, *supra* note 143; Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Gibson, *Inheritance of Community Property in Texas — A Need for Reform*, 47 TEXAS L. REV. 359 (1969); Plager, *supra* note 161.

171. MacDonald summarizes the statutory provisions: "The amount recoverable may include: (a) the intestate share; (b) the intestate share limited to a defined amount or fraction of the estate; (c) a share in the realty only; (d) a combination of a share in personalty and inchoate dower; (e) a limited right to elect; (f) nothing." W. MACDONALD, *supra* note 161, at 21-22. The extent of the share tends to vary with the number of children involved. *Id.* at 22.

172. Here, too, there are a variety of statutory provisions. *Compare* N.Y. EST., POWERS & TRUSTS LAWS §5-1.1 (McKinney 1972), *with* UNIFORM PROBATE CODE §2-202. For an analysis of new Florida law, see Fenn & Koren, *supra* note 95, at 36-38. The 1974 FPC was heavily amended since this article by Fla. Laws 1975, ch. 75-220.

173. When dower was first replaced with an elective share for the surviving spouse, the efforts of property owners to diminish it as much as possible attracted considerable attention. *See, e.g.*, Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1971); *In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951) which has inspired a great amount of critical comment; Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). *See generally* W. MACDONALD, *supra* note 156.

174. Generally, the criticism has been on the grounds that the augmented share is unnecessary. See Clark, *supra* note 149; Plager, *supra* note 161.

175. The drafters of the Uniform Probate Code (UPC) concede its complexity. UNIFORM PROBATE CODE §2-202 and Comment. *See also* UNIFORM PROBATE CODE art. 2, pt. 2, General Comment.

176. See authorities cited note 170 *supra*.

sary to prevent second wives from obtaining undue advantage and diverting the property from the decedent's own bloodline,[177] and capture provisions unduly handicap the property owner in the use of non-testamentary family provisions.[178] These objections can be, and often are, met in the legislation itself.[179] It may be that the basic objection is the indefeasible share's approximation to a recognizable property right in the wife.

A Reexamination of Prevailing Systems

Distribution at death is somewhat more certain than at divorce. The statutory minimum is set and is not within the discretion of a judge. Although that minimum may be inadequate, the capture provisions of modern indefeasible share statutes make it increasingly difficult to evade their purpose.[180]

Nevertheless, spousal protection schemes are flawed by their premise: that the property being distributed is, insofar as the surviving spouse—generally assumed to be the wife[181]—is concerned, a share of someone else's property.

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177. See Clark, *supra* note 149, at 531; Fratcher, *supra* note 150, at 1047-48.

178. Clark, *supra* note 149, at 545, states: "The injunction against disinheritance, as it is expressed in the statutory right of election, is probably a useful device, along with such tax incentives as the marital deduction, to remind a husband to include his wife in his estate plan. The law, however, exceeds its proper goals when it seeks to not just prod the husband but to reshape the distribution of the family's wealth by intervening massively on the side of the widow even though there has been no showing that she needs, deserves or will be greatly benefited by its action."

179. The UPC provision has as one of its purposes "to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements." UNIFORM PROBATE CODE §2-202 and Comment.

The UPC provision is also designed to make "it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage." *Id.*

180. Nevertheless, it can be done by a truly determined property owner. One of the most unabashed works on this subject is British. A form has been developed entitled *Settlement Upon Mistress and Illegitimate Child for Purpose of Evading the Provisions of the Act.* M. ALBERY, THE INHERITANCE (FAMILY PROVISION) ACT, 1938 67 (1950) (reprinted from THE CONVEYOR (N.S.), 1944, p. 282).

181. Despite the genderless "surviving spouse," the laws, past and present, are aimed at the widow. Reading of the legislative reports cannot fail to bear this out. *See, e.g.*, UNIFORM PROBATE CODE §2-202, Comment. This also applies to the legal commentary. No matter how neutral the terminology, there are either lapses into gender, examples, or outright admissions that betray the purpose of the legislation.

In all of the concern about widows, widowers receive little attention. When mentioned, however, the husband emerges as much a stereotype as the wife. He is the provider who "can presumably make his way in the world without the need of any part of his wife's estate." STATE OF NEW YORK THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 215 (1964). He is generally included in protective schemes to take account of situations in which he has "accumulated the estate and put it into the wife's name for business reasons or convenience [or he] is elderly or ill, or . . . [he] has given his wife substantial gifts during his lifetime." *Id.* Spousal protection might thus be characterized as a scheme to prevent a husband from diverting too much of his property away from his wife, and a wife from divert-

Although the no-fault laws have sometimes precipitated a change in attitude,[182] the same inequity exists with respect to distribution at divorce.[183] Both systems, in common law states, fail to recognize the ownership of marital property as vested in both spouses because the common law does not recognize the independent economic contribution of the housewife.[184]

Although in some jurisdictions, such as Florida, the certainty of a fixed minimum proportion at death is some improvement over common law dower and the precariousness of alimony awards at divorce, it still does not fairly reflect the housewife's contribution to family wealth. The fact that most property owners do indeed provide for their spouses is no answer to the basic question of legal entitlement. Only the continued good will and moral sense of their husbands stand between many wives and penury. Those so inclined, and undeterred by the difficulty, could defeat even the indefeasible share, and even if they could not, it is at best an arbitrary and belated form of compensation.

The contingent and deferred nature of the spouse's share is but one aspect of its inadequacy, however. The elective share affords the minimum recognition, because it is so easily defeated. In its defeasibility, the fact of entitlement is denied. There is also the question of amount. The indefeasible share, in jurisdictions and circumstances where it approaches half of the estate, approximates a fair distribution. Where it is less, or where dependent on factors such as the existence of children, the basic question of entitlement is again ignored.

Devolution to children was originally to the exclusion of all others,[185] and of the children, sons have been favored.[186] There are various explanations for this, the most common and perhaps the most persuasive of which postulates that the passage of property to descendants is some assurance of immortality.[187] Indeed, among primitive tribes the custom of the bride-price is a pur-

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ing too much of her husband's property away from her husband. In either case, the wife is essentially propertyless.

182. *Cf., e.g.*, Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974).

183. Provisions for equitable distribution of assets are recognized in some places as seeking "to right what many have felt to be a grave wrong. [They also give] 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." *Id.* That recognition, however, comes only at divorce, and is a matter of discretion.

184. See text accompanying note 142 *supra*. Community systems do accord such recognition in theory, and to some extent, in practice. However, the balance of property, and therefore power, is still cast in favor of the husband. *See* Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973).

185. T. ATKINSON, LAW OF WILLS 37-40 (1953). Spouses could, of course, take a share of personalty. *Id.* at 41.

186. *Id.* at 37-40. Although the English system of primogeniture found some support in this country, on the whole, it came under early attack. *See* 7 R. POWELL, *supra* note 148, ¶996.

187. See S. DE BEAUVOIR, THE SECOND SEX 82 (1953):

"Woman was dethroned by the advent of private property . . . . her history in large part is involved with that of patrimony. It is easy to grasp the fundamental importance of this institution if one keeps in mind the fact that the owner transfers, alienates, his existence into his property. . . . it overflows the narrow limits of this mortal lifetime, and continues to exist beyond the body's dissolution . . . . But this survival can only come about if the property

chase not so much of the bride, but of her progeny, from her own tribe, so that the husband and his tribe will be assured of an afterlife.[188] Although in feudal times preference for the eldest son took on military overtones,[189] the continued favored position of sons is in part attributable to the belief that they will carry on the father's name — another aspect of immortality. In such a scheme, there was no room for the wife as heir.

Similar reasons are sometimes offered as justification for the continued heirship of children, although such reasons seem questionable.[190] The children, by the time the parent dies, are likely to have become self-supporting. Although they may have contributed to the support of aging parents, it is unlikely that they had a hand in the accumulation of the wealth spent to rear and educate them. These facts and the assumption that, in any case, the survivor will see that the children ultimately succeed to whatever property is left, probably account for the overwhelming tendency of testators to leave at least half of a large estate and all of a small one to the spouse.

Legislation reflecting this preference for a greater share for a surviving spouse also reflects, somewhat ironically, mistrust of both the survivor and the decedent. The decedent must not be permitted to defeat the survivor's share and the survivor must not be able to claim more than her or his due. The rather elaborate "capture" or "augmented" share provisions of New York law and the Uniform Probate Code are designed to frustrate both the vindictive decedent and the greedy survivor.[191] Criticism has tended to focus more on the

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remains in the hands of its owner; it can be his beyond death only if it belongs to individuals in whom he sees himself projected, who are *his*. . . . Man will not agree, therefore, to share with woman either his gods or his children. . . . [A]t the time of patriarchal power, man wrested from woman all her rights to possess and bequeath property.

"For that matter, it seemed logical to do so. When it is admitted that a woman's children are no longer hers, by the same token they have no tie with the group from whence the woman has come."

188. *See, e.g.*, Goldschmidt, *The Brideprice of the Seibei*, SCIENTIFIC AMERICAN, July, 1973, at 75: "The essence of Seibei marriage is the husband's concern with procreation. And it is this concern with the acquisition of descendants, reflected at the clan level, that is the essence of the brideprice contract. The payment establishes a legitimate claim by the husband's clan on the progeny of the marriage. . . . It is a basic Seibei belief that immortality depends on having descendants." *See also* Radcliff-Brown, *Introduction to the Analysis of Kinship Systems*, in A MODERN INTRODUCTION TO THE FAMILY 242, 254-55 (N. Bell & E. Vogel eds., rev. 1968).

In early England, as well, marriage was attended by economic arrangements with the woman's kinsmen. The agreement was made with the kinsmen, and secured by the giving to them of the *wed*, a symbolic payment. Later, they, not the bride, would receive the marriage payment as well. Today the *wed*, or pledge, in the form of a wedding ring, is given to the bride. The "giving away" of the bride, however, is a survival of what was once the most important part of the ceremony. *Id.* at 252.

189. In the feudal structure, a great deal was seemingly dependent on a personal system of allegiances among males. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 507 (5th ed. 1956). A later justification for primogeniture was that it avoided too rapid a subdivision of agricultural lands. See 7 R. POWELL, *supra* note 144, ¶996.

190. *Compare* Slater, *Reforms in the New York Law of Property*, in REPORT OF NEW YORK DECEDENT ESTATE COMMISSION 293 (1930), in A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 146-48 (1967), *with* Wedgewood, *The Economics of Inheritance* 189-92 (1929), in A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *supra*, at 146-48.

191. See notes 166-171 *supra* and accompanying text.

capture provisions on the ground that most husbands do in fact provide for their wives and they should not be inconvenienced in selecting what appears to them to be the best method.[192] Such criticism is often accompanied by warnings about the ability of the second wife to upset family ararngements by taking advantage of elective share provisions.[193]

It is also sometimes suggested that in these days of women's liberation the elective share is perhaps not necessary, and worse, a disincentive to independence.[194] The same arguments have been heard with respect to alimony,[195] although less so with respect to distribution of assets. In both cases the fundamental point, which is again stressed here, is overlooked. Housewifery is valuable work, necessary work, and culturally encouraged work. It should be compensated. Concern with overreaching widows, second marriages, and the property owner's freedom to deal with his property is beside the point. Laws regulating distribution of property should have as their basis allocation to the spouse of "what really belongs to him or her."[196] Such a return could take sev-

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192. *Id.* That method may be a trust for the widow, on the assumption that she could not handle the property herself. See note 151 *supra.* Although the trust may limit her activities and her ability to dispose of the property at her own death according to what she might regard as most appropriate, it may be utilized to satisfy New York's indefeasible share requirements. N.Y. EST., POWERS & TRUSTS LAW §5-1.1 (McKinney 1972).

193. The ease of divorce has been used as an argument against forced-share legislation to the extent it enables a second wife to disrupt provisions made for the offspring of the first marriage. *Compare* W. MACDONALD, *supra* note 161, at 10-15, *with* Plager, *supra* note 161, at 687-88.

194. Clark, *supra* note 149, at 544-45.

195. Glendon, *Is There a Future for Separate Property?*, 8 FAMILY L.Q. 315, 321 (1974).

196. Chalmers v. Chalmers, 65 N.J. 186, 194, 320 A.2d 478, 483 (1974). There are practical difficulties with this view that should not go unremarked. If the justification for an even distribution of assets be that both spouses have contributed to their joint wealth, acquisitions by gift, devise, and descent, for example, should perhaps be excluded. Such a position was rejected, however, by the New Jersey supreme court in Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974), in its construction of the word "acquired." The reason given was that a construction excluding such assets would be a (partial) adoption of the community property view, and although the court did not wish "to be taken as suggesting that there is anything wrong with adopting a rule of community property law," such an adoption should occur "only after study and deliberation." *Id.* at 216, 320 A.2d at 494-95.

See also Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAMILY L.Q. 169, 175 (1973): "The Uniform Law Commissioners have decided to impose upon the large majority of states some of the policies and law of community property states when they provide therein for division of only 'marital property.' This . . . has met with strong disapproval on the part of the ABA Family Law Section and of its consultants since it provides for disposition or division solely of property acquired by the spouses subsequent to the marriage and, among other things, specifically excepts therefrom property acquired by gift, bequest, devise or descent and the increase in value of property acquired before the marriage. Under this proposed section if a spouse had a million dollar estate at the time of the marriage and if the marriage continued for even 30 or more years prior to dissolution, and if at the time of dissolution that spouse's estate had even increased to ten million dollars solely by reason of escalation of values of stockholdings, the other spouse would not be entitled to any share of this estate . . . . The Family Law Section strongly disagrees with this approach . . . ." If, however, the distribution of assets is based on equality of contribution, it is inconsistent to include unearned property, and is vesting greater discretion in the judge (as urged by the ABA section, *supra*); progress toward definite property rights is impaired. Com-

eral forms. Although it may be impracticable to decree wages for housewives, it is neither difficult nor impracticable to change the legally propertyless state of the homemaker. Recent developments, already described, in divorce legislation are suggestive.[197]

Property Distribution at Death and Divorce Compared

Before the removal of fault as a ground for divorce, it had generally been thought that the wife had some bargaining power, at least insofar as she was the "innocent" spouse and wanted a property settlement.[198] By contrast, when a marriage terminates by death, it is more difficult to ascertain the effect, if any, of bargaining on the final disposition. As one leading casebook puts it:

> [I]n the typical case of the nonworking wife all or most of the marital assets belong to the husband, and the starting point is that he has full power of disposition over them. Only when the wife owns substantial property before marriage, or acquires property after marriage . . . does she have any built-in protection against being left without means of support upon her husband's death.[199]

If the assumption is that the husband has full power of disposition, and there is nothing, such as consent to a divorce, for which to exchange some of that power, there is in effect no occasion for bargaining.[200] There are several possible explanations for this.

There is first a reluctance to discuss death,[201] and to discuss it in the context of who gets what may well be unthinkable to most tolerably happy spouses. Each may well expect the other to do what is right, and never bring up the matter at all, except in the context of holding property jointly or making other kinds of lifetime transfers. Second there is the fact that the will-making process can be, if a testator desires it, totally private. There is nothing involved that necessitates the presence of a spouse unless particular circumstances render it desirable.[202] Divorce at least requires notice to, if not full participation of, both spouses. Finally, even if disposition at death is discussed, there is no guarantee that any agreement reached will be carried out, because there is no

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pare the view expressed in Law Commission, Published Working Paper No. 42, Family Property Law 14 (1971): "In effect, what women are saying, and saying with considerable male support, is: 'We are no longer content with a system whereby a wife's rights in family assets depend on the whim of her husband or on the discretion of a judge. We demand definite property rights, not possible discretionary benefits.'" The Commission recommended a move away from England's family maintenance legislation, *see* note 27 *supra*, in favor of a form of community property.

197. See notes 72-856, 96-110 *supra* and accompanying text.

198. See notes 21-23, 67-68 *supra* and accompanying text.

199. J. Dukeminier & S. Johanson, Family Wealth Transaction 459 (1972).

200. *But see* T. Shaffer, Death, Property and Lawyers ch. 5 (1970), recounting will interviews with young married couples.

201. *See generally id.*, chs. 1-3.

202. It is not uncommon for lawyers to represent both husband and wife in the disposition of their property.

impediment to alteration or revocation of the resulting will.[203] Contracts to make a will[204] are difficult to prove and, in a growing number of jurisdictions, ineffective unless in writing.[205]

There are understandings that can be reached, concerns expressed, and desires made known, and if the testator satisfies them, it may be said that in some sense bargaining enters into the willmaking process, but true bargaining demands roughly equivalent positions. This is more likely to be the case when spouses are equally propertied, or at least, both propertied. Even the partner with the traditionally subservient role will have some incentive to bargain because she is aware that she has assets to protect and control. It was earlier suggested that the ability of wealthy women to avoid some of the harsher aspects of the *jure uxoris* may have delayed reform.[206] The same might be true today. Because women of property are more likely to enter into some sort of agreement respecting its treatment or distribution during marriage and on dissolution,[207] there is less impetus toward restructuring the system controlling most women who, because they have nothing, expect little.

It is fairly common for men and women entering second marriages to reach some agreement about the ultimate disposition of their property.[208] Either or both may have offspring from a former marriage, and both will have relations and friends of long standing. Even if the marriage is a first one, if both are employed some express agreement concerning property may be likely.[209] The nature of the agreement may well depend on the degree to which either harbors a step-parent complex. Such a complex may be fairly widespread since

203. Revocability is universally recognized as one of the leading attributes of a will. T. ATKINSON, *supra* note 185, at 419.

204. Contracts to make wills (and leave them unrevoked) are valid, although if breached, there is some disagreement on the form of the remedy. *See generally* T. ATKINSON, *supra* note 185, at 211-22.

205. FLA. STAT. §731.051 (1973); FPC §732.701 (1974); N.Y. EST., POWERS & TRUSTS LAW §13-2.1 (McKinney 1972).

206. See note 57 *supra* and accompanying text. Strictly speaking, mitigation of the *jure uxoris* was caused by appropriate transfers to a married woman and not by any agreement between herself and her husband, because she lacked capacity to contract generally, and particularly with her husband. H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 219-22 (1968).

207. The enforceability of such an agreement may still be open to question: "Where the wife attempts to contract with her husband, she continues to meet with difficulties even today." *Id.* at 226. This situation has been increasingly challenged. *Id.* at 227-28; Weitzman, *Legal Regulation of Marriage: Tradition and Change — A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169, 1258-76 (1974).

208. Although not by its terms restricted to second marriages, the Uniform Probate Code provision was drafted "in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse." UNIFORM PROBATE CODE §2-204, Comment. *See* FPC §732.702 (1974), *as amended*, Fla. Laws 1975, ch. 72-220; Fenn & Koren, *supra* note 95, at 39-40. It should also be noted that such statutes provide for the *waiver* of the spouse's rights in an estate, not their augmentation. *See* T. ATKINSON, *supra* note 185, at 110-12; Fenn & Koren, *supra* note 95, at 39-40. Presumably, the enhancement of the spouse's share could be achieved through the provisions on will contracts. See note 199 *supra*; UNIFORM PROBATE CODE §2-701.

209. For an example of such a couple, see Weitzman, *supra* note 207, at 1254.

it is built into recent legislation that measures the spouse's share according to whether the children are children of both.[210]

By contrast, such considerations are conspicuously absent from the property provisions of divorce legislation. Indeed, it is assumed that both spouses will remarry, and that some of the distributed assets will pass to the second spouse. The ancient concern that property follow blood is absent here. The element of bargaining in divorce is clearly affected by no-fault, and although agreements between the parties may still be made,[211] judicial discretion will operate when they are not. Herein lies another distinction between distribution at death and divorce. The minimum share for the surviving spouse is a certain one under most spousal protection schemes. In divorce, the minimum is purely a matter of judicial discretion. On the other hand, there is no room to vary an estate plan based on the need of the survivors;[212] a readjustment is clearly a possibility with respect to alimony.[213]

Finally, there is the question of amount. If that portion of an estate over which a testator has full power of disposition is analogized to the amount generally awarded to the property-owning spouse in divorce cases, and the surviving spouse's share analogized to the award to the homemaker-spouse, the contrasts are likely to be dramatic. For example, in New Jersey the surviving spouse of a marriage that lasted until death may be left with no more than dower, and not even that if there was no realty.[214] If the marriage were terminated by divorce, however, the property may well be evenly divided by judicial decree, and alimony awarded as well.[215] The message of that state's supreme court that the wife is to be regarded as entitled to part of the accumulated assets of the marriage[216] on divorce has not yet caused a revision of the estate laws. In Florida, on the other hand, the surviving spouse is somewhat better off than the divorcee,[217] although less so than before. Some minimum assurance of a percentage of the estate is afforded, but the property owner is quite free to deplete the estate, presumably at no risk of penury to self;[218] whereas the divorcee's share is uncertain at best.[219]

Why should distribution at death be so widely different from that accompanying divorce? There are explanations, but the key inquiry is whether there is any functional reason for continuing the difference. Both events terminate the marriage, but death also ends the life of one of the partners, whereas after a divorce both go on living and both require material resources. Yet testa-

210. *See* note 202 *supra*; UNIFORM PROBATE CODE §2-102; FPC §732.102 (1974), *as amended*, Fla. Laws 1975, ch. 75-220.

211. The New Jersey supreme court contemplates that voluntary property settlements will accompany most divorces. Painter v. Painter, 65 N.J. 196, 212, 320 A.2d 484, 492 (1974).

212. Compare the family maintenance legislation in force in several commonwealth countries. See notes 26, 30, 146 *supra* and accompanying text. By contrast, in American jurisdictions, flexibility must be built into an estate plan by the testator.

213. H. CLARK, *supra* note 206, at 452-65.

214. See notes 26, 151, 156 *supra* and accompanying text.

215. See notes 24, 75-82 *supra* and accompanying text.

216. See note 196 *supra*.

217. See notes 90-95, 159-163 *supra* and accompanying text.

218. See note 160 *supra* and accompanying text.

219. See notes 21, 90-95 and accompanying text.

mentary freedom[220] and a strong tradition of respect for the intent of a testator[221] result in at least as much concern for and protection of the property rights of a decedent as for a living person. By contrast, the interests of the widow and the divorcee are generally cast in terms of need.[222] Since the needs of both the widow and the divorcee are the same,[223] there is no readily apparent functional reason why the distributions should differ according to the cause of the marriage's termination.[224]

A restructuring of family property laws to reflect the contributions of both partners would result in a fixed and equal share of the assets to both, no matter how the partnership terminated. This is basically what occurs in community property systems that allot to each spouse half of the property designated as community.[225] Community property generally includes all property acquired by either spouse during the marriage except gifts, devises, and inheritances.[226] Presumably, similar consistency between distribution at death and divorce

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220. Testamentary freedom is a protected value, although not so unrestricted as commonly believed. As one leading casebook puts it: "In a capitalistic economy based on the institution of private property an owner has the widest possible latitude in disposing of his property in accordance with his own wishes whether they be wise or foolish." A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *supra* note 190, at 1. *But see* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942): "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

221. "The statutes and cases in the field have as their purpose the discovery of the true intent of the property owner, not to thwart it, but to give it effect." A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *supra* note 190, at 1.

222. Both the surviving spouse's share and alimony have been regarded as continuations of the duty to support, which was (and still may be) considered necessary because of the housewife's generally propertyless state. *See N.Y. Leg. Doc.* 70 (1928); Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 145-47 (1974) (on the extent to which need enters alimony awards); Comment, 37 COLUM. L. REV. 317, 318 (1937); Note, *Preventing Dower from Accruing When Acquiring an Estate*, 25 COLUM. L. REV. 938, 945 (1925) (on the widow's share).

223. Although the widow may be older than the divorcee, if there are children and she has custody, she may be unable to take advantage of employment opportunies. See H. CLARK, *supra* note 206, at 422. The widow will be foreclosed from employment, in many instances, because of her age.

224. The recognition that fault should play no part in property settlements or distributions because of divorce, and the focus on the homemaker's contributions to the family wealth, serve to emphasize this point.

225. The property acquired before marriage, or by gift, descent or devise, is designated as separate. In Idaho, Louisiana and Texas, the income from separate property is community property; in the other states, it retains its separate character. J. DUKEMINIER & S. JOHANSON, *supra* note 199, at 495. Descriptions and analyses of community systems in this country may be found in W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); 4A R. POWELL, THE LAW OF REAL PROPERTY ¶626, at 717-18. For recent critiques, see Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973); Younger, *Louisiana Wives: Law Reform to Their Rescue*, 48 TUL. L. REV. 567 (1974); Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORDER 163 (1972).

226. See note 196 *supra*.

could be achieved without drastic revision of existing common law rules.[227] Is, then, such a revision necessary, particularly in the context of the continuing emancipation of women?[228] To put the question another way, does a movement away from separate property have relevance only if the continued existence of the "housewife marriage" is assumed?[229] If that assumption is made, will it not encourage too many women to continue in an existence of economic dependence?[230]

TOWARD A REEXAMINATION OF PROPERTY AND FAMILY

Four decades ago, Professor Richard R. B. Powell, addressing himself to intrafamily relations and property, asked:

> Shall we adopt the rather characteristic tendency of our country and of our time, to think dominantly in terms of money, of wealth, of things, and embody the modern view of the equality of man and woman in a prounnunciamento that justice as between husband and wife consists in the having of equal shares in all the "things" acquired during the marriage through the efforts of either or both? Or shall we accept an approach simultaneously less mercenary and more individualistic, and regard marriage as a sharing of experiences, not primarily concerned with wealth, by two coordinated persons each of whom should be accorded by law the power to acquire, to control and to dispose of such wealth as his separate abilities may enable him to secure.[231]

Forty years ago, of course, women was still "properly placed in a class by herself"[232] and could be precluded from following any number of occupations.[233] Even today Professor Powell's alternatives are unrealistic because of continued resistance to the acceptance of women as fully equal, within or without the home. Even if full legal equality should be achieved, however, there is some question whether traditional concepts of individually owned property are appropriate to the marital relationship. If a couple agree that one of them will care for home and family, and the other seek paid employment, the work of the homemaker is in fact contributing to the family's wealth and is in fact deserving of compensation.[234]

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227. For example, statutes making distribution at death the same as that at divorce might achieve consistency without drastic revision.

228. *See* Clark, *supra* note 149, at 513, 544-45; Glendon, *supra* note 195, at 320-21. Both ask the same question — Clark, with respect to death, and Glendon, with respect to divorce — and arrive at different answers.

229. Glendon, *supra* note 195, at 319.

230. *Id.* at 321.

231. Powell, *Community Property — A Critique of Its Regulations of Intra-family Relations*, 11 WASH. L. REV. 12, 15-16 (1936).

232. Muller v. Oregon, 208 U.S. 412, 422 (1908).

233. Goesaert v. Cleary, 335 U.S. 464 (1948).

234. There are suggestions that the homemaking spouse be treated as an employee of the earning spouse. The idea is to move housework away from a status-connected obligation and toward a contractual one. *See* REPORT OF THE MARRIAGE AND FAMILY COMMITTEE OF THE NATIONAL ORGANIZATION FOR WOMEN, SUGGESTED GUIDELINES IN STUDYING AND COMMENTS ON THE UNIFORM MARRIAGE AND DIVORCE ACT 2 (1971) (quoted in K. DAVIDSON, *supra* note 22, at

Although homemaking as a full-time occupation is declining without the Equal Rights Amendment, which seems to indicate to some that a restructuring of property concepts is no longer necessary,[235] large numbers of women still prefer to be housewives, and even those who work remain primarily responsible for the home and children.[236] Such activities inevitably affect work outside the home, if only in the sense of leaving less time for advancement.[237] And in any event, these considerations do not affect the basic point that housewifery should yield property rights.

A more serious question is whether a restructured property system must be based on the "housewife marriage" model.[238] The simple answer is that it does not. Rather, any new system of marital property rights should be based on the presumption that persons entering marriage are doing so on a basis of equality, that their contributions to the marriage are likewise presumed to be equal, and that the distribution of assets at its termination will reflect that presumption. If some other property distribution is desired, the man and woman should be free to select and implement its terms, and generally speaking, the law should enforce their arrangement.

A version of community property would benefit housewives.[239] Some may

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142): "We are greatly disappointed that the proposed act does not deal with the structure of marriage and with the necessary reforms to make housewife a bona fide occupation, and to lessen the dependency status and inferior economic status of the housewife or dependent spouse. We refer to compensation and fringe benefits normally occurring in any career. A defined work week, paid vacations, workmen's compensation, health and medical insurance, full coverage under social security, pension plans, and the partnership concept of the assets of marriage are a few of the working conditions that need to be incorporated in the law to insure good labor standards for those going into marriage as a full-time career." For a discussion of this and similar proposals, see K. DAVIDSON, *supra* note 22, at 139-48.

235. Glendon, *supra* note 195, at 319-22, 328, states: "It may be that we will wait so long in the anteroom that the propertyless housewife will walk away from the operating table to the marketplace."

236. *Id.* at 321. Glendon also notes that removal of support for housewifery might be dependent on "the question of whether the role of housewife should be discouraged before a solution to the problem of child care can be seen." *Id.* at 326. The problem of childcare is but one aspect of housewifery's decline; the provision of childcare services is but one response. Possible solutions would include the end of sex-determined work division through shared housekeeping duties and shared child-care privileges and duties. This would mean, among other things, a restructuring of the work week and hours, attended perhaps by a shift in the economy from goods to services. *See* J. BERNARD, WOMEN AND THE PUBLIC INTEREST 269-77 (1971); J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 256-61 (1973). For a discussion of the husband's payment to wives of salaries for their housekeeping and child-care services, see C. SAFILIOS-ROTHSCHILD, WOMEN AND SOCIAL POLICY 76-78 (1974).

237. See notes 45-50 *supra* and accompanying text.

238. This seems particularly relevant since the full-time housewife is a relatively recent phenonemon and one that is now declining. *See generally* E. JANEWAY, MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY (1971); Glendon, *supra* note 195, at 319.

239. Care must be taken that a revised system not punish those who do not wish to be housewives. In several important respects, the present system is detrimental to both the housewife and the employed wife. The propertyless housewife is accorded only deferred compensation (at death or divorce) and the taxing system actually discourages two-earner families. *See generally Hearings Before the Joint Economic Committee on Economic Problems of Women*, 93d Cong., 1st Sess., pt. 2, at 221, 223-26 (1973).

fear that such a system would unduly reinforce the economic subservience of women by ameliorating the propertyless status of housewifery and thereby lessen incentives toward true economic independence outside the home.[240] But it may also be that legal and economic recognition of housewifery would make it less unattractive to husbands, and so hasten the demise of the intrafamilial division of labor along sex lines.[241] Unless society is prepared to abolish housewifery, it would appear that some economic recognition of its value must be made.[242] At the same time, it is important to consider the implications of such a system for married women and men who own, earn, and wish to control their own property, and do not desire to share it.

MODELS OF MARITAL PROPERTY

Any system of marital property must take into account a variety of marital models. There is, of course, the traditional breadwinner-housewife marriage, but this is gradually being replace by a marriage in which both spouses work — the wife often intermittently and almost certainly for less pay.[243] She will in either case bear the primary burden of the home and children.[244] In some cases the wife will earn more, as much as, or almost as much as her husband and be as fully committed to her profession or career. Neither may wish to assume primary responsibility for the home or be required to pool assets. Whatever system of marital property may emerge from the current debates must not select for prospective spouses their roles and then assume that they will be frozen into them until divorce or death. Those who do not wish to share all assets should not be required to do so. Business partners can dictate the terms of their partnership; marital partners ought to have the same freedom and the assurance that the contract will be enforced if necessary. Whatever system evolves should

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240. If present disincentives to full participation by women in the labor force were also removed, however, such fear may be groundless. For example, the work disincentive caused by taxation of the two-earner family might be removed. Grace Blumberg, in testimony before the Joint Economic Committee, recommended taxing "each spouse individually on his or her own earnings. . . . Thus, the tax bill of single persons and two-earner families would decline. An increased burden would be borne by one-earner families." *Id.* at 226. This result "seems entirely appropriate in view of the working couple's loss of imputed housewife income and the added employment expenses of the family's second earner." *Id.* The one-earner family enjoys real, if not pecuniary, family income by reason of the homemaker's work. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW §§4.10, 16.8 (1972).

241. When work is regarded as productive, the status of those who perform it tends to be enhanced. It may be, however, that housework is so intrinsically unfulfilling that attempts to improve its legal and economic position will have little effect on the division of labor iwthin the family. *See, e.g.*, Mainardi, *The Politics of Housework*, NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION 28-31 (1970) (reprinted in K. DAVIDSON, *supra* note 22, at 181-86).

242. This is quite apart from the fairness of granting economic recognition to the housewife. As the Law Commission expressed the issue, the "main question to be decided is 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." LAW COMMISSION, *supra* note 196, at 310-11.

243. *See* notes 44-49 *supra* and accompanying text.

244. *See* note 46 *supra* and accompanying text.

admit of the right to individualized contracts[245] and should encourage them as well.[246]

The basic system to be evolved should postulate, as the present system does not, the equality of husband and wife. To do this, the prejudice against "family property" as foreign to the common law may have to be overcome.[247] "Family property" is not, however, foreign to western legal systems, which contain several examples on which a revised property system could be modeled, with whatever adaptations seem appropriate and fair.[248]

The closest and perhaps most convenient model is that of the eight American community property states.[249] Although the various schemes are said to defy generalization, by and large they regard acquisitions made during the marriage, other than those of gift, devise, and descent, as community property of which each spouse owns half.[250] Although, not surprisingly, managerial

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245. *See* notes 206, 207 *supra* and accompanying text. *See also* Fleischmann, *Marriage by Contract: Defining the Terms of Relationship*, 8 FAMILY L.Q. 27 (1974); McDowell, *Contracts in the Family*, 45 B.U.L. REV. 43, 52 (1965).

Although this article is primarily concerned wth property rights, the general question of marital contracts encompasses the minute details of married life. The proponents are less concerned with practical effect, or even legal enforcement, than that "[m]aking a contract causes the parties to discuss issues and to reach agreement before failure to communicate destroys the marriage." B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 657 (1975). Furthermore: "A contract may also change the day-to-day balance of power and responsibility; a wife who knows that she and her husband have a written agreement that she owns half of his income could well feel freer to spend it. If her husband is unwilling for her to control one half his salary, they could agree to share housework so that each can earn a salary." *Id. See, e.g., id.* at 647-56; Weitzman, *supra* note 207, at 1249-55, for examples of attempts to replace the state-prescribed marriage contract with more egalitarian commitments.

246. Such encouragement should at least include educational programs. The procedures might go further and urge that filing a detailed marriage contract with the clerk of a court be made a condition of receiving a marriage license. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *supra* note 245, at 657.

247. LAW COMMISSION, *supra* note 196, at 1, states: "We have a very elaborate law of property, but the family, though a social unit of great importance and recognized as such by the law, is not an entity that is given rights or even defined: it has failed to attract rights and duties comparable with those of an individual human being, a company, or a partnership. And so it is not surprising that English 'family property law' is hardly more than a label given to the hesitant moves made by Parliament during the last hundred years to eliminate the grosser injustices inflicted by the common law upon married women in property matters."

248. "The Uniform Marriage and Divorce Act proceeds on the theory that property division upon termination of marriage should so far as possible, resemble the winding up of a partnership. The Act designates most of the acquests made by the couple during their marriage as 'marital property' and provides statutory guidelines for its division in 'just proportions.' . . . These reforms, where adopted, will produce in American states results similar to those achieved [by] . . . deferred community of property." Glendon, *supra* note 195, at 317-18.

The Uniform Marriage and Divorce Act does not, of course, address itself to the problem of property distribution at death, and its provisions can result in a distribution different than that prescribed by the Uniform Probate Code. See notes 150, 175, 178, 179 *supra* and accompanying text.

249. *See* notes 33-34 *supra*.

250. The concept of an ownership right in each spouse is quite important and tends to be emphasized by proponents of the system. Theoretically, this enhances the housewife's posi-

power was long vested in the husband,[251] recent changes seek to redress the imbalance.[252] Whether such changes go far enough is open to question.[253]

A similar system, described as deferred community,[254] is in effect in some European countries and has been under study in England.[255] Put most simply, this form of community goes into effect at the termination of the marriage when the assets are divided.[256] It is reported, however, that recently many

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tion, but practically, the managerial control vested in the husband diminishes it again. *See* Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211, 230-40 (1973). Recent revisions in community property laws have attempted to adjust this inequality. See note 32 *supra*. The changes, however, are not uniform. Texas, for example, provides that "each spouse has sole management, control and disposition of that community property that he or she would have owned if single." TEX. FAM. CODE §5.22 (1975). California, by contrast, now provides that "[t]he respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. . . ." CAL. CIV. CODE §5105 (West 1970). Further, "either spouse has the management and control of the community personal property, . . . with like absolute power of disposition. . . ." CAL. CIV. CODE §5125 (West Supp. 1975).

251. In theory, the managerial power of the husband did not approach the magnitude of the common law *jure uxoris*; the community property's manager was a fiduciary. *See, e.g.*, Fields v. Michael, 91 Cal. App. 2d 443, 205 P.2d 402 (Dist. Ct. App. 1949). By contrast, although there was a period of uncertainty as to whether the *jure uxoris* granted properietary or merely representative powers, around the thirteenth century proprietary power gained acceptance. *See* Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 2 (1936).

252. Prior to these changes the community property system reinforced the traditional family structure even more than the common law, because it caused the employed wife to lose control over her earnings. If the states do not change this aspect of the community system, it is generally believed that Reed v. Reed, 401 U.S. 71 (1970), would render it unconstitutional. *See* Barham, *Introduction: Equal Rights for Women Versus the Civil Code*, 48 TUL. L. REV. 569 (1974); Younger, *supra* note 250, at 234; Comment, *Community Property: Male Management and Women's Rights*, 1972 LAW & SOC. ORDER 163, 166-71.

253. Brown, Emerson, Falk & Freedman suggest that the Texas revision, note 250 *supra*, might not withstand scrutiny under the Equal Rights Amendment (if adopted as a rule that obviously favors the wage-earning spouse who for some time to come will more likely be the husband. "Thus it would require scrutiny as a rule neutral on its face which falls more heavily on one sex than the other." Brown, Emerson, Falk & Freedman *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 947-48 (1971).

254. Deferred community differs from the American system (and the Spanish system from which it derives) particularly in that it does not regard both spouses as having ownership rights in property regarded as community. *See generally* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); Kirkwood, *supra* note 251. During the marriage, each is left substantially free to deal with his or her own earnings. In principle, the property is divided equally on the marriage's dissolution. For a study of European deferred community systems see LAW COMMISSION, PUBLISHED WORKING PAPER NO. 42, FAMILY PROPERTY LAW (1971), which, after considering whether England should adopt a deferred community system, tended to favor it. The deferred system has the virtue of combining "the advantages of separate and community property systems." Glendon, *Is There a Future for Separate Property?*, 8 FAMILY L.Q. 315, 318 (1974). In order to assure that there will be some property to divide, there are restraints on the power of each spouse to deal with the property, unless the parties contract out of the community system. *Id.*; LAW COMMISSION, *supra*, at 279-80.

255. LAW COMMISSION, *supra* note 254, at 261-75.

256. In the European deferred community systems, some property is exempt from dis-

couples have taken advantage of the option to contract out of the system in favor of separate property, and that this tendency has accompanied the gradual decline of the "housewife marriage" in western Europe.[257]

A third system is the English,[258] or to be more accurate, New Zealand,[259] model. It, along with its difficulties, has been summarized as follows:

> English law provides neither dower nor an indefeasible share for the surviving spouse. The widow's only remedy is to induce the court to order her husband's estate to pay her income or to give her a part of the property itself, but this remedy is entirely within the discretion of the court. In the case of a divorce, English law provides the wife with some protection against ejectment from the marital home, and each spouse is entitled to keep the property that he or she equitably owns. But who owns, let us say, the furniture, the savings account or the house? As long as a marriage functions, spouses of modest means rarely earmark their assets as "his" and "hers."[260]

The difficulties attending this system have to do with determining who owns what, and in what proportions.[261]

The general state of the traditional marriage is perhaps best illustrated by the fact that deferred community systems are examining separate property; American community systems are moving toward deferred community; and common law systems seem unsure, to say the least. Since all modern systems were based on the supremacy of the husband,[262] it may be that fairly widespread discontent with that premise has led to the general state of the traditional marriage.

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tribution at the termination of the marriage. For a discussion of the European experience in light of the current worldwide movement for equality of the sexes, see Rheinstein, *The Transformation of Marriage and the Law*, 68 Nw. U.L. REV. 463, 468-73 (1973) (focusing on the development and effect of the German and Swedish deferred community systems). *See also* MATRIMONIAL PROPERTY LAW (W. Friedmann ed. 1955).

257. Glendon, *supra* note 254, at 321-22.

258. See notes 27, 31, 146 *supra* and accompanying text.

259. Family maintenance legislation originated in New Zealand. For a brief description, see Cameron, *Family Law*, in Robson, *New Zealand*, in 4 THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS 471-76 (2d ed. 1967).

260. Rheinstein, *supra* note 256, at 475.

261. *Id.* at 475. A deferred system also poses problems: "The law must also consider that a lazy wife may neglect her house and children. Shall she be allowed to walk away with half of her husband's fortune? And what of the good-for-nothing husband of a professionally successful wife? Shall a husband be able to give the bulk of his fortune to the children of his first marriage or to his mistress so that there is nothing left for the current wife or her children to share when the marriage ends? And what about debts? Shall one spouse be able to burden the community fund with debts incurred for his or her own personal ends? Safeguards are necessary . . . and the result can be legislation of considerable complexity." *Id.* at 472. These difficulties, however, are not unique to family law and surely are not insurmountable. The law must deal daily with persons who fail to meet their obligations, although in other legal areas the reasonableness of the obligations may be more apparent, or if not, at least more readily and speedily correctable. Landlord and tenant and consumer remedies are examples.

262. Ancient systems may have been more egalitarian. *See* S. DE BEAUVOIR, *supra* note 187, at 82; K. MILLET, SEXUAL POLITICS 33-36, 39-43, 109-27 (1970).

FROM STATUS TO CONTRACT

There are growing indications that marriage is moving from status to contract.[263] To the extent that this becomes a reality there will be a theoretical and actual basis for equality within marriage.[264] The gradual disengagement of the state from the marital relationship[265] is one indication that this relationship is becoming a matter for individual determination, although, so far, one that is weighted in favor of the husband. As wives achieve some property, and with it equality of bargaining power, the movement toward contract will be furthered. Even now, however, contract as a basis for marriage or indeed, as a substitute for it, is receiving considerable public and scholarly attention.[266]

Antenuptial and postnuptial contracts have not been an uncommon means of settling on property distributions in the event of divorce or death among well-advised and wealthy spouses.[267] Statutes in many states recognize their validity at least insofar as property provisions for these two contingencies are concerned.[268] Recent proposals, however, go well beyond the traditional sort of settlement and contemplate the division of labor, standard of living, number and education of children, methods and responsibility for contraception, and other details of married life as proper subjects for individualized contracts.

263. If Maine is correct, such a development is to be desired. He posits that progressive societies move from status to contract, and that there is a dissolution of family dependency and a growth of individual obligation in its place. MAINE, ANCIENT LAW 170 (14th ed. 1891).

264. The wife is more affected by "status" aspects of matrimony than her husband, who derives his identity from activities not related to the marital relation. *See* S. DE BEAUVOIR, *supra* note 187, at 156.

265. If no-fault divorce is tantamount to divorce on demand, the state has in effect disengaged itself from the substance of divorce, and confined itself to matters of process and property. *See* Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAMILY L.Q. 169 (1973). Further, if marriage is a basic civil right, state regulation may be subject to strict scrutiny. *See* Loving v. Virginia, 388 U.S. 1 (1967). However, its judicial machinery is still necessarily involved. *See* Boddie v. Connecticut, 401 U.S. 371 (1971). It has been said that "the power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution . . . to [the] . . . [s]tate." Labine v. Vincent, 401 U.S. 532, 538 (1971). The authority of that decision, however, has been weakened. *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973), Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *See also* Stanley v. Illinois, 405 U.S. 645 (1972). Other decisions have expressly limited the state's ability to regulate the procreative aspects of married life. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Eisenstadt v. Baird, 405 U.S. 438 (1972).

266. See authorities cited note 245 *supra*.

267. Antenuptial contracts settling alimony and property rights of the parties on divorce are no longer contrary to public policy in Florida provided there is full knowledge of the other's wealth at the time of the agreement. Posner v. Posner, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds on rehearing*, 257 So. 2d 530 (Fla. 1972).

Agreements affecting distribution at death, however, are apparently treated differently. Present Florida case law requires "full disclosure" to the party waiving rights in a decedent's estate in the case of postnuptial agreements, but the new Florida Probate Code changed this to "fair disclosure." FPC §732.702 (1974), *as amended*, Fla. Laws 1975, ch. 75-220. Moreover, "current law is considerably relaxed by the provision that '[n]o disclosure shall be required for an agreement . . . executed before marriage.'" Fenn & Koren, *supra* note 95, at 39. If the rationale is that antenuptial agreements are more likely to be arm's length transactions, it would apply also to agreements respecting divorce.

268. Fenn & Koren, *supra* note 95, at 39.

It had been thought that contracts attending the status of marriage were unenforceable, at least to the degree that they attempted to alter legally prescribed responsibilities derived from and resulting in the husband's supremacy.[269] Proponents of contract as a component of, or substitute for, marriage now challenge this view.[270] If they are correct, as they would seem to be, then contract as a meaningful alternative may well emerge.[271] Whether that alternative will be available to significant numbers of persons, however, is open to question. This depends on the continued movement of women toward more education and employment opportunities. Women who have little choice but marriage will scarcely be in a position to negotiate a reasonable contract; indeed, they may not wish to do so. There is still considerable pressure to socialize young girls toward domestic goals, and as a result, many of them will seek no other occupation than marriage. For the growing ranks of women who are, or who seek to be, financially independent, however, the individualized contract may well be worthy of consideration. To be sure, traditions of romance, love and self-sacrifice conflict violently with the notion of sitting down and hammering out a marriage contract, but there is ample precedent.[272] For different reasons, the marriage contract is an idea whose time has come again. Perhaps this has been precipitated by the torpid — indeed, almost imperceptible — response of marital and property laws to the propertyless condition of women.

Conclusion

Housewifery yields no independent property rights, and even the dependent rights accorded by the present laws are tenuous and derivative. The propertyless state of the housewife is a direct consequence of the legally prescribed dominance of the husband. Ironically, re-evaluation of her role came only when it was thought convenient to make the dissolution of marriage easier. Pandora's box is open and it will be very difficult to get it shut again.

Easy divorce dramatized the economic jeopardy of housewives and necessitated some compensation for their contributions to family wealth. Although not yet everywhere recognized, both legal and economic writers are increasingly taking it into account, as are legislators — as evidenced by the Uniform Marriage and Divorce Act and, quite notably, Florida Senate Bill 630. By law, the value of housewifery should be taken into account at divorce and at death. If the wife is to be returned what really belongs to her when she is divorced, she is equally entitled to it when her husband dies. Both death and divorce terminate a marriage and necessitate an accounting, and there appears to be no sound reason why that accounting should be differently computed at divorce and at death.

269. The question has been asked whether it is "anomalous that the parties can agree on their separation and divorce relations and not on the terms of their marriage." B. Babcock, A. Freedman, E. Norton & S. Ross, *supra* note 245, at 656.

270. Weitzman, *supra* note 207, at 1259-63.

271. Certainly there may be difficulties in realistically agreeing about such matters as who will change the baby on Tuesdays; the emphasis here, however, is on property rights.

272. It has not been so long ago that parents arranged their children's marriages with a keen awareness of economic considerations.

Most American legal systems proceed from the assumption that in marriage, as perhaps elsewhere, the man is superior to the women. Tinkering here and there with divorce and property laws is an inefficient and ineffective way to improve the position of the married woman. The assumption itself must be eradicated, and the presumption of equality posited as the basis for all laws respecting marital property. Perhaps the presumption should be rebuttable insofar as actual economic contribution is concerned, but equality should be the starting point.

The result will be not a loss of privileges by married women but an enhancement of their rights. If the full-time housewife's economic contribution to her marriage is recognized to be equal to that of her husband, her interest in the family's property becomes a claim of right, rather than spousal grace. Presently, however, reform in the divorce laws merely tends to substitute a judge's grace for the husband's. The prospect, or even probability, of a favorable exercise of judicial discretion is not quite the same thing as a property right.

To further complicate matters, the person who has caused all this concern, the propertyless housewife, is said to be a dying breed as more and more women enter the paid labor force. Nevertheless, housework is being done, whether on a full-time or part-time basis, and it is being done primarily by women. As a result, women are still disadvantaged in the marketplace. Furthermore, housework and child care are chores that have to be done by someone, whether woman or man. Whoever performs that work, whether full-time or part-time, is entitled to have it recognized and compensated.

If equality in terms of economic contribution is accepted as the beginning point of a new system of marital property, assets will be evenly divided on termination of the marriage, whether by divorce or death. The divorced partners will share equally in the marital property, unless the presumption of entitlement is rebutted. The question of alimony should perhaps be handled differently, based primarily on one party's decreased capacity for independent economic existence due to circumstances of the marriage itself. When the marriage is terminated by the death of one of the partners, the survivor should be entitled to at least half the acquests of the marriage without regard to the existence of children. Laws of testate and intestate succession should apply only to separately owned assets.

There remains the question of whether spouses could make other arrangements with respect to their marriage. It may be that neither wishes, for example, to share his or her property with the other. If that is the case, they should be able to enter an arrangement at variance with the legal prescription. There is a body of law concerning both antenuptial and postnuptial contracts incorporating basic contract principles to avoid coerced or fraudulent agreements, and it is undergoing intensive scrutiny at the present time. Individual marital contracts are often recommended as a means for spouses to contract into equality, although that should be unnecessary. The legal system should assume equality, yet permit individuals to make some other enforceable property arrangement if they wish.

APPENDIX

CODING: Words in underline type are deletions from existing law: words italized are additions.

SB 630
—Regular 1975—

By Senator(s) Scarborough

A bill to be entitled

An act relating to the dissolution of marriage; amending s. 61.03, Florida Statutes; providing standards for a court to follow in determining a proper alimony award relating to the needs, the ability to pay, and the expected earning abilities of the respective parties, and certain other specified factors; authorizing the court to adjust an alimony award due to a substantial change in circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 61.08, Florida Statutes, is amended to read:

61.08 Alimony.—

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. *The court shall follow the standards provided in this section in determining whether to award alimony to a party and, if so, in what amount.* The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.

(2) Definitions.—

(a) "Employment" means employment by others, self-employment or any other means of earning income.

(b) "Expected annual income" means that amount of annual income which the party should be able to earn in the relevant years either by self-employment or employment by others, or from interest, dividends, capital gains, or other profits on-property owned in whole or in part by the party or held in trust for the party, or from any other source. In making projections of expected annual income, the court shall give substantial weight to the actual past earnings of the party.

(c) "Primary earner" means the party to the marriage who, in the judgment of the court, will have a higher expected annual income than the other party to the marriage after the dissolution of the marriage.

(d) "Secondary earner" means the party to the marriage who, in the judgment of the court, will have a lower expected annual income than the other party to the marriage after the dissolution of the marriage. In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.

(3) The primary earner shall not be entitled to alimony.

(4)(a) Except for circumstances governed by subsections (6) and (7), the secondary earner shall be entitled to alimony only if he or she has less income earning ability at the time of the dissolution of marriage than he or she would otherwise have had due to a decision by the secondary earner to forego opportunities to increase his or her earning ability in favor of family or marital considerations. Any of the following shall be considered prima facie proof of a loss of earning ability due to family or marital considerations:

1. Relinquishment of an educational goal in favor of the educational goals or employment advancement of the primary earner.

2. Relinquishment of an employment opportunity to enhance the marriage or family life of the parties or to enable the primary earner to accept an employment opportunity.

3. Relinquishment of an opportunity to develop full income earing potential due to a disproportionate assumption of household responsibilities.

(b) If the court determines the secondary earner to be entitled to an award of alimony, the court shall set the award at an annual amount greater than zero and equal to or less than one

half of the difference between the expected annual income of the primary earner less any contribution to child support and the expected annual income of the secondary earner less any contribution to child support. The alimony shall be in such amounts and for such periods of time as the court deems just after consideration of all relevant factors, including:

1. The factors listed in paragraph (a).

2. The duration of the marriage.

3. The age of the secondary earner.

4. The standard of living established during the marriage.

(5)(a) If the court determines the secondary earner to be entitled to alimony under the standards of subsection (4)(a) and if the court determines that an award of rehabilitative alimony will enable the secondary earner to increase his or her expected annual income through additional educational or other training, the court may make an award of rehabilitative alimony to enable the secondary earner to pursue such training.

(b) The rehabilitative alimony shall be in such amounts and for such periods of time as the court deems just after consideration of all relevant factors, including:

1. The factors listed in subsection (4)(b).

2. The time and expense required to acquire such training.

3. The financial needs and resources of the secondary earner during the period of such training.

4. The ability of the primary earner to meet his or her own needs and those of the secondary earner.

(c) If the court determines that after the period of rehabilitation the standards of subsection (4)(a) would still entitle the rehabilitated party to additional alimony, the court shall also make an award of permanent alimony to such party.

(6)(a) Notwithstanding the provisions of subsection (4)(a), the secondary earner shall be entitled to an award of alimony if the court determines that he or she will be physically or mentally incapable of providing for his or her own financial support after the dissolution of the marriage.

(b) The alimony shall be in such amounts and for such periods of time as the court deems just after consideration of all relevant factors, including:

1. The factors listed in subsection (4)(b).

2. The financial needs and resources of the secondary earner.

3. The ability of the primary earner to meet his or her own needs and those of the secondary earner.

(7)(a) Notwithstanding the provisions of subsection (4)(a), the secondary earner shall be entitled to an award of alimony if the parties to the marriage have a minor child or children and if the court determines that the secondary earner should not seek full-time employment after the dissolution of the marriage in order to provide a better home life for the child or children.

(b) The alimony shall be in such amounts and for such periods of time as the court deems just after consideration of all relevant factors, including those listed in subsection (6)(b).

(8)(a) If the court determines that the provisions of more than one of subsections (3), (4), (5), (6) and (7) shall apply to the parties in the foreseeable future, the court shall provide for automatic adjustments in the alimony payments to meet expected changes in circumstances.

(b) The court shall retain the jurisdiction and the authority to enter an order adjusting an alimony award due to a substantial change in circumstances.

(c) The court shall give no consideration to the sex of the parties in the application of this section.

Section 2. This act shall take effect October 1, 1975.

SENATE SUMMARY

Amends §61.08, F.S., to provide standards for the court to follow in determining alimony in a proceeding for dissolution of marriage. Said standards relate to the needs, the ability to pay, and the expected earnings of the parties. Authorizes rehabilitative alimony. Authorizes the court to adjust an alimony award due to change in circumstances. Effective October 1, 1975.