

## THE ALI PRINCIPLES AND MARITAL QUALITY

ALLEN M. PARKMAN\*

### I. INTRODUCTION

Most adult Americans believe that having a successful marriage and family life is very important, yet many of them fail in their attempts. A subtle, but important reason for their failures is the laws governing the dissolution of marriage.<sup>1</sup> The combination of unilateral, no-fault grounds for divorce with financial arrangements at divorce—that usually disregard the effect of marriage on the spouses income earning capacities (human capital)—have encouraged spouses to be more concerned about their own self-interest and less concerned about their family's welfare. Recognizing the adverse financial effects of divorce on some ex-spouses, the American Law Institute promulgated its *Principles of the Law of Family Dissolution (Principles)*.<sup>2</sup> The *Principles* have the stated goal of achieving an equitable sharing of the losses, while controlling spousal negotiations in the event of marital dissolution.<sup>3</sup> The couple's financial conditions at dissolution are certainly a problem, but a more important concern with regard to marriage is how to encourage spouses to make decisions during marriage that are based on their family's welfare, rather than focusing on their own narrowly defined self-interest. Some aspects of the *Principles* are helpful in achieving this goal; others are detrimental.

While the *Principles* are written in gender-free language, increasing the quality of marriages may be of particular concern to women. First, while wives are more likely than husbands to eventually become disillusioned with marriage,<sup>4</sup> women initially tend to place a stronger emphasis on the importance of a

---

Copyright © 2001 Allen M. Parkman

\* Regents' Professor of Management, University of New Mexico School of Management.

1. See generally ALLEN M. PARKMAN, GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY (2000) (contains an analysis of the effect of no-fault divorce).

2. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.02 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES 1997]. This article only addresses the financial arrangements recommended in the Principles in Chapter 4 (Division of Property Upon Dissolution) and in Chapter 5 (Compensatory Spousal Payments).

3. See *id.* at xiii.

4. There is strong evidence from the National Survey of Families and Households that wives are more likely than husbands to initiate divorce. A majority of the wives who divorced between the two phases of the Survey in 1988 and 1992-93 indicated that they initiated the divorce and there was a high level of agreement from their husbands. See PARKMAN, *supra* note 1, at 110. Moreover, the Survey provides some insights as to why the wives became disillusioned with their marriage. When asked questions about the affection and understanding that they were getting from their spouse, the responses of the wives indicated that they were much more unhappy with those aspects of their marriage than did the responses of the husbands. *Id.* at 111.

successful marriage than do men.<sup>5</sup> Second, the increased specialization that commonly occurs during marriage often causes the lower-income spouse—usually the wife—to increase her emphasis on domestic work. This emphasis, which is particularly apparent when a couple has children, can adversely affect the lower-income spouse's future income if the marriage is dissolved.<sup>6</sup> Therefore, it is particularly important to women that the change in a spouse's income-earning capacity during marriage be recognized and compensated if there is a divorce. Knowing that there is protection for sacrifices in earning power can encourage domestic activities, thereby potentially increasing the quality of marriage and reducing the likelihood of divorce.

The remainder of this commentary will discuss the dynamics that encouraged the development of the *Principles*, the gains from commitment and specialization during marriage, and the factors that encourage these actions. Finally, this commentary evaluates the *Principles* in terms of their ability to encourage commitment and specialization.

Initially, we need to understand why the American Law Institute identified the need to modify the current financial arrangements at divorce. While there have been dramatic changes in the grounds for divorce, as fault grounds have given way to no-fault in all jurisdictions, there have only been minor changes in the financial arrangements at divorce.<sup>7</sup> The terms "fault" and "no-fault" are somewhat misleading as the critical change occurred from divorce being commonly based on the mutual consent of the spouses to its being available to either spouse unilaterally. Fault divorce often resulted in dissolutions based on mutual consent because the fault grounds of adultery, desertion or cruelty were difficult to establish. Consequently, most divorces in that era were the result of negotiations between the spouses who were able to ignore the statutes governing the financial arrangements. The divorcing spouse had to come up with a package of concessions to induce the cooperation of the other spouse. The initially unwilling spouse could be persuaded to cooperate—although not necessarily enthusiastically—if the concessions covered the anticipated financial and emo-

---

5. According to the Monitoring the Future Survey conducted by the Institute for Social Research at the University of Michigan, female high school seniors are ten percent more likely to say that having a good marriage and family life is extremely important than are male high school seniors. In 1999, the response by females was 83 percent, while for males it was 74 percent. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TRENDS IN THE WELL-BEING OF AMERICA'S CHILDREN AND YOUTH 175 (2000). Barbara Dafoe Whitehead and David Popenoe report similar results from their focus group discussions with never-married adults in their twenties. Women ranked marriage higher on their personal goals than did men. Barbara Dafoe Whitehead & David Popenoe, *Why Wed: Young Adults Talk About Sex, Love and First Unions*, in THE NAT'L MARRIAGE PROJECT (Jan. 1999), available at <http://marriage.rutgers.edu/pubwhywe.htm>.

6. Being a housewife and mother has a detrimental effect on the earnings of women who continue to work during marriage. See Joni Hersch & Leslie S. Stratton, *Housework, Fixed Effects, and Wages of Married Women*, 32 J. HUM. RESOURCES 285, 286 (1997). The long-term effect on the earnings of married women who leave the labor force is more pronounced. See Leslie S. Stratton, *The Effect Interruptions in Work Experience Have on Wages*, 61 S. ECON. J. 955, 956 (1995).

7. Between 1969 and 1985, all states either replaced the fault grounds of adultery, desertion and cruelty with no-fault grounds of irretrievable breakdown or incompatibility or added the no-fault grounds to the existing fault grounds. PARKMAN, *supra* note 1, at ix.

tional costs of divorce.<sup>8</sup> For example, in a community property state, a spouse could demand substantially more than the equal division of property provided for by law, in order to be persuaded to cooperate in a divorce. Since the couples ignored the applicable statutes, few inquired as to whether the legally-prescribed financial arrangements at divorce were necessarily just and fair.

Conditions changed with the introduction of no-fault divorce in most jurisdictions. As divorces became available unilaterally to either spouse, the need for negotiations was dramatically reduced. An unwilling spouse could seldom expect financial arrangements at trial that differed substantially from those prescribed by law. These laws generally provided for a sharing of marital property and potentially some short-term spousal support. A particular problem with those laws was that the financial arrangements tended to ignore the effect of marriage on the spouses' income earning capacities. The reduction in human capital that occurred when female spouses limited a career during marriage resulted in many divorced women and their children facing dire financial conditions following divorce.<sup>9</sup> The *Principles* respond to this problem by attempting to shift resources to the spouse with the lower income at divorce.

## II. THE CONFLICT BETWEEN THE BEST INTERESTS OF A SPOUSE AND THE FAMILY

The financial arrangements at divorce are important because a successful marriage is partly based on pragmatic considerations. In addition to love and physical attraction, marriages benefit from spouses making decisions based on their family's best interests rather than on a narrow concern for their own welfare. Still, there is strong evidence that individuals' own self-interest has a central role in their decisions.<sup>10</sup> One key, therefore, to a successful marriage is an incentive structure that encourages spouses to recognize that personal self-interest is best served by addressing the concerns of other family members, especially their spouses. Self-sacrifice in the family's service will only be rationally incurred when other family members provide corresponding benefits.

Often these sacrifices are associated with the spouses assuming more specialized roles in marriage. A spouse specializing in income production will still have those income earning skills in tact even if the marriage dissolves. A spouse specializing in domestic work may develop skills which have less value in another relationship and little value in the labor force. Still, domestic work is an important complement to earnings and it produces goods and services that ultimately increase the welfare of the family members. The family benefits from well-mannered and happy children, good meals and the like. While many of these services can be purchased from others, often the family may be more satisfied with the quality provided by family members (especially of childcare).

---

8. Since no court is capable of quantifying the emotional costs of divorce, mutual consent is a far better ground for divorce of established marriages than no-fault. *See id.* at 188.

9. Lenore Weitzman reported that divorce resulted in a 42 percent increase in the welfare of men and 73 percent decline in the welfare of women. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985). Others questioned the magnitude of the effect and when Richard Peterson re-analyzed Weitzman's data, he concluded the effects of divorce, while dramatic, were less substantial—a 27 percent decline for women and a 10 percent increase for men. *See* Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1995).

10. *See* N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* (2d. ed. 2001).

To encourage the sacrifices in earning capacity often associated with domestic work, those sacrifices should be recognized as the basis for compensation if the marriage is dissolved. Spouses are encouraged to make these sacrifices based on the expectation that benefits will follow, either from reciprocal acts by other family members or, at least, from legal safeguards if the marriage is dissolved. While altruism can be a pertinent force in close relationships, the expectation of present and future benefits provides a strong incentive for making these sacrifices. The essence of marriage consists of reciprocal arrangements. While neither washing the family car by one spouse nor cooking dinner by the other will necessarily result in positive net benefits for that person, the combination of activities will result in positive net benefits for the couple. Neither activity is done in isolation, but each is done in anticipation of the other. A car wash and a meal are activities that are reasonably contemporaneous, so the spouses need not be concerned about whether the reciprocal actions will occur. However, other benefits may occur long after the costs were incurred, such as instances where educational support is provided by a spouse. The providing spouses are more likely to incur these costs if there is a reasonable assurance that they will be compensated.

If the likelihood increases that compensation will not be received for sacrifices, then spouses are discouraged from making welfare-enhancing decisions for which the benefits exceed the costs.<sup>11</sup> For example, a couple may recognize that their children would benefit from one parent limiting a career to provide important childcare services. However, that parent may be reluctant to incur the potential cost of limiting a career if he or she is not confident that the other spouse and the children will provide financial and emotional compensation. This lack of compensation can be due to the lack of systematic recognition for past incurred costs in financial and custodial arrangements following divorce.<sup>12</sup> As a consequence, the parents may intensify their focus on their careers to the detriment of themselves and their children.

It is important that these earning capacity sacrifices be recognized at dissolution and incorporated in the property settlement. Since these sacrifices were incurred for the benefit of the family, they should be recognized as material debts which, in other contexts, are commonly recognized as property.<sup>13</sup> A property settlement may consist of a lump sum payment (when sufficient assets are available) or specific future payments. The predictability of these property settlements is preferable to modifiable and terminable periodic payments, such as

---

11. Because no-fault divorce permits unilateral divorce often accompanied by limited financial compensation for women who have limited their careers to benefit their families, married women have been forced to take steps to protect themselves from the potential adverse effects of divorce. Since they are acting in their best interest rather than that of their families, this lack of protection for their investments often induces them to make inefficient decisions for their families because the benefits do not exceed the costs. See Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41, 43-44 (1998).

12. Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. REV. 671, 672 (1992).

13. While only sacrificed careers are discussed here, there are other debts that should be recognized at divorce. These include those associated with investments in enhancing a spouse's human capital through education. See generally Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51 (1998-99).

alimony or spousal support. Modifiable and terminable payments encourage ex-spouses to make choices based on their effect on payments rather than making decisions which would otherwise be in their best interests. For example, ex-spouses receiving support payments have an incentive to not aggressively establish a career or remarry because these actions will reduce or terminate their payments. These perverse incentives can be avoided with a fixed award at divorce.

### III. REFORMS BY THE AMERICAN LAW INSTITUTE

In evaluating the *Principles*, a key consideration is whether its provisions recognize and compensate divorcing spouses who have made sacrifices for the benefit of their families. The *Principles* lack consistency by only indirectly addressing sacrifices during marriage and ignoring the analysis of human capital (giving periodic compensatory payments a central role). The financial arrangements at divorce are addressed in Chapter 4 (Division of Property Upon Dissolution) and Chapter 5 (Compensatory Spousal Payments). It is important to appreciate that the laws governing the grounds for divorce and the financial arrangements at divorce have subtle, but important effects on the quality of ongoing marriages. The financial arrangements are not just important for those who divorce but also for those who stay married, in part because those spouses are encouraged to invest in their marriage thereby increasing its quality and hopefully their satisfaction with it.

#### A. Property

The *Principles* define marital and separate property, but not property itself when considering the division of property upon the dissolution of marriage.<sup>14</sup> The *Principles* assume that traditionally-recognized marital property should be divided equally,<sup>15</sup> except when there is financial misconduct.<sup>16</sup> The *Principles* do not provide a definition of “marital property” stating, “. . .if the term was meant to have a special meaning different from its meaning in other areas of the law, but no such special definition is necessary or desirable. The most frequent occasion for debate over the definition involves the law’s treatment of earning capacity and goodwill, but the characterization of these assets involves policy choices whose analysis is not aided by appeal to a general definition of property. The definition of marital property must follow from the policy choice; the policy choice is not determined by the definition.”<sup>17</sup>

The failure to define marital property to include human capital is a shortcoming because human capital, in contrast to other forms of property, is not marketable. Marital property is just another term for what economists and financial analysts refer to as assets. Assets have value because of their ability to provide future returns to their owner. The services of a house, the interest on a bond and the dividends on a share of stock are the returns that give those assets

---

14. See ALI PRINCIPLES 1997, *supra* note 2, § 4.02 cmt. a.

15. *Id.* § 4.15 cmt. b.

16. See *id.* § 4.16.

17. *Id.*

value. Moreover, these assets have a market value because they can be sold in markets. While human capital also provides future returns in the form of earnings, it differs from other assets because of its lack of marketability. In other words, the services resulting from human capital can be sold, although the asset itself—the person—cannot be sold. Even so, marriage can affect its value, just as marriage can affect the value of other assets owned by the spouses. A major omission in state law is the lack of recognition that human capital should be included in the property divided at divorce. The ALI had an opportunity to correct that omission in the *Principles* and it elected not to do so.

Under fault divorce laws, a clear definition of property was less important because spouses could negotiate their own financial arrangements. Now that statutes play a central role in determining the financial outcomes at divorce, a clear definition is becoming increasingly important. It is not an acceptable conclusion that the law's treatment of earning capacity and goodwill, for example, should be based on policy choices. If an object is an asset and considered property, then the object should be recognized as such with the normal standards for its identification and valuation.

Public choices may then determine whether there are reasons for modifying the general rules for the allocation of property at divorce. For example, much of the confusion about how earning capacity and professional goodwill<sup>18</sup> should be treated at divorce is due to the lack of a clear definition and understanding of property, especially human capital. This lack of clarity is easily remedied using the language of the financial and economic analysts who usually identify and value property.

This omission is a particular problem for women. Human capital can increase or decrease due to choices made during marriage. While the courts have often been concerned about the higher-income spouses—usually husbands—who leave a marriage with their income intact, often those spouses are earning an income that they would have earned even without *this* marriage. In other words, the marriage did not affect that spouse's human capital. The subtler—but much more common—injustice occurs when a spouse leaves a marriage with a potential income less than they would have had if they had not married or at least not limited their career during marriage. The spouse's human capital has been reduced due to *this* marriage. The *Principles* does not recognize this change in their assets in a systematic manner.

If we view marriage as a partnership, the *Principles'* framework of dividing marital property and returning separate property has a basic appeal. Because the *Principles* do not clearly define property, they do not address the effect of marriage on the spouses' human capital. The recharacterization of separate property as marital property goes beyond current rules on transmutation and lacks a logical basis.<sup>19</sup> This requirement seems unnecessary since a rebuttable presumption of commingling or transmutation will usually result in some of the parties' separate property becoming marital property, except when the spouses

---

18. See generally Allen M. Parkman, *A Systematic Approach to Valuing the Goodwill of Professional Practices*, in VALUING PROFESSIONAL PRACTICES AND LICENSE 6-1, 6-4 (Ronald L. Brown ed., 1998) (discussion of professional goodwill).

19. See ALI PRINCIPLES 1997, *supra* note 2, § 4.18.

take deliberate steps to avoid that change.<sup>20</sup> If access to another person's separate property is a motivating factor in choosing to marry, then the parties should be forced to recognize that reality rather than have the law create a presumption that the separate property has become marital property during a long-duration marriage.

#### B. Compensatory Payments

The primary concern of the *Principles* is the equitable sharing of the losses from the dissolution of a marriage. Because women have frequently been the victims of these losses, the *Principles* are an improvement over current laws for them. Nonetheless, a primary basis for the compensation provided under the *Principles* is periodic payments, which—while having an aura of fairness—can be unfair and inefficient.<sup>21</sup> The *Principles* have rejected including intangible assets such as spousal earning capacity among the items considered in property settlements, rather assigning their relevance to be considered as compensatory payments.<sup>22</sup> Some awards are fixed at dissolution, while others can be modified and terminated with remarriage or death.<sup>23</sup>

These payments would provide compensation for: 1) a reduction in living standard in long-duration marriages in earning capacity due to childcare or care for a third party; and 2) investment in the other spouse's earning capacity. Additionally, compensatory payments may assist a spouse in recovering her premarital standard of living after the dissolution of a short marriage.<sup>24</sup>

Compensation for investments in the other spouse's earning capacity and payments which assist a spouse in recovering her premarital living standard after the dissolution of a short marriage cannot be modified and do not terminate with remarriage or death.<sup>25</sup> An award based on these factors can be made in the form of an enhanced share of the marital property, a lump sum payment from separate property or a set term of monthly payments.<sup>26</sup> Both the logic behind and provision for a lump sum payment would justify treating these forms of compensation as part of the property settlement. Reimbursement for investments in the other spouse's human capital is not only fair, but it also encourages these critical investments. While the lack of compensation for these investments has often been viewed as a particular problem for women, the increase in the number of women pursuing higher education has made this a concern for both genders.<sup>27</sup>

---

20. See generally HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 596 (2d ed. 1988).

21. See ALI PRINCIPLES 1997, *supra* note 2, §§ 5.01-02.

22. *Id.* § 4.07(1) cmt. a.

23. *Id.* § 5.08.

24. *Id.* § 5.03.

25. *Id.* § 5.17.

26. *Id.*

27. In 1995, 56 percent of students in higher education were women. See U. S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 164 (1999). The growth in the percentage of professional degrees conferred on women has increased rapidly with the percentage of medical degrees growing from 8 percent in 1970 to 41 percent in 1996, and the percentage of law degrees increased from 5 percent to 44 percent over the same period. *Id.* at 206.

Recovering a premarital living standard is another application of human capital. At marriage, individuals have human capital based on their future income stream that reflects prior—and potentially future—investments in education and experience. The couple may decide that they would benefit from a spouse leaving his or her current job to either relocate or increase their emphasis on domestic work. There is an expectation that family welfare will be improved by this action. While the person leaving the paid workforce—frequently the wife—should be compensated if the marriage is for a short duration, this approach, while ignored by the *Principles*, is also appropriate for longer-duration marriages. Lacking a consistent framework, the *Principles* do not appreciate that an application of § 5.16 (Restoration of Premarital Living Standard After a Short Marriage) to longer marriages would eliminate the need to consider the issues addressed in § 5.05 (Compensation for Loss of Marital Living Standard) and § 5.06 (Compensation for Primary Caretaker's Residual Loss in Earning Capacity). The financial loss experienced by a spouse due to the dissolution of this marriage is the difference between the income that she can now anticipate and the income that she would be earning if they had never married.<sup>28</sup> This loss will be due to a variety of choices made during marriage including those associated with care for children and parents.

Because the *Principles* do not recognize the potentially broad application of Section 5.16, compensatory spousal payments are also provided for a loss in living standard after a long- duration marriage, or a loss in earning capacity due to caring for others. Again, these provisions are expected to shift additional funds to women at divorce. These payments end with remarriage or death<sup>29</sup> and can be modified.<sup>30</sup> Compensation is based on a sharing of the spouses' post-dissolution incomes, although the income transfer often has only a limited link to the sacrifices made or losses incurred.<sup>31</sup> The *Principles* do not provide a logical reason why ex-spouses' incomes should be shared just because they were married, even when there is no discernable sacrifice involved.<sup>32</sup> Working at home during marriage is only a basis for these payments if the couple has children<sup>33</sup> or the marriage is for a long duration.<sup>34</sup>

While modifiable and terminable income sharing after divorce has a fundamental appeal, it is a poor structure for the financial arrangements at di-

---

28. This is a loss based on reliance. See generally Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TULANE L. REV. 855 (1988).

29. See ALI PRINCIPLES 1997, *supra* note 2, § 5.08.

30. *Id.* § 5.09.

31. *Id.* § 5.05-.06.

32. See J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 815 (1997). If we view a divorce as the breach of a marriage agreement, the PRINCIPLES provides a remedy based on the expectation at the end of the marriage rather than even the expectation at the beginning of the marriage. Even if one wants to use an expectation framework rather than the reliance one suggested here, the expectation should be based on the parties' expectation at marriage. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 130 (5th ed. 1998)(discussion of contract remedies).

33. See ALI PRINCIPLES 1997, *supra* note 2, § 5.06 cmt. a.

34. *Id.* § 5.06.



vorce.<sup>35</sup> It encourages people to make decisions based on the effect on their payments, rather than addressing those choices that are in their best interest without regard to the payments. First, it creates disincentives for ex-spouses to seek their best employment opportunity since they will have to share their income with their ex-spouse. The *Principles* want to ignore one of the most basic aspects of human nature—self-interest. Each dollar earned by either ex-spouse must be shared with the other, creating a disincentive for the other ex-spouse to earn that dollar. While the reaction of the higher-income spouse may be more obvious, the effect on the lower-income spouse may be more important because their potential income is not evident at divorce. The pre-dissolution income of the higher-income party is probably a fair estimate of his or her potential income. Any deviation from that level could be the basis for judicial sanctions. Although previously the lower-income spouse often sought more flexible employment for the benefit of their family, that spouse now often has to pursue less attractive but higher paying employment. Since any increase in the income of the lower-income spouse will reduce the compensation from their ex-spouse, she has a disincentive to make these choices. Often this will work to her detriment because less attractive, more challenging jobs often provide training and experience that is important for higher paying and more rewarding jobs later. Since wives tend to be the spouses with the lower income after divorce, this provision reduces their incentive to reestablish a career.

Some of the periodic payments end with remarriage or cohabitation, so the spouse receiving them has less incentive to attempt to establish a new relationship. Since the recipients of the payments are more likely to be women, this provision also works to their detriment. Remarriage does not affect the obligations of the higher-income party, which will often be the husband, imposing no new penalty on them if they elect to remarry or cohabit. Finally, women will often be adversely affected because there are the inevitable problems associated with collecting periodic payments that could have been avoided if more of the financial transfer had been completed through a property settlement at the time of the divorce.

Not only do the *Principles* encourage inefficient decisions, but numerous injustices are likely to occur because an analysis of earnings and sacrifices is not considered. These injustices will tend to be randomly distributed among men and women. Most notably, there is a lack of understanding of the basis for different earnings. Among workers with similar attributes, those willing to work harder and accept jobs with fewer attractive attributes tend to have higher earnings. Consequently, it can be unfair to force a higher paid ex-spouse to subsidize a lower paid ex-spouse. Secondly, injustices will occur because sacrifices are not considered. Long-duration marriages would result in compensatory payments regardless of whether there were sacrifices during the marriage. A spouse may have left the labor force not so much to emphasize domestic work as to obtain a more leisurely life. This person will receive the same transfers as a spouse who made significant career sacrifices to provide valuable services in the home.

---

35. See Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117 (1989)(discusses another rationale for income sharing after divorce).

There also can be important sacrifices before marriage. Parties who made numerous sacrifices before marriage to acquire important income earning skills (such as a medical education) may be forced to share their income with parties who did not make similar sacrifices either before or during marriage. Moreover, if a spouse limits a career to provide important services in the home and that loss is recognized at dissolution as the basis for compensatory payments, it will not disappear even if the person remarries (when the *Principles* would normally terminate compensation).

Injustices will also occur because the *Principles* assume that the lower-income earning spouse only deserves compensation if that person's income is substantially below that of the other spouse. If the primary caretaker does not have an income that is substantially less than the other spouse, she will receive no compensation for any reduction in her future income due to her working in the home.<sup>36</sup> With the increase in women with substantial education, the likelihood has increased that women who assumed primary responsibility for child-care will be able to return to the labor force at an income that would not qualify them for compensation, even though their income is less that they would have made if they had not assumed domestic responsibilities. Maintaining the *ad hoc* nature of the law in this area, the *Principles* notes that it is contrary to existing law for the lower-income spouse to compensate the higher-income spouse even when it is the higher-income spouse who incurred a sacrifice because of the marriage.<sup>37</sup> While the *Principles* permit couples to contract around these provisions,<sup>38</sup> experience has shown that people are reluctant to contract over emotional relationships such as marriage.

#### IV. CONCLUSION

The financial arrangements at divorce should encourage spouses to consider all family members during marriage. This is most likely to occur if the spouses know that they will be compensated for sacrifices that reduce their income-earning capacity. The *Principles* provide compensation for some of those sacrifices, such as investing in a spouse or limiting career options in a short-duration marriage. However, other provisions in the *Principles* do not link compensation to sacrifices. Considering the effect of marriage on the spouses' human capital, incorporating this factor in the property settlement is particularly important to women because of their concern for successful marriages and the sacrifices that they frequently make for their family's benefit.

---

36. See ALI PRINCIPLES 1997, *supra* note 2, § 5.06(2)(c).

37. *Id.* § 5.06 cmt. d.

38. *Id.* § 5.01 cmt. b.