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DIVISION OF MARITAL PROPERTY

MAX RHEINSTEIN*

All the world over—one is tempted to say from Alabama to Zanzibar—family law is undergoing change. In those parts of the world that have become industrialized, divorce, or, as it is now frequently called, dissolution of marriage, has become a mass phenomenon. Divorce (or in Roman Catholic countries, judicial separation) is being facilitated universally. The changes in the availability of divorce or separation have been accompanied by changes in the law concerning its financial consequences.

I. BACKGROUND OF THE PROBLEM

The Changing Model of Marriage

In Western societies, the property consequences of divorce have been based on what is now known as housewife or maintenance marriage. The foundation of this approach was a clear division of labor between the sexes. The husband was expected to go out into the world and earn a living for himself, his wife, and their children. The wife was to stay at home and take care of the household and the children. She was not expected to earn a living of her own, but was to be dependent upon the husband, who was assigned the dominant role by law. Marriage was the normal way for a female

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1. The reader should be assured that we shall not speak about Zanzibar in this essay. We shall content ourselves with looking at the industrialized countries of the Western world.

2. For instance, in 1974, the United States had 970,000 divorces, or 4.6 divorces for each 1000 of population, compared with only 83,000 divorces in 1910, or .9 divorces for each 1000 of population. BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., U.S. FACT BOOK 1976 at 51. Sweden in 1900, with a population of 5,136,441, had 5,546 divorces. In 1973, with a population of 8,144,428, there were 16,294 divorces. STATESMAN'S YEARBOOK, STATISTICAL AND HISTORICAL ANNUAL OF THE STATES OF THE WORLD FOR THE YEAR 1975-1976. France, in 1969, had 38,100 divorces, or .76 divorces for each 1000 of population. DEMOGRAPHIC YEARBOOK OF THE UNITED NATIONS (1972). However, in 1901, with a population of 38,595,500, there were only 7,741 divorces. STATESMAN'S YEARBOOK, STATISTICAL AND HISTORICAL ANNUAL OF THE STATES OF THE WORLD FOR THE YEAR 1904.

3. In the following text, "divorce" will be used only in the sense of dissolution of marriage.

4. See, e.g., French Civil Code of 1804 art. 213: "The husband owes protection to his wife, the wife owes obedience to the husband"; Spanish Civil Code of 1888 tit. IV: same; Italian Civil Code of 1865 art. 131: "The
to find the support necessary for life. Of course, not all women could or wanted to find a husband-provider. If she could not support herself, a spinster had to be supported by her extended family, by the taxpayers, or by such institutions as nunneries or brothels.

With the onset of the industrial revolution, pure housewife marriage was an inaccurate description of the family life of increasing masses of industrial workers. The husband’s wages rarely satisfied the needs of the entire family. His wages had to be supplemented by money earned by the wife, who was thus forced to seek employment outside the home, largely with no decrease in her workload as housewife. In industrialized nations like England, Germany, Sweden, and the United States, the number of such double-earner marriages was already considerable at the beginning of the 20th century. However, 19th century law had been patterned upon the model of bourgeois marriage—housewife marriage in which the wife was economically dependent upon the husband.

As the working part of the population obtained greater political influence, double-earner marriage began to find recognition in the law. The Married Women’s Property Acts in the United States and the British Empire gave married women unrestricted disposition and title to their own earnings and whatever property they might own through inheritance or other events. The Married Women’s Property Acts allowed all married women to have the same control over property that the wealthy had commonly obtained by means of marriage settlements. Known as marital contracts (contrats de mariage, Eheverträge, capitulaciones matrimoniales), these settlements had also long been possible under European-continental legal systems. The effect of the legislation

husband is the head of the family”; Civil Code of the Netherlands of 1838 art. 159, para. 1: same; Austrian Civil Code of 1811 art. 91: same; Brazilian Civil Code of 1916 art. 233: same; Swiss Civil Code of 1907 art. 160, para. 1. See also Civil Code of Argentina Law No. 340 of 29 September 1889 arts. 184-188; Russian Code (Swod Zakonov) vol. 10, pt. 1 (1900/1909) art. 107: “The wife has to obey the husband as the head of the family”; German Civil Code of 1896 § 1354: “The husband has the right of decision in all matters concerning the marital life in common.” As to Islamic law, see KHADDURI & LIEBESNY, LAW IN THE MIDDLE EAST (1955).


6. The percentage of women in the total nonagricultural labor force was 23% in the United States in 1900 and 37% in France in 1906. Dirac, Quelques vues sur le travail féminin non-agricole en divers pays, 13 POPULATION 72 (1958).
was thus limited to that part of the population among which marital contracts had been uncommon, and where a married woman's property ownership was limited to the fruits of her labor. Married women were given unrestricted disposition of their earnings in Germany by the Civil Code of 1896, in Switzerland by the Civil Code of 1907, in France by the Law of 13 July 1907, and by similar laws in other countries.

The Changing Law of Divorce

Maintenance-marriage remained the prototype for laws regulating the financial consequences of divorce for a long time. Divorce, if allowed at all, was difficult to obtain. In both Roman Catholic and Protestant countries, divorce was viewed as a punishment for marital misconduct; first for adultery, and later for desertion and serious impairment of bodily integrity and health. Where there was marital infidelity or danger to life or health, the innocent party was to be relieved, and the guilty to be punished. A wife could thus be freed of a husband who was intolerably cruel, who had committed adultery under particularly serious circumstances, or who had deserted her. Furthermore, as far as possible, the innocent wife had to be protected financially. The guilty husband, deprived of her company and her work in the home, remained her provider. He would be ordered to pay her alimony so that she could live at the same standard she would have had if the husband had not been guilty of the misconduct that made life with him intolerable. On the other hand if the wife had broken the vow of marital fidelity by even a single act of adultery or other conduct that made life with her intolerable, or if she had eloped from the marital home, the husband would be entitled to repudiate her and throw her out in the cold without any duty to continue her support. Only if the wife would become a public charge as a result of such non-support might the ex-husband have to pay for her subsistence, since he was regarded as being nearer to her than the taxpayers.

The obligation of support upon divorce was not reciprocal, however. Since women were thought to be economically dependent upon men, they were not regarded as providers for their husbands. An ex-wife could thus make a claim for alimony against her ex-husband, but an ex-husband could not make that claim against his ex-wife. Men, married or unmarried, had to take care of themselves.

7. § 1364.
8. Art. 191, no. 3.
In certain jurisdictions, divorce could bring with it the obligation of an ex-husband to give his ex-wife part of the property that during marriage he alone had managed and enjoyed. This obligation could arise in Anglo-American common law jurisdictions where, during marriage, the husband was the owner of all personal property that but for the marriage would be the wife's, and where, under his estate *jure uxoris*, he was entitled to all the fruits of her real property. Upon judicial separation, or later, divorce, the court of equity could require the husband to provide an equitable settlement for his wife.

After a judicial separation or divorce in community property jurisdictions, an ex-wife might obtain part of the fund that was under the sole management and enjoyment of the husband. While during marriage the husband managed and enjoyed the community fund, title to the assets of the fund belonged to both spouses in equal parts. Upon the termination of the marriage, the wife was entitled to possession of her one-half interest, or if the marriage was ended by her death, her interest vested in her heirs or devisees. The wife's right to her share in the assets of the community fund apparently exists in all community property jurisdictions even if she was guilty of conduct that caused the collapse of the marriage.

Today, the notion of divorce as punishment for marital misconduct and as a reward for the innocent party lingers on in the statutes of a diminishing number of jurisdictions. We now look upon divorce as an increasingly accessible escape from a marriage that has failed to live up to expectation. Almost universally, judicial practice has turned *divorce-sanction* into *divorce faillite*, and statutes are following suit with increasing frequency. In one form or another, with or without delay, with or without right of opposition by an innocent party, no-fault divorce has become available in the Nordic countries, the socialist countries, the Netherlands, West Germany, Switzerland, Austria, Italy, Portugal, France, Japan, England, Australia, Canada, several Latin American countries, as well as, it now seems, 47 of the 53 jurisdictions of the United States.

10. At the beginning of the 20th century the following jurisdictions had community property as the legal regime of marital property: *Universal community*: Brazil, Denmark, Finland, Iceland, Netherlands, Norway, Portugal, South Africa, Sweden. *Community of movables and acquests*: Belgium, France, Haiti, Luxembourg, Quebec. *Community of acquests*: Argentina, Arizona, Bolivia, California, Chile, Colombia, Cuba, Ecuador, Idaho, Louisiana, Nevada, New Mexico, Paraguay, Peru, Puerto Rico, Spain, Texas, Uruguay, Washington.

The increased availability of divorce and the concomitant transformation of marriage demand that the law dealing with the financial consequences of divorce be altered. Not only is the view of divorce as punishment disappearing, but the dominance of maintenance-marriage is also declining. The old division of labor between the sexes is breaking down, and "housewife" marriage is no longer the general model. Double-earner marriage is beginning to prevail as industrialization proceeds. Consequently, female dependence on the male is no longer the rule. Alimony is no longer...
a universal necessity, and the precariousness of its enforcement is being recognized. On the other hand, people are demanding that alimony be available to men who are economically dependent on their wives. The frequent insufficiency of the right to alimony, together with the postulated equality of husband and wife, is resulting in an increased demand for property sharing upon divorce. Accompanying these new trends is the reluctance to give up the ideal of marriage as a lifelong full community, "for better or worse, in sickness and health," and the simultaneous desire to treat divorce as a clear-cut termination of a relationship so that it does not stand in the way of a new family. These ideals in good measure contradict each other and the problem of how to reconcile them is troublesome. It is no wonder then that various solutions to this problem are being attempted.

If the traditional approach to property division survives anywhere it is in Austria\textsuperscript{13} and in the State of New York.\textsuperscript{14} Upon divorce, the court merely unscrambles what is his and what is hers, and the parties walk away with what they own. No asset belonging to one party is to be assigned to the other, and there is no community fund to be divided. Nothing but a claim for alimony against the ex-husband can be given to the ex-wife. The one new feature is that alimony may be granted to the husband, though neither spouse is entitled to alimony if he or she was the guilty party. In both jurisdictions the situation is likely to change in the near future.

In the just mentioned system, husband and wife are treated as equals insofar as each of them owns and manages his or her earnings and other property independently of the other. As far as property is concerned, husband and wife are like any other two people. They may pool resources for special purposes, or one may entrust the other with the management of all or some of his funds.\textsuperscript{15} If upon dissolution of the marriage one spouse is needy while the other is in a financially better position, the latter must come to the rescue of the former, provided the needy party has not forfeited assistance through marital guilt. In this respect the system is based upon the model of the housewife, or maintenance, etc.

\textsuperscript{13} Austrian Civil Code of 1811 § 1237; Marriage Law of 6 July 1938 (German Reichsgesetzblatt 1938 I. 807) §§ 66-69; GSCHNITZER, FAMILIENRECHT 43 (1963).
\textsuperscript{15} The existence of a marriage between two persons can still influence their individual property through the existence of such rights as dower, customary, homestead, and rights of one spouse in the estate of the deceased spouse.
marriage. It is the withering of this marriage model that has rendered the system obsolete.16

II. Solutions Based on Community Property Concepts

The growth of double-earner marriage has revived interest in the treatment of marital property matters that evolved when most marriages were a joint enterprise of husband and wife running a farm, store, or craft shop. Whatever assets were acquired by such a joint effort were owned by them jointly as their community property. In Spain and in parts of Central Europe, the community property is limited to the marital acquests, i.e. the funds that are acquired by the gainful activity of either spouse. What each of them brought into the marriage or what either acquired during marriage by inheritance or donation remains his or her separate property and stays outside the community fund. As long as tradition prevailed, the management of the community fund and the right to its fruits during the marriage belonged to the husband, who in turn had to support his wife and his dependent children. The community ceases upon the death of one of the spouses, and the community fund is equally divided between the surviving spouse and the heirs of the predeceased spouse. Upon judicial separation, or as it has become available, divorce, the community fund is also divided equally without consideration of guilt. If there are no acquests, or if a divorced spouse's share is insufficient for his future support, alimony is provided.

In the Nordic countries, the Netherlands, Portugal, and some Central European systems, community property has been more comprehensive. From the Netherlands the system of universal community was carried to its onetime colony South Africa. From Portugal (where it has now been replaced by community of acquests) universal community was carried to Brazil, where it still exists in a strangely modified form. Under the system of universal community, the community fund consists, at least on general principle, of all the assets of the spouses, which are distributed in equal parts upon the termination of the marriage.

An intermediate system of community of movables and acquests held sway in parts of Central Europe and in the heartland of France. Under this system, the community fund consists of all movable assets of the spouses, irrespective of the time and mode of acquisition, and all movable or immovable property acquired

during marriage by gainful activity of either spouse. Each party
remained the separate owner of the immovables acquired by him
or her before marriage or during marriage by inheritance or dona-
tion. This intermediate approach found its way into the unified
legal system of France through Napoleon's Civil Code of 1804. In
France, the system was changed to one of community of acquests
by the reform law of 13 July 1965. As of 1975, the intermediate
system could be found only in Belgium and Haiti.

In practice the difference between universal community and
community of acquests is less formidable than it seems. Under all
systems of community of acquests, assets are presumed to be com-
community if their mode and time of acquisition cannot be proved.
Since the parties ordinarily fail to keep inventories and tend to
commingle their assets, at least the movables existing at the time
of liquidation are likely to be treated as community assets.

Community property, with its equal division of the community
fund upon the termination of a marriage, is misleadingly referred
to as the system of the civil law. It did not exist in Roman law,
but originated in Germanic customs. Community property has not
penetrated into all the regions of civil law. On the other hand,
it became the marital property system of nine American jurisdic-
tions whose legal systems are otherwise that of the common law
(Arizona, California, Idaho, Nevada, New Mexico, Texas, Washing-
ton, the Canal Zone, and Guam). Community property also exists
in Louisiana and Puerto Rico, where private law is still generally
based upon civil law.

Why should a wife working as keeper of the home and nurse
of the children be in a less favorable position than the married
woman who works outside the home, earns her own living, and
accumulates her own savings? Does not the housewife through her
work enable the husband to earn money and accumulate his sav-
ings? Is she not his partner in a joint venture and therefore
titled to participate in his acquests? Such questions have been
posed with increasing urgency as housewife marriage gives way to
double-earner marriage. In jurisdictions with community property
systems, whether universal or of acquests, the postulate of sharing
had already been realized. But how should it be implemented in
noncommunity property jurisdictions? Should a husband pay his
housewife-spouse a salary commensurate with what she could earn
if she worked outside of the home, or with the amount the husband
might have to expend if he hired an outside person as housekeeper?
Such proposals would not only be difficult to implement, they
would also be widely regarded as incompatible with marriage.
Where systems of community property had been in force, and thus where no new means to accomplish sharing seemed to be needed, another problem arose. How could community property be combined with that other postulate of modern times, equality of husband and wife? Traditionally, the marital community fund had been managed by the husband, who needed the consent of his wife only for exceptional transactions such as the alienation or encumbrance of an immovable or a business. How could the wife be made a general co-manager? Would it be feasible to have a ship with two captains? Different answers have been given to this troublesome question, and in the process community property systems have been profoundly transformed.

The French Law of 1907 was an early inroad into the concentration of management in the husband. As already stated, this law entitled the wife to the independent management of the earnings she obtained through working outside the home. Whatever might remain in this **libre salaire** at the termination of the marriage would be added to that part of the community fund that had been subject to the management of the husband. The law was not formulated so that third parties could easily ascertain whether or not an asset was one that the married woman could dispose of on her own. Therefore, the French law, like its Belgian counterpart of 20 July 1932, remained a dead letter until it was amended in the 1940's.

A much more radical step was taken in the legislation of the five Nordic countries: Sweden, Finland, Denmark, Norway, and Iceland. In the first two countries the traditional system of marital property law was community of movables and acquests. The other three used the universal community system. The husband was theoretically the manager of all the property of both spouses. Under the new laws, each spouse is the owner and manager of his or her assets. When the marriage is ended by death or divorce, or if the community system is terminated through agreement of the parties or by some other means, the funds of the two parties are combined and then divided equally. This system of deferred community property can be characterized as a combination of separation of assets during marriage with community of property upon termination. But during the first stage each party must consider that the management of his assets will necessarily affect what the other will have upon termination. Therefore, transactions

of special importance such as disposition of immovables may not be made without the consent of the other spouse. A spouse generally may be held liable in damages if he or she has intentionally impaired the ultimate interest of the other.

Prior to the carefully drafted, detailed Nordic legislation, the idea of deferred community property was expressed in rudimentary form in three brief sections of the Civil Code of Costa Rica of 26 April 1886. In later years more elaborate schemes of deferred community of acquests were introduced in Columbia, Argentina, Uruguay, and Israel. Deferred community was also regarded as the proper combination of sharing and equal rights in a modified form called community of increase (Zugewinngemeinschaft) when it was adopted in 1957 in the Equal Rights Law of West Germany. Another modified form of deferred community developed in Texas when that state's system of community property was modernized in the Family Code of 1970.

In a deferred community property jurisdiction, each party is the master of his own fund during the marriage, limited only by the need to have the consent of his spouse for transactions of special importance. Contrasted with this approach is the system of the Soviet Union and other East European socialist countries. The community of acquests fund is managed jointly by husband and wife. But either spouse is presumed to have the other's power of representation in ordinary transactions. This system of mutual representation can work well in a society where private ownership is limited to goods for use and consumption and where all means of production remain in the sphere of public ownership and thus outside of the scope of marital property. Yet similar systems of mutual represen-

18. Law No. 28 of 1932.
20. Law No. 783 of 18 September 1946.

§ 5.24. Protection of Third Persons
(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in his or her name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in his or her possession and is not subject to such evidence of ownership.
(b) A third person dealing with a spouse is entitled to rely (as against the other spouse or anyone claiming from that spouse) on that spouse's authority to deal with the property if:
   (1) the property is presumed to be subject to the sole management, control, and disposition of the spouse; and
   (2) the person dealing with the spouse:
      (A) is not a party to a fraud upon the other spouse of another person; and
      (B) does not have actual or constructive notice of the spouse's lack of authority.
tation have recently been adopted in Italy\textsuperscript{24} and in the states of Arizona, California, Idaho, and Washington.\textsuperscript{25} These laws set out more comprehensively and in greater detail the transactions for which cooperation of both spouses is required.

Jurisdictions in which community property already existed had to adapt in order to achieve legal equality between husband and wife. In West Germany and Italy, where community property had not been the system, it was introduced in modified form for the purpose of adding a scheme of sharing to a scheme of equal rights.\textsuperscript{26}

III. SOLUTIONS UNDER SEPARATE PROPERTY SYSTEMS

Property sharing has been sought in jurisdictions of Anglo-American law by various methods. At least in a formal sense, equality of husband and wife in the ownership and management of property had been accomplished by the Married Women's Prop-

\textsuperscript{24} Italian Civil Code as amended by New Family Law of 5 May 1975, art. 180.

\textsuperscript{25} WASH. REV. CODE § 26.16.030 (1974) reads:

Property not acquired or owned, as prescribed in [the code sections defining separate property], acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

1. Neither spouse shall devise or bequeath by will more than one-half of the community property.

2. Neither spouse shall give community property without the express or implied consent of the other.

3. Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.

4. Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.

5. Neither spouse shall create a security interest other than a purchase money security interest as defined in RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances unless the other spouse joins in executing the security agreement or bill of sale, if any.

6. Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the goodwill of a business where both spouses participate in its management without the consent of the other: \textit{Provided}, That where only one spouse participates in such management the participating spouse may in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

See also ARIz. REV. STAT. § 25-214 (Supp. 1973); CAL. CIV. CODE §§ 5125, 5127 (1975); IDAHO CODE § 32-911 (1974).

\textsuperscript{26} West Germany, Equal Rights Law of 18 June 1957; Italy, New Family Law of 5 May 1975.
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property Acts. But, as we have seen, the separate ownership of his or her respective assets meant that on divorce both spouses would walk away with whatever each happened to own. In the case of a housewife, this easily meant nothing. If she needed support, she would be given a claim for alimony against the husband. This claim would be precarious, if enforceable at all, and it might be forfeited if she was guilty of adultery or other serious marital misconduct. In common law countries, dissatisfaction with this state of affairs has been expressed less vociferously and less systematically than in Europe. The dissatisfaction has been felt no less deeply, however. The courts have quietly and almost imperceptibly brought about changes in the majority of jurisdictions.27

In all common law states except Pennsylvania, the court can make an award of alimony, i.e. order one party to contribute to the support of the other by periodical payments of money. Every now and then an obligor spouse may prefer to free himself or herself of the permanent obligation by paying all of it at its capitalized value. The obligee may likewise prefer capital in his or her hands to the expectation of receiving a pension every month or week. A number of courts decided they were powerless to order transformation of a pension into a lump sum when it was not expressly authorized by statute. Other courts assumed that they had such power even in the absence of explicit legislation. In any case, appropriate statutes have now been enacted almost everywhere.

Where an award of lump sum alimony is possible, payment may be ordered in a variety of forms: a sum of money payable all at once; a fixed sum of money payable in a fixed number of successive installments; transfer of property assets to the obligee or a trustee for the benefit of the obligee; or any combination of these modes of payment. The distinction between alimony as a means of support, and the unscrambling of the parties' property, can easily be lost in such a process. As a result, in the great majority of non-community property states, divorce can be combined with a redistribution of the spouses' property under the guise of alimony, as a mixture of alimony and property settlement, or in the application of a general power of property redistribution. The power to take such measures is assumed by the courts or, as in Oregon,28 is expressly given to the courts by statute. Such a redistribution is

27. See R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 164 (1969); H. CLARK, LAW OF DOMESTIC RELATIONS § 14.8, at 449 (1968). The texts of the state laws concerning property arrangements upon divorce, as of 1969, are set out in R. LEVY, supra app. B.

28. OR. REV. STAT. § 107.105(c), (d), (e).
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not limited to the fund of marital acquests, as it is in traditional community property jurisdictions. There can be a redistribution of all property owned by the parties and, in the extreme case, allotment to one party of all the property owned by the other.

The amalgamation of alimony and property settlement has been promoted by the desire to constitute divorce so that it brings about a final and definite termination of the relationship between the parties. As the view that dissolution of a marriage should clear the way for establishment of a new family gains ground, the tendency to eliminate as much as possible future obligations between ex-spouses also increases in strength, and the courts welcome the opportunity to ease the burden of post-divorce litigation over enforcement or modification of alimony claims.

Diverse approaches to property division thus exist among the jurisdictions in the United States. There are still states in which the court is limited to unscrambling the property already owned by each of the spouses and cannot redistribute property upon divorce. In these states alimony is granted strictly for the purpose of providing support for a party who needs it and, as in New York, has not forfeited it by marital misconduct. On the other hand, in the common law jurisdiction of Pennsylvania and the community property state of Texas, divorce is treated as a final act with such consistency that no periodic alimony is to be ordered and the future is taken care of exclusively by the redistribution of the

29. Tex. Fam. Code § 3.63 (1975) seems to give the court power to reassign all the property of the parties upon divorce. However, in view of its legislative history, the provision has been interpreted as not extending to separate real property. Ramirez v. Ramirez, 524 S.W.2d 767 (Tex. Ct. Civ. App. 1975). On the Texas Family Code concerning property division upon divorce, see Raggis & Rasor, The Anatomy of a Family Code, 8 Family L.Q. 105, 128, 131 (1974).


Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.

Although it is the tendency of the majority of the noncommunity property jurisdictions to combine redistribution of property with alimony, there are community property jurisdictions where partition of the fund of marital acquests can be combined with alimony. There is also the difference between California, where the community fund can be divided in no proportion other than that of fifty-fifty, and the other community property states, where the fixation of the redistribution shares is more or less left to the discretion of the court.

IV. JUDICIAL DISCRETION AS A SOLUTION

The Uniform Act on Marriage and Divorce (UMDA) is an attempt to bring uniformity to the area of property division. This very Act, however, illustrates the difficulty of the task. Sections 307 and 308 of the Act, proposed and approved in 1970 by the


32. CAL. CIV. CODE § 4800 (1975). Exceptions are permitted in the following situations:
1. when property has been deliberately misappropriated by one party to the exclusion of the community property or quasi-community property interest of the other party;
2. if the net value of the community property or quasi-community property is less than $5,000 and the other party cannot be located;
3. community property constituting damages for personal injury.


34. Sections 307 and 308 may be found id. at 202-05.

Section 307. [Disposition of Property]
(a) In a proceeding for dissolution of the marriage, or for legal separation, or a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:
(1) contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
(2) value of the property set apart to each spouse; and
(3) economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.
(b) For purposes of this Act only, “marital property” means all property acquired by either spouse subsequent to the marriage except:
(1) property acquired by gift, bequest, devise, or descent;
(2) property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
National Conference of Commissioners on Uniform State Laws, are characterized by the following features:

1. The sole ground for divorce is "that the marriage is irretrievably broken" (sec. 302).

2. The purpose of disposition of property on divorce is not merely that of determining who owns what, but also to take care of future needs insofar as a spouse cannot be, or cannot be made to be, self-supporting.

   (3) property acquired by a spouse after a decree of legal separation;
   (4) property excluded by valid agreement of the parties; and
   (5) the increase in value of property acquired prior to the marriage.

(c) All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (b).

COMMENT

Subsection (a) establishes standards for the court's disposition of property in four kinds of proceedings: (1) dissolution of marriage; (2) legal separation; (3) independent proceedings for property disposition following an earlier proceeding for dissolution of the marriage in which the court had lacked jurisdiction over the person of the absent spouse, and (4) independent proceedings for property disposition following an earlier proceeding for dissolution of marriage in which the court made no disposition, equitable or otherwise, of property located in the enacting state. In all four kinds, the court is directed first to set apart to each spouse all of his or her property that is not defined as marital property by subsection (b), and secondly to divide the marital property between the parties in accord with the standards established by the section. The court may divide the marital property equally or unequally between the parties, having regard for the contributions of each spouse in the acquisition thereof, the value of each spouse's non-marital property, and the relative economic position of each spouse following the division. The court is directed not to consider marital misconduct, such as adultery or other non-financial misdeeds, committed during the marriage, in its division. If the parties have reached a mutually satisfactory property settlement agreement which is not unconscionable (see Section 306) the court will not be called upon to make a disposition under this section.

Community property states which require an equal division of community property on termination of marriage may wish to substitute that rule in this section. Appropriate changes to achieve this aim would be to substitute for the language beginning "without regard for marital misconduct" the words "equally between the spouses." Subdivisions (1), (2) and (3) of subsection (a) could then be omitted; but the state may wish to retain, as a final sentence in subsection (a) the following: "In making the division, the court may consider the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children."

Subsection (b) defines marital property only for the purposes of division on dissolution of marriage or legal separation. No attempt is made to regulate the respective interests of the spouses in property during the existence of the marriage.

Subsection (c) creates a presumption that all property ac-
3. The property that can be redistributed is limited to what
would be the community fund in a system of community of
acquests. Each party remains entitled, however, to keep whatever
“separate property” he or she may own.

quired after marriage and prior to a decree of legal separation is
marital property. In the absence of contrary evidence this pre-
sumption will be controlling, regardless of the manner in which
the property was acquired. A spouse seeking to overcome the pre-
sumption has the burden of proof on the issue of identification. The
presumption is overcome by a showing that the property (1) was
acquired prior to the marriage, was the increase in value of such
property, or was acquired after the marriage, in exchange for such
property; (2) was acquired after the marriage by gift, bequest, de-
vote, or descent or in exchange for property so acquired; (3) was
acquired after the entry of a decree of legal separation; or (4) was
designated as non-marital property by a valid agreement of the
spouses, all as provided in subsection (b). The phrase “increase
in value” used in subsection (b) is not intended to cover the
income from property acquired prior to the marriage. Such income
is marital property. Similarly, income from other non-marital
property acquired after the marriage is marital property.

SECTION 308. [Maintenance]
(a) In a proceeding for dissolution of marriage or legal sep-
aration, or a proceeding for maintenance following dissolution of
the marriage by a court which lacked personal jurisdiction over
the absent spouse, the court may grant a maintenance order for
either spouse only if it finds that the spouse seeking maintenance:
(1) lacks sufficient property, including marital property ap-
portioned to him, to provide for his reasonable needs, and
(2) is unable to support himself through appropriate employ-
ment or is the custodian of a child whose condition or circum-
stances make it appropriate that the custodian not be required to
seek employment outside the home.
(b) The maintenance order shall be in such amounts and for
such periods of time as the court deems just, without regard to
marital misconduct, and after considering all relevant factors in-
cluding:
(1) the financial resources of the party seeking maintenance,
including marital property apportioned to him and his ability to
meet his needs independently, including the extent to which a pro-
vision for support of a child living with the party includes a sum
for that party as custodian;
(2) the time necessary to acquire sufficient education or training
to enable the party seeking maintenance to find appropriate
employment;
(3) the standard of living established during the marriage;
(4) the duration of the marriage;
(5) the age, and the physical and emotional condition of the
spouse seeking maintenance; and
(6) the ability of the spouse from whom maintenance is sought
to meet his needs while meeting those of the spouse seeking main-
tenance.

COMMENT
Section 308(a) authorizes the court to order maintenance to
either spouse in three kinds of proceedings: (1) dissolution of mar-
rriage; (2) legal separation; and (3) independent proceedings for
maintenance following an earlier proceeding for dissolution of the
marriage by a court which lacked personal jurisdiction over the
absent spouse and thus could not affect maintenance [see comment
to Section 302(a)]. In all three kinds of proceedings the court may
award maintenance only if both findings listed in (1) and (2) are
4. The distribution of the marital acquests is not to be made in any fixed proportion, but is to be based on the discretion of the court.

5. In the exercise of its discretion the court is guided by a set of statutory directives; it is forbidden, however, to consider marital misconduct.

The scheme of the UMDA met with what one may term violent critique in the Special Committee of the Family Law Section of the American Bar Association. While the ABA Section agreed with the Commissioners on Uniform State Laws that a marriage ought to be dissolved when it had broken down irretrievably, it insisted that courts should be guided by a statutory indication of circumstances under which such irretrievable breakdown exists. Both groups agreed that accusations of marital misconduct should be excluded, not only in the decision about the dissolution of the marriage, but also in the determination of its financial consequences.

There has been little controversy either as to the disdain for fixed proportions in the allotment of property to be distributed or about the catalog of factors to guide the courts in dividing property. Controversy has arisen, however, over the scope of the property that may be distributed between divorced spouses. Should it be limited to the "marital property" or should the court have power to redistribute every thing that might be owned by them? The former position—that of the Commissioners on Uniform State Laws—was the system of community of acquests as it had been taken from Spain by the American community property jurisdictions. The latter position—that of the Family Law Section of the ABA—has been developing in the noncommunity property states. It had also long been the position of the community property state of Texas and, as we may add, of the Nordic countries, the Netherlands, and

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35. ABA Family Law Section, Proposed Revised Uniform Marriage and Divorce Act, 7 FAMILY L.Q. 135, 151 (1973); Podell, The Case for Revision of the Uniform Marriage and Divorce Act, 7 FAMILY L.Q. 169, 175 (1973).
the Republic of South Africa. The Law Reform Commission of Canada expressed agreement with the scheme of the UMDA and recommended a new Commonwealth Law of Divorce in which the provinces will be given the choice between schemes corresponding to the two alternatives of the revised UMDA.

In the discussions between the two organizations, the view of the Family Law Committee of the ABA prevailed. However, it was recognized that the new version might not be acceptable to community property or even other community of acquests jurisdictions.\(^{36}\) The former version of section 307 was thus added to the new version as an alternative.\(^{37}\)

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36. In WASH. REV. CODE § 26.09.080 (1974), the community property state of Washington has already adopted a system that is closer to alternative A of the UMDA than to alternative B. The alternatives are set out in note 37 infra.


**Alternative A**

[Disposition of Property]

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally 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. In making apportionment the court shall consider the duration of the marriage, any prior marriage of either party, any 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 as the contribution of a spouse as a homemaker or to the family unit.

(b) In the proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

**Alternative B**

[Disposition of Property]

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal dissolution by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property,
The new version—alternative A—may well reflect the desire to constitute divorce as a definite termination of the relationship between the former spouses. Less periodical alimony will be required if more property of the financially capable spouse is allotted to the needy spouse. The new version of section 307 may also appeal to judges and lawyers in the many states where it has been the practice to resuffle all the property of divorcing spouses. For partners who have not kept inventories of what exactly is owned by him and by her, the presumption that all assets are acquests or, as previous versions of the UMDA said, marital property, can make all property available for redistribution. But does the scheme correspond to popular expectation? Is marriage truly seen as a full community of life, of fortune, and of property in a time in which marriage is no longer seen as an indissoluble partnership for life? Are we truly far from the stage at which marriage is widely regarded as a scheme of living and copulating together until affections erode?

What renders the scheme particularly dangerous is committing the redistribution of the parties’ property to judicial discretion. It is true that the UMDA seeks to guide this discretion, but it

without regard to marital misconduct, in just proportions after considering all relevant factors including:
(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
(2) value of the property set apart to each spouse;
(3) duration of the marriage; and
(4) 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 a reasonable period to the spouse having custody of any children.

**COMMENT**

Alternative A, which is the alternative recommended generally for adoption proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a). It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the “homemaker’s services to the family unit.” This last is a new concept in Anglo-American law.

Subsection (b) affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children.

Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone, in accordance with an enumeration of principles, resemblant, so far as applicable, to those set forth in Alternative A.
remains discretion that can be exercised over a wide range. It is unsettled to what extent, if any, the exercise of discretion of trial judges will be controlled by appellate courts.

Judicial discretion in the distribution of the property of divorcing spouses may appear to be not only commendable but indispensable. No hard and fast uniform rule seems able to do justice to the infinitely varying circumstances of individual cases. Judicial discretion guided by carefully elaborated statutory directives may be the only possible way to achieve just results, especially if the mass to be divided consists of the entire belongings of both parties.

But, as in all problems of public policy, one has to consider the price, and the price of individual justice can be high. One can never entirely foresee how judicial discretion will be exercised, and foreseeability may be vital to a married person who must decide whether or not to take the grave step of divorce. A husband wants to know how much of his property he will have left and to what extent his future will be burdened with obligations of maintenance for the ex-wife and support for children who may no longer live with him. For the wife it may be decisive to know the resources she can count on for the future. Professor Kahn-Freund has severely criticized this difficulty of foreseeability as a dangerous feature of the English system.\(^8\)

\(^8\) Matrimonial Property: Where Do We Go From Here? 11 (Josef Unger Memorial Lecture, University of Birmingham 1971).

Under the English Matrimonial Causes Act 1973, ch. 18, judicial discretion has been preserved with respect to all “Financial Relief for Parties to Marriage and Children of Family.” Under Section 23(1), the court may order that either party to the marriage shall make to the other periodical payments, for such term as may be determined. “Without prejudice to the generality of the provision,” subsection (3) declares that lump sum payment may be ordered for the purpose of enabling the obligee to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making application for an order under section 23. For the purpose of “property adjustment” the court may, under section 24, order “that a party to the marriage shall transfer to the other party such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.” In section 25 guidance is given to the court for the exercise of the discretion given to it under sections 23 and 24.

[T]he court . . . [is] to have regard to all the circumstances of the case including the following matters, that is to say—

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
(c) the standard of living enjoyed by the family before the breakdown of the marriage;
The unpredictability of the exercise of judicial discretion also impedes settlement of the property issue by agreement of the parties, who need a firm basis upon which to negotiate. Under the UMDA, agreement is treated as the most desirable form of settlement, just as it is from the viewpoint of divorcing individuals and in public opinion. Referral of a vital issue to judicial discretion can be tantamount to reference to litigation. This means delay, expense, and often bitterness, even if the venom of mutual accusations is sought to be excluded by prohibiting consideration of marital misconduct. An invitation to litigation is undesirable even where courts are easily accessible, confidence in judicial wisdom is high, court calendars are not crowded, procedure is expedient, the cost is low, and parties may effectively represent themselves without lawyers. These conditions may exist in the Nordic countries, and perhaps in one or another jurisdiction in the United States. But can they be assumed to exist everywhere? And where they do not exist, divorcing parties and their children have to pay a high price. Of course, the hard and fast establishment of equal distribution or some other fixed proportion such as the Swiss 2:1 ratio for the husband and wife does not exclude all litigation or dickering. Title to particular assets, the dates of acquisition, or the particularly troublesome question of value must all be determined. Still, the scope of controversy is reduced, a highly unpredictable issue is eliminated from litigation, and extra-judicial settlement is facilitated.

In spite of these considerations, some may feel that individual justice is worth the price. The point is that before we adopt one or the other legislative solution we must be aware that there is a price to be paid. We cannot have both individual justice (or more correctly, the hope of individual justice) and predictable, fast, easy, and inexpensive disposition of matters of divorce.

(d) the age of each party to the marriage and the duration of the marriage;
(e) any physical or mental disability of either of the parties to the marriage;
(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

Matrimonial Causes Act 1973, § 25(1).
Of course, in some cases the application of fixed proportion would lead to results of such shocking inequity that they cannot be tolerated. Models for the avoidance of insufferable unfairness can be found in practically all legal systems where equal division is established as the general rule. Under French law one party may be ordered to pay the other "damages for the pecuniary or non-pecuniary harm caused by the dissolution of the marriage."40 In extreme cases a claim for damages may also be based upon the general provision of Civil Code article 1382.41 The original version of divorce laws in the Nordic countries also provided for an action for damages to cure inequities of equal distribution. However, Swedish courts were disinclined to apply this provision because it compelled them to engage in an investigation of misconduct that the divorce law has tried to eliminate and that the Swedish courts felt unable to tackle adequately.42 The original provision of the Nordic legislation was thus replaced by the new section 11:122, which reads as follows:

If in the partition following a divorce [property] division according to the regular rules is openly unfair in view of the economic circumstances of the spouses and the duration of the marriage, division is to be made according to such other principles as appear appropriate. Neither spouse may, however, receive on the basis of this provision more than what corresponds to his share of the fund of the marital goods.

In 1963 the courts of Denmark were given limited discretion to order unequal division after marriages of short duration and insignificant accumulation of savings from gainful marital activity.43

Perhaps the most workable solution is that of the West German Equal Rights Law of 18 June 1957, which established the marital property system called community of increase. The increases that have occurred in the estates of each spouse during marriage are compared with each other. The amount of the smaller increase is deducted from that of the larger and the difference is divided by two. The party with the larger increase must then pay the other exactly one-half of the difference. This general rule can be changed if it would result in "gross unfairness under the circumstances of the case." The law goes on to say that "gross unfairness

may exist in particular if the spouse whose property increase has been the smaller has for an extended period of time been guilty of failure to satisfy those economic obligations which are implied in the marital relationship." This approach opens the door to some exercise of judicial discretion, but it is limited to certain cases that are not difficult for the parties to predict. In the run-of-the-mill case the parties will know that the partition will be equal and that litigation about the proportions would be futile.

V. Marital Contract as a Solution

The most important way to correct a statutorily fixed proportion of distribution may be to allow the parties to provide for a different disposition in advance of the divorce. In non-Anglo-American community property jurisdictions, for instance in France and West Germany, a marital contract may provide that the distribution of the community fund (or, in West Germany, the increase of the respective estates) shall not be by equal parts. It seems that in all community property jurisdictions the parties may opt to exclude community property altogether and to live with their agreed separation of assets. In such a case, reshuffling of assets on divorce seems to be excluded altogether.45

In common law countries, ante-nuptial settlements are less common, and a contract regarding the financial consequences of a divorce not immediately pending or even contemplated is generally regarded as legally invalid.46 This ancient rule developed when marriage was still seen as a lifelong union and divorce as a rare and deplorable social misfortune. Even those to whom divorce still appears deplorable must see that it is no longer rare and that its incidence cannot be reduced by legal nonrecognition of contracts regulating the consequences in advance. The rule of invalidity is ripe for abandonment. The need for admission of advance contractual regulation clearly exists in jurisdictions with a fixed proportion of property division. But an equal need for recognition exists in jurisdictions that leave property distribution to judicial discretion. Marrying parties of today know that their marriage may

44. German Civil Code § 1381.
45. France, Civil Code art. 1497, no. 5; West Germany, IV STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH; FAMILIENRECHT § 1408 n.79 (Felgenträger ed. 1970). For the Netherlands, see De BRUIJN, HET NEDERLANDSE HUWELIJKSVERMOGENSRECHT 375 (2d ed. Soons & Kleijn eds. 1959). In Sweden, however, while parties may opt for separation of assets, they may not change the equal division of the community fund if they live under the legal regime of deferred community property. GB 13:3, 8:1, para. 2.
end in divorce, and they must be able to provide for the reduction of controversy in that eventuality.

It also appears necessary to re-evaluate the hitherto neglected area of preventing evasion of the property distribution scheme, whatever it may be, whether it is provided by law or by contractual agreement. At present the only legal protection available is an injunction forbidding a party to dispose of all or part of his property. Even this remedy is rarely available unless a divorce suit has been commenced or is impending. There appears to be no remedy by which a party to a marriage may upon divorce recuperate an asset that was owned by the other and alienated or encumbered by him. Under the heading of fraud to the widow's share there has been much discussion about protection in the case of death. While no American state except Louisiana permits the surviving spouse's indefeasible share in a decedent's estate to be defeated by testamentary disposition, the protection against defeasance by transaction inter vivos is precarious. A contradiction thus exists between the extensive protection of the surviving spouse from disinheritance, and his or her insufficient protection against defeasance by inter vivos transactions.

Legislatures have not been under much pressure to change this situation, and courts have been reluctant for two reasons. First, limitations on a person’s freedom to give away or otherwise dispose of his property may appear to be incompatible with the traditional view of property as necessarily implying unlimited freedom of use and disposition. However, in the present age of zoning, eminent domain, securities regulation, consumer protection, antitrust, environment protection, and whatnot, this 19th century ideal no longer seems to be sacrosanct. The second reason may be the reluctance to endanger bona fide purchasers more than they already are under American law. If Mr. A has made a gift of a piece of land, stock, or a work of art to Donee, Mrs. A might upon Mr. A’s death recover the asset from Mr. B.F.P., to whom Donee has sold it. In civil law systems a bona fide purchaser is generally protected. Mrs. A’s remedy is against Donee, who may have to pay her the purchase price he received from Mr. B.F.P. If Donee had no knowledge that Mrs. A’s expectation was impaired by her husband’s donation, Donee’s duty to pay is limited to the amount he still has. Why should this approach not also be applicable in common law jurisdictions? Why should it not apply to both death and divorce? Obviously the details of the regulation could not be exactly the same in the two situations.

47. Macdonald, Fraud to the Widow’s Share (1960).
A clash between seemingly incompatible social theories also exists in the area of contract regulation of the financial consequences of divorce. A wide measure of freedom to contract appears to be indispensable for the regulation of property division and the maintenance of the economically weaker party by the economically more advantaged. While advance regulation is frowned upon at present, the law allows or even favors regulation by contract made in connection with a separation or divorce already pending. In fact, disposition by party agreement occurs in the overwhelming majority of cases, estimated at some ninety percent or more. The prevalence of contractual regulation, however, does not dispense with the necessity for regulation by law. Parties desiring to handle the matter by their own arrangement want to know what the outcome would be if the matter were decided by a court. Even where decision is left to judicial discretion, parties are anxious to know what practice is generally followed by each of the judges before whom they may appear, and both parties are likely to engage in maneuvers tending to get the case before the judge whose practice appears most favorable.

In the conclusion of contracts—both pre-marital and upon separation—judicial supervision is appropriate because dominance by one party over the other can easily occur. In accordance with prevailing American law, UMDA section 306 provides that in a case of judicial separation or divorce the agreement must be shown to the court and the court can declare the agreement invalid if “it finds after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.” As the Comment to section 306 points out, the term “unconscionable” is not new. It is found in section 2-302 of the Uniform Commercial Code and is being used by courts in the context of contract cases.

The provision is well meant and probably indispensable, but the extent to which a separation agreement will actually be scrutinized by the judge of an overcrowded divorce court on his own motion is dubious. Any unfairness in a pre-marital settlement designed to regulate a divorce or separation not yet immediately contemplated is more likely to be brought up by one party only in a post-divorce proceeding. If attack is made at that stage, the

48. Decrees of divorce are granted without final contest in about 90 percent of all cases in the United States, England, Germany, France, Japan, and the Nordic countries. See M. Rheinstein, Marriage Stability, Divorce, and the Law 247-60 (1972). In such cases the financial consequences of the divorce are regulated by agreement of the parties, including open or tacit agreement not to make any claims.
exercise of judicial control must be limited to cases of extreme over-reaching. Parties have a profound interest in clearly understanding what their financial position will be after the divorce. It must therefore be possible for them to agree that there will not be judicial modification of the property or maintenance terms of a divorce decree or of a separation agreement except in extreme circumstances of unconscionability at the time of the original determination. Any limitation of the parties’ freedom to provide for unchangeability must be limited to child support.

VI. THE SPECIAL PROBLEM OF RETIREMENT BENEFITS

Irrespective of whether the financial consequences of a divorce are regulated judicially or by agreement of the parties, a thorny problem is how to deal with future rights of, or expectations to, pensions, annuities, or other benefits upon retirement or incapacity. Under schemes such as social security or pensions for employees of government or private enterprise, an employee’s widow is ordinarily entitled to benefits upon the employee’s death. If an employee is divorced and then dies, his ex-wife is not his widow and consequently not entitled to widow’s benefits. Such claims seem to belong only to the later wife to whom the employee happens to be married at the time of his death. The desire to protect the prior wife from the loss of such benefits is a source of much of the opposition to no-fault divorce upon unilateral application.\[^{49}\] The problem is becoming more significant as savings increasingly take the form of pension rights and similar benefits rather than capital savings.

Where both spouses are actively engaged in gainful pursuits, and where the wife has her own pension rights, the problem is less urgent than in cases of old-fashioned housewife marriages or of modern marriages in which the wife is the breadwinner and the husband the homemaker. Even so, housewife marriage and female dependency are still sufficiently common that novel ways of handling this new form of property in case of divorce are being sought.

Splitting a governmental pension between the ex-wife of an employee and his widow has long been the law in Sweden.\[^{50}\] A penetrating analysis of various possible solutions was undertaken

\[^{49}\] A limited right to object to a unilaterally applied for no-fault divorce is granted, for instance, in the laws of Switzerland, Civil Code art. 142; West Germany, Marriage Law of 21 December 1940 § 48, para. 2; and England, Matrimonial Causes Act 1973 § 5.

\[^{50}\] M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 143 (1972).
by the English Law Commission. The West German Law of 1976 contains a detailed attempt to deal legislatively with the wide variety of possible situations.

Like practically all other problems of property division upon divorce, the treatment of pension rights and similar benefits is common to all countries at comparatively equal stages of industrialization. Consideration of foreign attempts at solution is self-evident for European law makers. American law makers confronted with the problem of how to divide marital property in the form of retirement benefits might also derive some lessons from the experiences and errors of their foreign colleagues.

VII. A Final Overview

Consideration of ideas and experiences from abroad could be as valuable a device in lawmaking and adjudication as the use of precedent or of learned writing. In most branches of private law the same problems are encountered in all highly industrialized countries, and the legal solutions adopted in those countries are strikingly similar in basic approach, although varying considerably in detail. In the field of divorce this observation holds true with particular force.

As discussed earlier in this article, marriage has been undergoing a transformation everywhere in the industrialized world. As Christianity strengthened its hold over the population of Europe, marriage was transformed from a private affair between the parties into an institution strictly regulated by the Church. The existence of a marriage between the parties became an indispensable condition for permitting sexual intercourse. All extramarital intercourse was treated as sinful, and even within marriage intercourse other than in a normal way apt to produce offspring was considered sinful. Marriage was to be not only strictly monogamous but indissoluble. Divorce in the sense of cutting the bond of marriage and thus enabling a party to remarry or even to have legitimate intercourse during the lifetime of the other spouse did not exist. Above all, in the secular sphere, marriage was the one and only kind of sexual relationship that could produce “legitimate” offspring, i.e. offspring capable of succeeding to the status of the parent and thus to his estate. From the Age of the Reformation on, control of marriage gradually shifted from the Church to the state; and in the majority of Protestant countries, divorce became

possible. But even then divorce was conceived of as a faithful spouse's privilege to repudiate a partner who had been guilty of serious marital misconduct.

All over the modern world, this traditional conception of divorce is being abandoned. We are on the way toward the ancient idea of treating marriage and sex life as private matters. The trend of not only permitting divorce but transforming it from a punishment for misconduct into an increasingly easy exit from an unhappy or a merely unsatisfactory situation is proving irresistible. But the variation from the traditional view of divorce is still unequal in different jurisdictions. This is true not only among nations, but also among sister states in America. Also irresistible has been the changing social and economic role of women. All over the industrialized world housewife marriage, or marriage for maintenance, is giving way to double-earner marriage, but nowhere has housewife marriage disappeared entirely.

In all jurisdictions the coexistence of the various forms of marriage has created problems of how to deal with a married couple's property when the marriage is breaking up. The different solutions attempted depend to some extent on the imagination and creativity of individuals in the lawmaking process. But more significantly, the solution chosen is a function of the peculiar situation of each jurisdiction: What type of marriage actually prevails? What is the politically dominant ideology? Is the body politic monolithic and thus trying to preserve traditions? Or, at the other extreme, is it trying to move women en masse from housework to the labor force? Is the political ideology pluralistically aiming at accommodating heterogeneous forms of marriage? What degree of confidence does the population have in its judiciary? To what extent is the legal profession anxious and able to protect what it regards as its interests? These and similar questions ought to be consciously considered wherever and whenever changes in the law of property division are contemplated. Observation and analysis of foreign experiences help to raise such contemplations to the level of purposeful and rational inquiry. It is irrelevant whether the foreign jurisdiction is within what is called the sphere of the common law or of the civil law. In the field of divorce this distinction does not apply.