

Louisiana Law Review

Volume 72 | Number 1

The Future of Community Property: Is the Regime Still

Viable in the 21st Century? A Symposium

Fall 2011

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Repository Citation

J. Thomas Oldham, *Should Separate Property Gradually Become Community Property as a Marriage Continues?*, 72 La. L. Rev. (2011)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/6>

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Should Separate Property Gradually Become Community Property as a Marriage Continues?

J. Thomas Oldham*

I. INTRODUCTION

“Community property” states do not always apply identical rules to determine the rights of spouses when a marriage ends. Indeed, as I have recently shown, there are some significant differences among these states.¹ However, all of them adhere to the distinction between separate and community property. Premarital acquisitions by a spouse and property acquired by one spouse during marriage by gift or inheritance are separate property, and acquisitions during marriage due to the effort of either spouse are community property. The spouses each have a 50% interest in each item of community property from the moment of acquisition; separate property is solely owned by the acquiring spouse. At dissolution the community estate is shared, but separate property is not, regardless of the length of the marriage.² Separate property remains separate, as long as it is segregated from other property, and the parties do not change title or sign a written agreement to change its character.

This distinction between premarital acquisitions and gifts or inheritances by one spouse and acquisitions during marriage due to effort has also been accepted by a majority of the non-community property U.S. states as the guiding principle for how property should be dealt with upon divorce. “Separate property” is not to be divided, while “marital property” is shared.³

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1. See J. Thomas Oldham, *Everything is Bigger in Texas, Except the Community Property Estate: Must Texas Remain a Divorce Haven for the Rich?*, 44 *FAM. L.Q.* 293 (2010).

2. The sole exception to this rule is Washington, where separate property can be divided at divorce. See *WASH. REV. CODE ANN.* § 26.09.080 (West, Westlaw current through Aug. 2011 amendments).

3. See generally J. THOMAS OLDHAM, “Property” and “Marital Property,” in *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 5.03, at 5–9 (2010). Professor O’Brien states that “community-property standards are increasingly *predominant* in divorces occurring in separate-property [non-community property] states.” Raymond C. O’Brien, *Integrating Marital Property into a Spouse’s Elective Share*, 59 *CATH. U. L. REV.* 617, 688 (2010) (emphasis in original).

The generally accepted idea is that spouses are partners in the marital economic enterprise, which encompasses all acquisitions during marriage that result from the efforts of either spouse. Premarital acquisitions, as well as gifts or inheritances received by one spouse during marriage, are not considered part of this economic partnership.

Some have begun to question this distinction. Various proposals have recently been made that, particularly in marriages of substantial duration, spouses at dissolution should share a portion or all of what would normally be considered “separate property.”

I will summarize these various proposals below and describe the commentators’ arguments why such a change would be desirable. I will outline why I disagree and then offer other suggestions about how sharing could be increased at divorce.

II. PROPOSALS TO CHANGE THE RULES APPLICABLE AT DIVORCE BY PARTIALLY OR FULLY TRANSMUTING SEPARATE PROPERTY INTO COMMUNITY PROPERTY

A. Proposals to Share Pre-marriage Savings

The American Law Institute (in the Principles of the Law of Family Dissolution) has proposed that, when determining what property should be divided upon divorce, premarital “separate” property should gradually become “marital” over time, once the length of marriage exceeds the specified minimum duration.⁴ The drafters argue that after many years of marriage, spouses “typically do not think of their separate-property assets as separate,” and “the longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on . . . expectations [of having access to] the separate property of both spouses.”⁵

In an example discussed in the body of this proposal, the drafters envision a system where shared ownership would begin after five years of marriage at an increment of four percent per year thereafter. So, if a marriage ends in divorce after 20 years, 60% of pre-marriage property would be treated as marital⁶ (four percent per year for the 15 years of marriage exceeding the five-year

4. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12, (2002) [hereinafter ALI PRINCIPLES]. The drafters note that this minimum duration should be at least “two or three years” before any sharing should begin, and after “thirty or thirty-five years” total sharing should occur. *Id.* cmt. b.

5. *Id.* cmt. a.

6. *Id.* cmt. b, illus. 1.

mark).⁷ Under such an approach, 100% of pre-marriage property would be treated as marital upon divorce after 30 years of marriage.⁸ The ALI does give a court discretion not to apply this sharing doctrine if it would result in a substantial injustice.⁹ This proposed regime of gradually sharing pre-marriage savings could be avoided via a premarital agreement that would specify that the parties do not wish to adopt that regime.¹⁰

Other commentators have also supported this ALI proposal to gradually recharacterize pre-marriage savings for purposes of determining what property should be shared at divorce. Professors Frantz and Hagan argue that this approach is consistent with “the moral imperative to share all one has with a loved one in financial need” as well as “the fact that, over time, spouses feel less need and less desire to guard against the possibility of divorce and remarriage.”¹¹

Another commentator, like the ALI, contends that “spouses tend to share more and more of their [separate] assets as the marriage progresses.”¹² This commentator further proposes a system of sharing premarital savings that would depend on the length of the marriage and the age and life expectancy of the owning spouse at the time the marriage begins. At divorce, a portion of the pre-marriage savings would be marital; the marital share would be calculated by comparing the duration of the marriage at the time of divorce to the life expectancy of the owner of the property when the marriage began. For a person age 30 at the beginning of the marriage with a life expectancy of 50 years, if the marriage ends in divorce after 10 years, the pre-marriage savings would be considered 10/50 marital at divorce.¹³ In contrast, if a person marries at age 60 with a life expectancy of 80 and divorces in 10 years, it would appear that, under this approach, the premarital savings would be considered 10/20 marital. So,

7. It does not appear that the drafters are suggesting that in a community property state, actual ownership during an intact marriage would gradually change, but this is not clear.

8. ALI PRINCIPLES, *supra* note 4, at § 4.12 cmt. b, illus. 5.

9. *Id.* at § 4.12(6).

10. *See, e.g., id.* at § 7.05(5). This section provides that most of the grounds normally available for challenging the enforcement of a premarital agreement under the ALI proposal would not be available to challenge the parties' agreement not to share separate property.

11. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 114 (2004).

12. Shari Motro, *Labor, Luck and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1625 (2008).

13. *Id.* at 1653–54.

unlike the ALI proposal, under this regime sharing would be greater for spouses marrying later in life.

B. Proposals to Share Gifts or Inheritances Received During Marriage

The same commentators also propose that gifts or inheritances received by one spouse during marriage should not always be considered totally separate property. Under the ALI proposal, the amount of sharing is impacted by the point in time that the gift is acquired. Even in a long marriage, no sharing occurs if the gift is received shortly before the divorce.¹⁴ In contrast, there is more sharing with respect to gifts received early in marriage. The Reporters discuss what should occur if an inheritance is received in the 10th year of marriage and the couple divorces 10 years later. The proposed statute would allow sharing of 4% per year of marriage, starting five years after receipt, plus 2% per year for the time between five years of marriage and the date of receipt. The above example results in sharing 20% (4% x 5) plus 10% (2% x 5), or 30% of the gift.¹⁵

Under the ALI, a spouse can avoid the application of this sharing regime by giving the other spouse written notice when the gift or inheritance is received of a desire not to share.¹⁶ The sharing regime may also be circumvented if the donor or testator expresses a wish that the sharing regime not apply.¹⁷

Other commentators offer different mechanisms for sharing gifts and inheritances received during marriage.¹⁸ Professors Frantz and Dagan would determine the marital character of a gift for purposes of divorce by comparing the marital duration when the gift is received to the length of the relationship between the donor and donee at that time. So, if a spouse who is 52 years old receives a gift after eight years of marriage from a parent, the gift would be 8/52 marital.¹⁹ So, in contrast to the ALI, there generally would be greater sharing regarding gifts received later in the marriage.

In contrast, Professor Motro suggests that the marital claim should be calculated by comparing the length of time between the

14. See ALI PRINCIPLES, *supra* note 4, § 4.12, cmt. b, illus. 1 (suggesting that the gift must have been received more than three years before divorce for sharing to occur).

15. *Id.* illus. 2.

16. *Id.* at § 4.12(4).

17. *Id.* at § 4.12(5).

18. Again, this does not appear to be a claim of immediate ownership but is merely how the property should be treated if the parties divorce.

19. See Frantz & Dagan, *supra* note 11, at 118 n.195.

date of receipt and divorce to the recipient's life expectancy on the date of receipt. So, if a spouse inherits property at age 38, with a life expectancy of 80 years, and the parties divorce two years later, 2/42 of the gift should be marital.²⁰ In contrast to the ALI proposal, it appears that there would be sharing under these last two proposals for gifts received shortly before divorce. In addition, Professor Motro would not let the recipient unilaterally opt out of sharing a gift or inheritance by giving the other spouse notice that the recipient did not intend to share.²¹

III. THE UNIFORM PROBATE CODE PROPOSAL REGARDING THE SURVIVING SPOUSE'S FORCED SHARE

A committee was appointed in the late 1980s to revise the "forced share" system to provide for a surviving spouse in common law states.²² When reevaluating the surviving spouse's elective share in connection with the 1990 revisions to the Uniform Probate Code, the drafters attempted to implement in a general way the partnership theory of marriage. The drafters decided that, unlike the previous version of the UPC, the survivor's claim should vary based upon the duration of the marriage. However, the drafters did not attempt to replicate the system applicable at divorce in many states that distinguishes between "marital property," which is shared, and "separate property," which is not.²³

Among other things, the drafters concluded that it would require too much time and effort to trace what was marital and what was separate.²⁴ They argued that this result could roughly be replicated by gradually treating more of the parties' property as marital as the marriage endures.²⁵ The 1990 UPC amendments

20. Motro, *supra* note 12, at 1654.

21. *Id.* at 1657.

22. For a general discussion of these "forced share" statutes, see J. Thomas Oldham, *You Can't Take It With You, and Maybe You Can't Even Give It Away*, 41 U. MEM. L. REV. 95 (2010), and O'Brien, *supra* note 3.

23. See generally Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society*, 26 REAL PROP. PROB. & TR. J. 683 (1992); O'Brien, *supra* note 3, at 673 n.278.

24. See Lawrence W. Waggoner, *The Multiple Marriage Society and Spousal Rights under the Uniform Probate Code*, 76 IOWA L. REV. 223, 247 (1991). Regarding tracing in general, see OLDHAM, *supra* note 3, at § 11.03[1], and J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219 (1989).

25. See generally Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment* (Univ. of Mich., Working Paper No. 208, 2010) [hereinafter *Working Paper*]. See also, Lawrence W. Waggoner, *The*

provide for full sharing after 15 years; Prof. Waggoner, the Reporter for the 1990 amendments, has more recently proposed that this period be extended to 25 years.²⁶

Under the 1990 Uniform Probate Code amendments, no attempt is made to determine whether property was acquired before or during marriage or by gift or inheritance. Indeed, Prof. Waggoner argues it would be unfair to do this in situations where one party segregated his or her separate property and the other did not.²⁷ He also contends that his proposed scheme is similar to what would happen in a community property state where, in a long marriage, it becomes increasingly difficult to trace any property in existence at dissolution to pre-marriage savings or prior gifts or inheritances.²⁸

Professor Newman has challenged these arguments by Professor Waggoner.²⁹

IV. COMMENTS ON THE PROPOSALS

A. The Expectations of the Spouses

Commentators have primarily focused on whether spouses should share pre-marriage savings or gifts or inheritances at divorce, as opposed to when a marriage continues until the spouse dies.³⁰ One of the main arguments in favor of recharacterizing separate property as community property at divorce is that, over time, spouses gradually treat all property of both spouses as family resources; the distinction between “separate” and “community,” it is argued, withers away. But, is this true? The ALI proposal admits there are no studies confirming this and simply relies on assumptions about spouses’ expectations.³¹

If a party wants to share ownership of separate property with a spouse, a few avenues are already available. The owning spouse could add the other’s name to the account or convey a 50% interest

Uniform Probate Code’s Elective Share: Time for a Reassessment, 37 U. MICH. J.L. REFORM 1 (2003).

26. See Waggoner, *Working Paper*, *supra* note 25, at 16 (discussing a possible amendment to Uniform Probate Code § 2-202).

27. *Id.* at 13.

28. *Id.* at 13–14.

29. See Alan Newman, *Incorporating the Partnership Theory*, 49 EMORY L.J. 487, 521–22 (2000).

30. For example, the ALI, Professors Frantz and Dagan, and Professor Motro all focus on division of property at divorce.

31. See ALI PRINCIPLES, *supra* note 4, at § 4.12 cmt. a.

to the spouse.³² Alternatively, if the property consists of liquid assets, the assets could gradually be commingled with marital funds.³³ In addition, the parties could sign a written agreement to change the character of the property. If the party owning property did none of these things and kept the property separate, is it clear there was an intention to share?

When discussing an “intention to share,” it also seems there could be a variety of levels of intentions to share. One spouse may be willing, for example, during an intact marriage, to use separate property to pay for the other spouse’s medical emergency if one arises. But does that mean there is also an understanding that some or all of the property will be shared if they break up?

It is possible that some spouses develop an expectation that all resources owned by both spouses will be available for family support in the future. But should such an expectation give rise to a right to share in some or all of this property if the parties divorce? It is possible that many spouses also have an “expectation” that they will share in the other spouse’s earnings for the remainder of the spouse’s career. Regardless of such an expectation, no U.S. state would currently provide for equal sharing of post-divorce income, even in a marriage of long duration.³⁴

B. The Rationale for Distinguishing between Separate and Community Property

Professor Motro notes that acquisitions during marriage from effort can be partially due to luck, family connections, or premarital experience or education.³⁵ In addition, gifts or inheritances might be received in part for services provided.³⁶

If a spouse has an express agreement that property will be devised to him or her in consideration for services provided, the devised property would be community property.³⁷ But the

32. This would normally transmute the property into some form of shared property. *See, e.g.,* Oldham, *supra* note 3, at § 11.01[2].

33. This would result in the commingled mass being treated as community property. *Id.* at § 11.01[3].

34. Some commentators have proposed post-divorce income sharing for a certain fraction of the duration of the marriage. *See* Cynthia Lee Starnes, *Mothers as Suckers*, 90 IOWA L. REV. 1513, 1543 (2005); Jane Rutherford, *Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 568–69 (1990); sources cited in June Carbone, *Back to the Future: The Perils and Promise of a Backward-Looking Jurisprudence*, in RECONCEIVING THE FAMILY 209, 220 n.76 (Robin Fretwell Wilson ed., 2006).

35. *See* Motro, *supra* note 12, at 1625, 1639.

36. *Id.* at 1638; Frantz & Dagan, *supra* note 11, at 117–118.

37. *See* *Andrews v. Andrews*, 199 P. 981 (Wash. 1921).

“normal” inheritance will be considered separate property, even if the inheriting spouse provided some services, and wages will be community property, even if partially the result of luck, family connections, or premarital experience or education. The fact that in some instances there might be multiple factors influencing why a spouse receives an inheritance or the level of his or her salary does not prove that it is senseless to distinguish, as a general rule, between acquisitions during marriage from effort and gifts or inheritances.

Professor Motro has challenged this distinction. She has argued

[the community property system’s] exclusive focus on labor is inconsistent with what most Americans presume marriage means. . . . Marriage is not fundamentally about equal contribution of labor. It is about two people joining the risks and rewards of their lives: merging their fates, committing to be ‘in the same boat,’ to sink or swim together. . . . Marital property law should look to spouses’ overall financial resources and require them to share these resources. . . .³⁸

Despite Professor Motro’s assertion about “what most Americans presume marriage means,” most commentators have argued that the community property, labor-centered economic partnership model reflects most people’s understanding of marriage and the appropriate level of sharing.³⁹ In addition, the system of “community of acquests” accepted in the community property states in the U.S. is the marital property regime most commonly applied to spouses in many other countries.⁴⁰ The system of “universal community property,” where all property of the spouses is shared, is the default regime only in the Netherlands, where it has been the subject of significant criticisms.⁴¹

38. Motro, *supra* note 12, at 1627.

39. See Carbone, *supra* note 34, at 216 n.49.

40. See Charlotte Butruille-Cardew, *A French Perspective on International Prenuptial and Postnuptial Agreements*, in *INTERNATIONAL PRE-NUPTIAL AND POST-NUPTIAL AGREEMENTS* 127, 129 (David Salter, Charlotte Butruille-Cardew & Stephen Grant eds., 2011) (discussing the default marital regime in France); see generally *FAMILY LAW IN EUROPE* (Carolyn Hamilton & Alison Perry eds., 2d ed. 2002) (summarizing the marital property law rules in various European countries). In a non-community property jurisdiction such as England, the division of premarital acquisitions or inheritances during marriage is possible. See Philip Moor, *Where Did Our Love Go: Recent Developments in Ancillary Relief*, 41 *FAM. LAW* (U.K., Jan. 2011) at 34.

41. See generally Ian Sumner & Caroline Forder, *The Netherlands—Proposed Revision of Matrimonial Property Law, a New Inheritance Law, and the First Translation of the Dutch Civil Code*, in *THE INTERNATIONAL SURVEY*

V. SHOULD SEPARATE PROPERTY GRADUALLY BECOME
COMMUNITY PROPERTY AS THE MARRIAGE CONTINUES?*A. The Expectation to Share*

I am not persuaded that an additional mechanism is now needed to transmute separate property into community property. As mentioned above, parties now can transmute property via a marital agreement, by adding the other spouse's name to title, or by conveying an interest in the property to the other spouse. In addition, liquid assets can be mixed with assets accumulated during marriage. As a result of any of these actions, the non-owning spouse will acquire an interest in the property that formerly was "separate" property. In all these instances, the owning spouse has taken some action that reflects an intent to share.

If the owning spouse did none of these things to indicate an intention to share, and kept the property separate, is it clear there still was a mutual expectation to share separate property? I am not convinced. And even if there was an expectation to share *if the marriage continued*, should there be sharing if the marriage ends in divorce?

A similar situation arises when one spouse supports the other through graduate school, with the expectation of sharing the enhanced earnings that will result from the professional training. In almost all states, even though one spouse probably had an "expectation" that he or she would share in the increased earnings of the other spouse after graduation, if the spouses divorce shortly after graduation, the spouse who supported the other while in school does not share a substantial portion of the educated spouse's post-divorce earnings.

As one court has stated:

The termination of a marriage represents, if nothing else, the disappointment of expectations, financial and non-financial, which were hoped to be achieved by and during the continuation of the relationship. It does not, in our view, represent a commercial investment loss. . . . If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectation by itself as any more compensable . . . than the

OF FAMILY LAW 337 (Andrew Bainham ed., 2004); *see also* Ian Curry-Sumner, *The Netherlands—Party Autonomy and Responsibility*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 260 (Bill Atkin ed., 2008).

loss of expectations of any other spouse who, in the hope and anticipation of the endurance of the relationship . . . has invested a portion of his or her life . . . in a failed marriage.⁴²

Regardless of whether one spouse has an "expectation" to share in the income of the educated spouse after that spouse receives a professional degree, if a divorce occurs before graduation or shortly thereafter, in almost all states the other spouse is not entitled to share in the post-graduation income, despite any expectations to the contrary.

B. A Comment about Increasing Sharing for Married Couples

Some Western countries treat unmarried partners like spouses if the relationship continues for a specified period.⁴³ Others give unmarried partners some rights if the partners break up, but not as many rights as spouses.⁴⁴

In contrast, in most U.S. states, unmarried partners have no status rights; they only have a claim when the relationship ends if a generally recognized cause of action between unrelated third parties can be established, based on principles of contract or partnership, for example.⁴⁵ It is therefore not uncommon for an unmarried partner to have no claim when the relationship ends.⁴⁶ So, when a relationship ends, the rights of unmarried partners in the U.S. currently are very different from spouses, regardless of the length of the relationship or whether the parties have raised a child together. This raises the question of whether current legal rules in the U.S. encourage a party (at least the wealthier one) not to marry if, as a result, the sharing that would otherwise result from marriage could thereby be avoided, without the necessity of a premarital agreement. A related question is whether any proposal to increase sharing in marriage in any substantial new way would create additional incentives to avoid marriage, as long as there are so few status rights given to unmarried partners.

42. *Mahoney v. Mahoney*, 442 A.2d 1062, 1070–71 (N.J. Super. Ct. App. Div. 1982).

43. See generally HARRY KRAUSE, LINDA ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, *FAMILY LAW* 255–256 (6th ed. 2007).

44. *Id.*

45. See OLDHAM, *supra* note 3, §§ 1.02[1], 1.02[5].

46. See *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

VI. INCREASING SHARING AT DIVORCE BY CHANGING COMMUNITY PROPERTY RULES

I have noted elsewhere that community property states do not agree regarding the rule to apply to determine the size of the community estate.⁴⁷ If increased sharing at dissolution is the desired goal, states could review their community property rules to see if any should be changed to increase the size of the community estate. For example, in some community property states income from separate property is considered separate property.⁴⁸ This creates unfair results, particularly in the situations examined below.

A. The Wage-Earner Married to a Spouse with Inherited Wealth or Premarital Savings

Spouses can generate income in various ways. A spouse with inherited wealth or pre-marriage savings can generate investment income in the form of interest, dividends and rents. A spouse who works outside the home generates income in the form of wages.

In some community property states, income from separate property is separate.⁴⁹ Some commentators have challenged this rule and proposed that all states accept that income from separate property should be community.⁵⁰ Otherwise, the spouse with inherited wealth can accrue separate property income during marriage, while the income of the wage-earning spouse is community, which seems quite unfair.

B. The Retired Married Couple

After retirement, people accrue pensions and investment income. In community property states where income from separate property remains separate, spouses who marry after retirement could accrue little or no community property, even if the marriage continues for a long period, and even if substantial investment

47. See Oldham, *supra* note 1.

48. See ARIZ. REV. STAT. ANN. § 25-213 (West, Westlaw current through the First Regular Session and Third Special Session of the 50th Legislature, 2011); CAL. FAM. CODE §§ 770-71 (West 2004); NEV. REV. STAT. ANN. § 123.130 (West, Westlaw current through the 26th Special Session of the Nevada Legislature, 2011); N.M. STAT. ANN. § 40-3-8 (West, Westlaw current through the First Regular Session of the 50th Legislature, 2011).

49. See statutes cited, *supra* note 48.

50. See Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56 LAW & CONTEMP. PROBS. 171 (1993).

income is received. This would not be true, of course, if all states adopted the rule that income from separate property is community property.⁵¹

C. A Different Way to Increase Sharing: Change the Community Property Rules Applicable to Income from Separate Property

Professor Andrews argues that community property states adopted the rule that income from separate property during marriage is separate property “more out of confusion or a misguided attempt to protect wives than out of sound policy.”⁵² He persuasively argues that the opposing rule, that income from separate property is community, “captures the essential notion that in the community property system, each spouse is expected to dedicate the fruits of all of his or her capital, be it human or nonhuman, to the community during marriage.”⁵³

So, one way of increasing sharing in a way consistent with community property theory would be for all states to accept the “Spanish Rule” that income from separate property is community.⁵⁴ This would, among other things, help address the problems mentioned above when parties marry after retirement, as well as when one spouse’s income comes from investment income and the other’s comes from wages.

VII. ANOTHER WAY TO INCREASE SHARING AT DIVORCE—REVISE SPOUSAL SUPPORT RULES

Some commentators have suggested that spouses should share at divorce, at least in marriages of significant duration, pre-marriage savings and gifts or inheritances received during marriage. I have questioned whether this would be a necessary or sensible change in the basic system of community property. If the basic goal is to increase sharing in marriage, is there any other option?

51. Professor Motro has proposed that all natural enhancement of separate property during marriage also should be shared. See Motro, *supra* note 12, at 1656. This would be like the “sharing of accruals” approach applicable in Switzerland and Germany. See Anna Stepien-Sporek, *Sharing of Accruals as the Best Solution for Marriage?*, in FAMILY FINANCES 639 (Bea Verschraegen, ed., 2009).

52. See Andrews, *supra* note 50, at 215.

53. *Id.*

54. See Brigitte M. Bodenheimer, *The Need for Legislative Attention to Separate-Property Marriages Under Community Property Law*, 8 CAL. W. L. REV. 381, 408 (1972).

About two decades ago, many U.S. commentators made various proposals to increase post-divorce income sharing.⁵⁵ Numerous arguments justifying such sharing were made, including the point that roles assumed during marriage can have a prolonged negative impact on a person's career, and that it would be more fair for former spouses to share those costs if they break up via post-divorce income sharing.⁵⁶

These proposals for much more robust post-divorce income sharing have not yet been adopted to any significant degree in the U.S., but they do seem to have had some impact. As Professor Garrison has shown in her work, during the 1980s it was increasingly common for post-divorce support, even in marriages of longer duration, to be fixed-term rehabilitative support.⁵⁷ Perhaps at least due in part to scholarship advocating increased post-divorce income sharing, more courts in the U.S. are now willing to award indefinite support when a marriage of long duration ends in divorce.⁵⁸ It should be emphasized, however, that most courts fashioning such post-divorce awards in the U.S. do not attempt to

55. See Rutherford, *supra* note 34; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Stephan Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 136 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Ira M. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351 (1989); see generally J. Thomas Oldham, *Putting Asunder in 1990s*, 80 CALIF. L. REV. 1091, 1110–1124 (1992) (book review).

56. See authorities cited, *supra* note 55; see also J. Thomas Oldham, *Changes in the Economic Consequences of Divorce, 1958–2008*, 42 FAM. L.Q. 419, 425 (2008).

57. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75, at 83, 91 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

58. See Oldham, *supra* note 56, at 432 n.88; see generally *Hammer v. Hammer*, 991 P.2d 195 (Alaska 1999); *Gripshover v. Gripshover*, 246 S.W.3d 460 (Ky. 2008); *Bernier v. Bernier*, 873 N.E.2d 216 (Mass. 2007); *Holley v. Holley*, 969 So. 2d 842 (Miss. 2007); *Christian v. Christian*, 742 N.W.2d 819 (N.D. 2007); *Craig v. Craig*, 617 S.E.2d 359 (S.C. 2005); *Fausch v. Fausch*, 697 N.W.2d 748 (S.D. 2005); *Sloan v. Sloan*, 632 S.E.2d 45 (W.Va. 2006); *Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. Ct. App. 2000); *Cox v. Cox*, 762 A.2d 1040 (N.J. Super. App. Div. 2000). For cases from community property states, see *In re Marriage of Vomacka*, 683 P.2d 248 (Cal. 1984); *McNelis v. McNelis*, 806 P.2d 442 (Idaho 1991); *Sprenger v. Sprenger*, 878 P.2d 284 (Nev. 1994); *Rainwater v. Rainwater*, 869 P.2d 176 (Ariz. Ct. App. 1994); *Leathers v. Leathers*, 166 P.3d 929 (Ariz. Ct. App. 2007); *Baker v. Baker*, 4 Cal. Rptr. 2d 553 (Cal. Ct. App. 1992); *Rabie v. Ogaki*, 860 P.2d 785 (N.M. Ct. App. 1993); *In re Marriage of Tower*, 780 P.2d 863 (Wash. Ct. App. 1989); *In re Marriage of Morrow*, 770 P.2d 197 (Wash. Ct. App. 1989).

equalize post-divorce living standards, and many commentators continue to characterize the awards as inadequate.⁵⁹

It is interesting to contrast the development of U.S. spousal support rules during the past two decades with the Canadian experience. Until the 1990s, Canadian spousal support rules were quite similar to those in the U.S.⁶⁰ However, during the 1990s, the Canadian Supreme Court announced two important decisions, *Moge v. Moge* and *Bracklow v. Bracklow*,⁶¹ both of which announced justifications for more frequent and more substantial spousal support awards.⁶² During this period, Canada adopted child support guidelines, and the guidelines were perceived to work well.⁶³ As courts and lawyers struggled to implement the principles of *Moge* and *Bracklow*, some wondered whether guidelines could be created for spousal support as well. In 2005, a first draft of advisory spousal support guidelines was proposed.⁶⁴ From 2005 to 2008 the drafters made minor adjustments to the guidelines, based on feedback received. A “final” version was promulgated in 2008.⁶⁵

Once a court has determined that the award of spousal support is appropriate, the guidelines offer a way to compute the amount and duration of support. For example, for a divorce not involving minor children, the presumptive amount is 1.5–2% of the difference in the spouses’ respective gross incomes multiplied by the number of years the parties were married, with a maximum of 50%.⁶⁶ The duration is one half to one year of support for each year of marriage, with a presumption of indefinite support if the marriage lasted at least 20

59. See Oldham, *supra* note 56, at 438 n.127.

60. See Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69, 78 (2004).

61. See Oldham, *supra* note 56, at 438–439.

62. In Canada, the federal Parliament has exclusive jurisdiction over marriage and divorce, as well as the rules governing the right to post-divorce spousal support. See Nicholas Bala, *The Debates about Same-Sex Marriage in Canada and The United States*, 20 B.Y.U. J. PUB. L. 195 (2006).

63. See Oldham, *supra* note 56, at 439.

64. See generally CAROL ROGERSON & ROLLIE THOMPSON, CAN. DEP’T OF JUSTICE, SPOUSAL SUPPORT ADVISORY GUIDELINES: A DRAFT PROPOSAL (2005).

65. See CAN. DEP’T OF JUSTICE, <http://www.family.justice.gc.ca> (last visited Aug. 17, 2011); Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: Report on Revisions*, 28 CAN. FAM. L. Q. 193 (2009).

66. See Rogerson & Thompson, *supra* note 65, at 197–198; Lonny L. Balbi, *Steps to Using the Spousal Support Advisory Guidelines: Without Child Support Formula*, 28 CAN. FAM. L. Q. 365, 366 (2009). The basic idea is that the recipient should never receive more than 50% of the parties’ net disposable income. See Carol Rogerson & Rollie Thompson, *The Spousal Support Advisory Guidelines: A User’s Guide to the Final Version*, 28 CAN. FAM. L.Q. 209, 218 (2009).

years.⁶⁷ Situations where deviation from the guidelines might be appropriate are set forth.⁶⁸ Support is unlikely if the parties divorce after a short marriage and do not have children.⁶⁹ An income floor and ceiling are proposed; spousal support generally is not to be awarded if the potential obligor's annual income is less than \$20,000 and the guidelines do not apply to annual income exceeding \$350,000.⁷⁰ It is currently unclear how various events subsequent to the divorce will impact the support order, such as an increase in the obligor's income, the re-partnering of the recipient, or if the obligor has additional children.⁷¹

Although spousal support guidelines are not common in the U.S. today, some U.S. states and counties have begun to apply guidelines to spousal support.⁷² Although no consensus has yet been reached, they all attempt to reduce levels of inequality in post-divorce income while support is being paid.⁷³ The presumptive support duration is a function of the duration of the marriage.⁷⁴ It would seem likely that in those jurisdictions that are attempting to implement guidelines, spousal support is being awarded more frequently than before the guidelines were promulgated.

If greater sharing at divorce is desired in the U.S., perhaps the avenue that offers the most opportunity is increased sharing through reimagining spousal support, as opposed to transmuted separate property into community property. Current rules in most U.S. states give courts great discretion, which frequently leads to arbitrary and unpredictable results.⁷⁵ Perhaps jurisdictions could

67. See Balbi, *supra* note 66. Indefinite does not mean permanent. See Rogerson & Thompson, Report on Revisions, *supra* note 65, at 198. For example, in Prof. Thompson's survey of recent Ontario cases, of ten marriages ending in divorce after 20 years of marriage or more, in nine of ten the support was of indefinite duration. See Rollie Thompson, *All Guidelines, All The Time: Spousal Support in Ontario 2009–2010*, 29 CAN. FAM. L.Q. 201, 209 (2010). In addition, for marriages that lasted at least five years, support is to be of indefinite duration if the length of marriage and the age of the recipient when the parties separated totaled 65. See Balbi, *supra* note 66, at 366.

68. See Rogerson & Thompson, *supra* note 65, at 204–207; Rogerson & Thompson, *supra* note 66, at 230–235. See also, Carol Rogerson & Rollie Thompson, *The Canadian Experiment with Spousal Support Guidelines*, 45 FAM. L. Q. (forthcoming 2011).

69. See Rogerson & Thompson, *User's Guide*, *supra* note 66, at 219.

70. *Id.* at 235–237.

71. *Id.* at 237–240.

72. See Oldham, *supra* note 56, at 443.

73. *Id.*

74. *Id.*

75. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. Rev. 401, 481, 487, 489 (1996).

mimic Canada and attempt to agree upon presumptive rules regarding spousal support. At a minimum, this could provide more certainty and predictability to post-divorce spousal support awards. In addition, greater post-divorce income sharing seems a possible outcome if spousal support guidelines would be more broadly accepted in the U.S.

VIII. CONCLUSION

Some commentators have suggested that in marriages that exceed a certain specified minimum duration and end in divorce, in addition to the community property estate spouses should share a portion or all of the spouses' separate property, with the amount of sharing generally determined based on the marriage duration. I am not persuaded that such a basic change in community property rules is needed.

If the goal is to create a larger pot of divisible property at divorce, a number of options exist. I have shown in a recent article that, in a number of instances, community property states do not agree on how to determine the amount of the community property claim, and that the choice of the approach to be applied to determine the community claim in each instance can significantly impact the amount of divisible property when the marriage ends.⁷⁶ One such issue mentioned above is how to characterize income accruing during marriage from separate property. A number of states consider such income to be separate property. There are strong arguments that it would be more consistent with community property theory to adopt the opposite rule, which is applied in Texas and Louisiana; if that rule would be accepted in all states, this would enlarge the pot of divisible property. In addition, increased sharing at divorce could be accomplished by reevaluating the various rules that govern how to calculate the amount of community property claim in various other situations.

Another way to increase sharing at divorce would be to reimagine spousal support, which has occurred during the past two decades in Canada. Persuasive arguments have been made why, at least in those instances where a spouse's career has been permanently impacted by caring for the couple's children, substantial post-divorce income sharing would be fair and appropriate.

76. See Oldham, *supra* note 1.