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Uniform Marital Property Act: A Renewed Commitment to the American Family

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Uniform Marital Property Act: A Renewed Commitment to the American Family

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I. INTRODUCTION

The transformation of American society since World War II has caused us to rethink the social and economic role of men and women in marriage.\(^1\) A major focus of this reexamination has been the quest for a marital property system that adequately reflects the changes that have occurred.\(^2\) A milestone in this quest is the Uniform Marital Property Act (UMPA), promulgated by the National Conference of Commissioners on Uniform State Laws at its annual meeting in 1983.\(^3\) The Commissioners have described the act as a "statute speaking to the realities and equities of marriages in America in the Eighties."\(^4\) The purpose of this article is to evaluate the Uniform Marital Property Act in order to determine whether it establishes a norm that reflects the values that our society should foster.

II. HISTORICAL ANTECEDENTS OF THE UNIFORM MARITAL PROPERTY ACT

A. The Evolution of Initial Common Law Concepts

At first glance there seem to be many different matrimonial property regimes in Western societies.\(^5\) A closer examination reveals that these diverse systems are in fact variations on two themes, community property and separate property.\(^6\)


4. Id. at § 1.

5. I. Loeb, The Legal Property Relations of Married Parties 49 (1900); Loh-inger, The History of the Conjugal Partnership, 63 Amer. L. Rev. 250, 250 (1929).

The essence of a community property regime is shared ownership of property during the marriage. Each spouse has a present, one-half interest in all property that is part of the community. For example, the wife acquires an ownership interest in one-half of the husband's wages, and the husband acquires an ownership interest in one-half of the wife's wages. The basic premise of this system is that marriage is a partnership, and both husband and wife contribute to that partnership in their own way. The law does not focus on the quantity or the quality of these contributions. Rather, it presumes equal contribution. The husband and wife, therefore, are each entitled to one-half of the fruits of the partnership.


7. W. REPPY & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 1 (1975). See also La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426 (1914); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 2-3 (1971); Vaughn, supra note 2. At one time, many community property jurisdictions characterized the wife's interest in the community as a mere expectancy. In the eight American community property jurisdictions the law is now clear that both the husband and the wife own a present vested and equal right to the community. See Bartke, Community Property Law Reform in the United States and in Canada - A Comparison and Critique, 50 TUL. L. REV. 213, 219-21 (1976). See infra text accompanying note 48.

8. The definition of community is not the same in all community property jurisdictions. The Gananciales system provides that all property acquired through the labors of the husband and the wife during marriage is classified as community property. Any property acquired before marriage and all property acquired by gift, devise, or inheritance is classified as separate property. During marriage each spouse retains ownership of his or her separate property. It is not part of the community and is not shared during the marriage or at its termination. Pugh, The Spanish Community of Gains in 1803: Sociedad De Gananciales, 30 LA. L. REV. 1, 2-11 (1969).

In the Netherlands, Brazil, South Africa, some Scandinavian countries, and Portugal, a system of community property evolved that has been aptly named the universal community of acquests. In these jurisdictions, marriage is treated as a total community of life; all property of either spouse is included in the community regardless of its origin or time of acquisition. See INT'L ENCY. OF COMP. L. § 58 (1980).

The deferred community is the most recent variation to emerge: "During the marriage the spouses own the property they respectively acquire the same as they would if single. But upon death or divorce each spouse is entitled to claim a share in the assets earned by the other spouse during marriage." W. A. REPPY, JR. & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 10 (2d ed 1982). In a deferred, Gananciales system only property acquired by the husband and the wife during marriage would be divided at the time of death or divorce. In a deferred universal system, all property owned by either spouse would be divided at the time of death or divorce. See 4 INT'L. ENCY. OF COMP. L. §§ 138-61 (1980).

9. See Mabie v. Whittaker, 10 Wash. 656, 662, 39 P. 172, 174-75 (1895); Krauskopf & Thomas, supra note 2, at 595.

10. This conjugal partnership is not established upon the basis of equality of contribution of labor or capital. It exists and is enforced under principles
On the other hand, a separate marital property regime permits each spouse to retain individual ownership of his or her property. During the marriage, both husband and wife have an equal right to produce property, retain ownership of it, and dispose of such property without consulting their spouse. They can voluntarily title property jointly, but they are not required by law to share the fruits of their labor with their spouse.

Under such a system, a homemaker's contributions are not recognized. Because she receives no salary with which to purchase property, she has none. Her economic position during the marriage, therefore, is inferior to the status afforded to the homemaker in a community property regime; she does not gain an ownership interest in any property titled in her husband's name.

It has been said that community property and separate property reflect different attitudes toward marriage. Community property jurisdictions treat marriage as an economic and emotional partnership to which both husband and wife make equal contributions. Separate property jurisdictions envision marriage as a relationship between two equal, but independent and separate persons. History tells us, however, that the modern dichotomy between community and separate property is more a result of historic accident than a conscious decision to implement policy. It does not appear that either system was developed to mirror a societal attitude toward marriage.

A major force in the development of community property in France was the relative weakness of the French king and the strength of the French nobility. The great French families benefited from a marital property system that divided the acquests equally between the

which recognize perfect union and equality of enjoyment of gains, regardless of all inequalities induced by accident, misfortune, disease, idleness, or even wasteful habits of one or the other of the spouses.

Routh v. Routh, 57 Tex. 589, 595 (1882).

11. See, e.g., I. LoeB, supra note 5, at 51; Greene, supra note 6, at 83; Lobinger, supra note 5, at 269; Mahoney, Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries, 22 J. Fam. L. 221, 221 (1984).

12. Donahue, supra note 6, at 59; Younger, supra note 2, at 48-59.

13. Glendon, supra note 2, at 316; Green, supra note 6, at 86. While some have praised community property as favoring women, it in fact assigns wives a subordinate role. Until recently, the husband had the right to control the community, including any wages that the wife might earn. The community property jurisdictions accorded the wife a one-half interest in the marital property but provided no legal means for her to enforce her rights. Hence, it is hard to argue that either marital property system favored women. K. DECROW, SEXIST JUSTICE 181-82 (1974).

14. Oldham, supra note 2, at 266. See also Glendon, supra note 2, at 323; Prager, supra note 2, at 5.


16. Prager, supra note 2, at 15-16.

17. Donahue, supra note 6, at 81-84.
husband and wife. Both sons and daughters could then contribute to their family's wealth. As one commentator noted:

The French system ensured that much more property passed to the wife's family if the marriage were childless than did the English system. Her relatives got her family lands back immediately rather than having to wait for the husband to die (as they did in England if a child had been born to the marriage and predeceased its father) and they took one-half of the acquired lands (and in many areas one-half of the moveables as well) rather than losing the whole to the husband . . . . 18

While an attempt was made by the French king to prevent the community property from being divided between the wife's heir and the husband, he was unsuccessful.19

Similarly, it does not appear that community property was rejected in England because of a lack of respect for women or a desire to reflect that society's attitude toward marriage. Rather, in Medieval England there was a strong movement to unify property ownership in a single person.20 Hence, the rule of primogeniture and the principle that a married woman lost all rights to own property during coverture developed. This unification principle was also reflected in the English marital property system. An English wife did not acquire an ownership interest in her husband's property. In fact, after marriage the common law disabilities attached and the woman even lost power over her own separate property.21 During coverture, her husband had the right to sell, enjoy, or consume her personal property.22 On his death, most of this personal property passed not to her, but to her husband's legal representative.23 The husband was also entitled to the rents and profits from her real property, and during marriage he had the exclusive right to manage and control it. A wife could convey her real property but only with her husband's consent.24 Blackstone described the relationship as follows: "The husband and wife are one person in law and that is, the very being or legal existence of the woman is suspended during the marriage . . . . 25

18. Id. at 80.
19. Id. at 82-84.
20. Id. at 81.
21. J. SChouLER, A TReATiSe ON thE LAw OF mAriAGe, diVoRCE, SePARATiON AND DomESTiC ReLATiONS 145 (6th ed. 1921). But see Williams, The Legal Unity of Husband and Wife, 10 MoD. L. ReV. 16 (1947).
22. L. FRIEDMAN, A HiSTORy OF AMERiCAN LAw 184-85 (1973); W. HOLDSWORTH, HiSTORy OF ENGLISH LAw 520, 826 (4th ed. 1927); THE COMPARATiVe LAw OF MAriAGe AND DiVoRCE 666 (A. Renton & G. Phillimore ed. 1910) [hereinafter cited as Renton & Phillimore].
25. W. BLACKSTONE, COMMENTARiES 442 (1813) (footnote omitted). Even though the
This strong impetus to unify property ownership in a single person is in part attributable to the consolidation of power in the English king and the development of the common law courts. As one author noted: “In short, the English system seems to have favored the individual and suppressed the wife’s interest in the process, while the French favored the lineage and enhanced the wife’s interest as a result.” Thus, considerations unrelated to the role of women and the institution of marriage appear to be the primary reasons that the modern dichotomy between community and separate property evolved.

Once established, the dichotomy was frozen by inertia and cultural bias. The common law system came to America with the English colonists. Expansion moved from the East to the West, and the common law was rapidly transplanted throughout the United States. Most settlers were not familiar with the civil law, and those who were regarded France and Spain as autocracies whose traditions did not belong in a new democratic society. Community property was viewed as foreign and difficult to understand. A judge in 1855 stated:

We remark that the case involves a large amount of property and that the questions discussed and to be decided depend upon a foreign system of law quite different from that to which we were bred, and with which, of course, we have very little familiarity. These questions, too, spring out of the transactions of a foreign race of men, the French inhabitants of this city, whose manners and customs as well as institutions, both legal and social, were very different from our own.

In response to this cultural aversion, most American jurisdictions rejected the entire body of civil law, including community property. This was often done with general or selective retention statutes without any discussion of the advantages or disadvantages of either system.

wife and husband were legally merged during marriage, the common law system is classified as a separate marital property regime. While control of the wife’s property was vested in the husband, the wife retained the right to pass some of her personal property and all of her real property to her family at the time of her death subject to the husband’s curtesy. Furthermore, her husband had no right even during the marriage to dispose of her real property without her consent. The husband, therefore, acquired the right to use and manage the wife’s property, but the law clearly distinguished between those assets brought to the marriage by the wife and those assets owned by the husband. While she lost her separate identity, her property did not. Likewise, the husband’s property remained his during the marriage, and the wife’s only interest in it was in the form of dower. Thus, in England there was unified control of the property during the marriage, but the husband’s and wife’s assets were never pooled as they were on the continent.

26. Donahue, supra note 6, at 81-87.
27. Id. at 81.
28. W. McClanahan, supra note 23, at 58. See also 1 R. Powell, supra note 23, at ¶45.
30. Id. at 118.
of marital property. Only eight American jurisdictions chose to retain the community property system: Texas, California, Louisiana, Washington, Nevada, Idaho, Arizona, and New Mexico. Many of these states were familiar with community property principles because they had been settled by the Spanish.

32. Kirkwood, Historical Background and Objectives of the Law of Community Property in the Pacific Coast States, 11 WASH. L. REV. 1, 9 (1936). See W. McCLANAHAN, supra note 23, at 92-113. The constitutional provisions and statutes that adopted the common law took many forms. When the common law is received or accepted in general terms, without limitation as to time or as to previous law of the state, the statute is a "general reception statute." When the common law is received or accepted only as of a certain date (i.e., all common law in force at time of Declaration of Independence), it is referred to as a "selective reception statute." Id.

33. W. McCLANAHAN, supra note 23, at 2. Of these states, Louisiana, Texas, California, New Mexico, and Arizona were settled by either the French or Spanish who brought with them the community property system. The leaders in these states, therefore, were conversant with the community property principles. This fact alone, however, is not enough to explain why community property continued in these jurisdictions, even after the Spanish left.

Several other American states were settled by the French or Spanish and community property principles developed in their early histories as well. Nonetheless, most of these jurisdictions rejected the civil law and with it the community property system. Hence, Spanish and French influence does not fully explain why community property was retained in some states and rejected in others. See generally W. McCLANAHAN, supra note 23, at 92-115.

One explanation is that English and American settlers arrived in the midwest and eliminated the Spanish influence before community property gained a stronghold. Furthermore, by the time the Western States gained their independence from Spain, the flaws of the common law property system were already being focused upon by the media. Many common law jurisdictions, in fact, had rejected the common law disabilities that married women were subject to even though they retained the concept of separate property. Indeed, debates in western legislative constitutional conventions often focused on this issue of women's rights:

The only despotism on earth that I would advocate, is the despotism of the husband. There must be a head and there must be a master in every household; and I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience. This doctrine of women's rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright and the rest of that tribe. . . .

At the time the common law was introduced, woman occupied a position far inferior to that which she now occupies. As the world has advanced in civilization, her social position has been the subject of increased consideration, and by general consent of all intelligent men, she is now regarded as entitled to many of the rights in her peculiar sphere which were formerly considered as belonging only to man. This part of the common law (relating to marital property rights) is one of those portions belonging to the dark ages, which has not yet been expunged by the advance of civilization.

Brown, Debates in the Convention of California in the Foundation of the State Constitution 259, 262-63 (1851). The California convention finally voted to retain
B. Shift to the Partnership Concept in Common Law Jurisdictions

While most American jurisdictions rejected community property without comment, the common law system of marital property that they adopted has not remained static. In fact, it has drifted away from the unity concept described by Blackstone toward the partnership concept that is characteristic of community property.

The first major step in that direction was the adoption of the Married Women's Property Acts. These laws were passed in several stages during the nineteenth and early twentieth centuries.34 They permitted a woman to retain control of her own property even after marriage.35 They also restored her separate legal identity, permitting her to contract and litigate in her own name.36 With the adoption of the Married Women's Property Acts, common law jurisdictions accepted, at least for some purposes, a proposition that community property jurisdictions had always adhered to: spouses have separate legal identities. The reforms did not, however, substitute a different marital property regime. In fact, they further separated the husband's and wife's assets. During marriage, their property rights were no longer affected by their marital status.37

The common law system of dower also came under attack at the same time that the Married Women's Property Acts were being adopted. Dower entitled a widow to a life estate in one-third of the

community property even though in all other respects it rejected the civil law and adopted the common law. McMurray, The Beginnings of the Community Property System in California and the Adoption of the Common Law, 3 Calif. L. Rev. 359, 369-73 (1915).


37. See Younger, supra note 2, at 63. See also Bristow v. Jennings, 105 Ore. 1, 207 P. 883 (1922). The wife did have an inchoate dower right during marriage but it did not vest until her husband had died, terminating the marriage relationship. Likewise, the husband's curtesy rights did not vest until the wife's death and only then if a live child had been born to the couple.
real property of which her husband had been seized during the marriage.\textsuperscript{38} As personal property became a significant component of the husband's wealth, dower was criticized because it did not provide adequate care for the surviving spouse.\textsuperscript{39} Dower was also criticized because it only gave the widow a life estate.\textsuperscript{40} Even though her homemaking skills had contributed to the acquisition of the husband's property, she acquired no control over that property. Even on his death, she remained in the role of a dependent, entitled to lifetime protection, but without the power to dispose of the fruits of the marriage by either devise, sale or gift.\textsuperscript{41}

In response to these criticisms, many jurisdictions abolished dower and enacted elective share statutes. These statutes guaranteed a widow a one-third to one-half interest in her husband's estate.\textsuperscript{42} Even if he executed a will leaving her little or nothing, she could elect to take this statutory share in lieu of the devise. In most states, the husband's real and personal property were subject to the elective share,\textsuperscript{43} and the right to elect existed regardless of whether the property had been acquired before marriage or after, and regardless of the length of the marriage. The elective share was a crude way for the dependent spouse to share in the marital assets when the marriage ended.

The tax laws have also changed to reflect the partnership model of marriage. Prior to 1948, couples living in common law property jurisdictions did not have the advantage of income splitting.\textsuperscript{44} It was available to couples in community property jurisdictions because of the United States Supreme Court's decision in Poe v. Seaborn.\textsuperscript{45} The Court held that a husband living in a community property state should be taxed on one-half of his income and his wife should be taxed on the other half, even though the wages had all been derived from the hus-

\textsuperscript{38} 3 C. VERNIER, AMERICAN FAMILY LAWS 345 (1931).
\textsuperscript{40} For a recent discussion of this problem, see L. FRIEDMAN, supra note 22, at 375. See generally Comment, Gender Based Discrimination in the Alabama Probate Laws, 11 CUM. L. REV. 671, 683-88 (1980).
\textsuperscript{41} See 2 R. POWELL, supra note 23, at §§ 209, 213; Sayre, Husband and Wife as Statutory Heirs, 42 HARV. L. REV. 330, 331 (1929); Note, Inter Vivos Trusts vs. the Right of Election Given Surviving Spouses, 40 GEO. L.J. 109 (1951).
\textsuperscript{42} Most statutes provided that the elective share was equal to the intestate share that the widow would have been entitled to if her spouse had died without a will. See Cheny v. Cheny, 110 Me. 61, 51 A. 387 (1912); Klocke v. Klocke, 276 Mo. 572, 208 S.W. 825 (1919); Act of April 1, 1929, ch. 229, § 4, 1929 N.Y. Laws 449, 500-02. See also I. LOEB, supra note 5, at 162.
\textsuperscript{43} Not all jurisdictions extended the elective share to cover personal property. See, e.g., Osborn v. Osborn, 102 Kan. 890, 172 P. 23 (1918).
\textsuperscript{44} Younger, supra note 2, at 69.
\textsuperscript{45} 282 U.S. 101 (1930).
band's employment. The Court recognized that a homemaker in a community property jurisdiction "earned" one-half of her husband's wages because of her marital status. The progressive nature of the income tax system made this a substantial benefit to persons living in community property states.

In response to intense lobbying efforts by common law states that wanted these tax benefits for their citizens, Congress was finally pressured to pass the Tax Reform Act of 1948. That act permitted a husband and wife to be taxed on family income as if they were members of a marital partnership, regardless of whether they lived in a common law or community property jurisdiction. It recognized that both spouses share in the economic fruits of marriage and should be taxed accordingly. In 1981 the Congress reinforced this partnership concept of marriage by permitting tax-free transfers of property between husband and wife at death. Finally, the Deficit Reduction Act

46. Id. at 111.
48. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114 (current version at I.R.C. § 1(a)).


It is clear that these six states enacted community property laws solely because of the tax advantage. The "radical" change was thought to be justified because of the money that state residents would save. One state legislator admitted this: "The purpose of the recent legislation is primarily to effect savings on Federal Income Tax. I have been advised that the minimum savings to taxpayers of Pennsylvania under the bill will be $100,000,000 a year. This is a consideration that cannot possibly be overlooked." HISTORY OF SENATE BILLS, SESSION OF 1947 122 (Pa).

49. See Surrey, supra note 48, at 1103-16; Younger, supra note 2, at 69.
50. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a), 95 Stat. 172, 301. Prior to this Act a limited deduction was available for gifts or bequests complex,
of 1984 authorized tax-free transfer of property between husband and wife both during marriage or incident to a divorce. Our tax laws, therefore, have been reformed to focus primarily on the marital unit and not the individuals within it.

In 1963 the drive to reform marital property law gained momentum. In that year, the Committee on Civil and Political Rights of the President's Commission on the Status of Women examined the status of marital property law and came to the following conclusion:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact is becoming increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property.

The reform suggested by this committee was supported by vocal adherents, but no legislative action was forthcoming. The debate that ensued, however, did provide the impetus for the Uniform Marriage and Divorce Act (UMDA) that was promulgated by the National Conference of Commissioners on Uniform State Laws in 1970. It is this act that has substantially narrowed the gap between community and separate property systems.

Prior to the UMDA, most states divided property according to title upon dissolution of a marriage. If all or most of the property was titled in the husband's name, he left the marriage with his assets intact. Common law jurisdictions provided "protection" for the dependent homemaker in the form of alimony.

The proposed UMDA changed this system of property division and

and in the absence of an estate plan, the property owned by the marital unit was subject to estate tax one and one-half times. Half was taxed when the first spouse died and the whole was taxed when the second spouse died. The Congress concluded that an individual should be free to devise his entire estate to his spouse without any tax consequences. See Internal Revenue Acts 1980-1981, 1604 (West Publishing Co.).

51. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421(a), 98 Stat. 494, 793-94 (to be codified at I.R.C. § 1041). The pertinent part of the section states: "General Rule - No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) - (1) a spouse, or (2) a former spouse, but only if the transfer is incident to the divorce." I.R.C. § 1041(a) (West Supp. 1985).

52. COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORTS OF THE PRESIDENT'S COMM'N ON THE STATUS OF WOMEN 18 (1963).


55. Rheinstein, supra note 34, at 415, 424.
permitted the court to divide property equitably upon divorce. Regardless of title, the judge could reallocate the property, awarding a portion of the property titled in the husband's name to the wife or a portion of the property titled in the wife's name to the husband. When making this division the court was explicitly directed by the UMIDA to take into account the contributions made by a homemaker in acquisition of the marital property. The basic premise of the UMDA was that marriage is a partnership that accumulates property. When that partnership dissolves, each partner is entitled to a share of the property.

While the UMDA has not been widely adopted, it has influenced substantially the way in which property is divided in common law jurisdictions at the time of divorce. Judges in all but one of the forty-two common law states now have the power to distribute property regardless of title. Some states permit all assets owned by either the husband or wife to be divided. Others permit division of only those assets produced during the marriage. They all recognize that both husband and wife make a contribution to the partnership and thereby acquire some right to share in each other's property.

Thus, most common law property systems in the United States have been reformed to implement sharing principles when the marriage ends either by death or divorce. These reforms have had the effect of substantially diminishing the differences between the community property jurisdictions and the common law property jurisdictions. When the two systems first emerged as legal institutions they were in stark contrast to each other. As the common law system has evolved, however, the two systems have become more alike, bridging the gap between their old historical differences. As old cultural biases are discarded, the values and weaknesses of each system can be considered more objectively. The UMPA now presents the question of whether these two institutions can be blended to produce a comprehensive marital property system during the marriage that is both workable and consistent with the values that our society should promote.

56. See Comment, supra note 54, at 1284.
57. UMDA, supra note 69, at § 307, Alternate A. See also Foster, Divorce Reform and the Uniform Act, 7 Fam. L.Q. 179 (1973); Rheinstein, supra note 34, at 428.
58. UMIDA, supra note 53, at § 307.
61. See id. at 390-91; J. Krauskopf, supra note 59, at 32-33. See also Comment, supra note 54, at 1284-94.
62. See Freed & Walker, supra note 60, at 390-91.
III. WHAT DOES THE UNIFORM MARITAL PROPERTY ACT PROVIDE?

The Uniform Marital Property Act is based on four primary principles. The first is shared ownership during marriage. All property produced by the labors of husband or wife during marriage is classified as marital property. Each spouse acquires a vested, undivided one-half interest in that marital property as it is acquired. The ownership interest attaches regardless of who produced or earned the property and regardless of whose name the property is titled in. The sharing principle is derived from community property law that treats marriage as a partnership. Shared ownership is the cornerstone of the UMPA.

The second principle of the Act is title-based management. This principle is derived from the common-law rule that whoever has title to property has the right to manage and control it. Drafters of the UMPA, however, are quick to note that title and ownership are not synonymous terms under the Act. Title-based management is a familiar device in common law jurisdictions and is a simple method to facilitate the transfer of property and to protect third parties. Management rights do not alter the rule that each partner owns half of the marital property.

The third principle of the UMPA is that a husband and wife should be able to alter their financial relationship by contract. This principle insures flexibility. The UMPA sets the norm but also accommodates...
dates the varied marital relationships that are evolving in the twentieth century.

The fourth principle of the UMPA is that it defines property rights only during the marriage.\textsuperscript{70} The UMPA is not intended to govern the division of property at the termination of the marriage by death or divorce. Probate and dissolution laws need not be altered if the UMPA is adopted.

A. Principle 1: Shared Ownership

The UMPA recognizes that marriage is an economic partnership. Each spouse makes an equal contribution to the partnership and is entitled to one-half of the partnership property. Only property produced by the husband and wife during marriage is classified as marital and shared equally. Property acquired before the marriage is not shared, nor is property acquired by gift or inheritance.\textsuperscript{71} To reduce evidentiary problems caused by these classifications, the Act presumes that all property owned by either husband or wife is marital property.\textsuperscript{72} The burden is on the person contesting this classification to show that the property was acquired before marriage, by gift, inheritance, or one of the other exceptions listed in the Act.

Income from any type of separate property received during the marriage is classified as marital property.\textsuperscript{73} Likewise, if separate property increases in value because one of the spouses contributes substantial labor or skill, the appreciation is classified as marital.\textsuperscript{74} Finally, if marital and separate assets are commingled, the whole is treated as marital property and shared unless the non-marital component can be traced.\textsuperscript{75}

While these rules of classification are complex, lawyers in many common law jurisdictions are already familiar with them. In twenty-seven states the courts are authorized to divide only marital property at the time of divorce.\textsuperscript{76} In these jurisdictions the distinction between separate and marital property is already being made. In fifteen states the courts can divide any property owned by either the husband or wife, regardless of when or how it was acquired.\textsuperscript{77} Even in these jurisdictions, the courts are frequently required to take into account the

\textsuperscript{70} Id. at Prefatory Note, 9A U.L.A. 24 (Supp. 1985).
\textsuperscript{71} Id. at §§ 4(f), 4(g)(1).
\textsuperscript{72} Id. at § 4(b).
\textsuperscript{73} Id. at § 4(d). This provision has been criticized in that it fails to take into account inflationary pressures. In a society where inflation is high, the value of the property may not keep up with inflation if the income from the property is not also classified as separate property.
\textsuperscript{74} Id. at § 14(b).
\textsuperscript{75} Id. at § 14(a).
\textsuperscript{76} See Freed & Walker, supra note 60, at 390-91.
\textsuperscript{77} See id.
While there are some similarities between UMPA and common law equitable distribution statutes, the application of the sharing principle during marriage will create many substantive rights that are not now found in common law jurisdictions. The shared ownership principle of the UMPA permits each spouse to accumulate an estate that can be devised individually at death. At common law, a homemaker had no estate to transmit on her death because she acquired no property during the marriage. She shared in the economic fruits of the marriage only when her husband died first. In contrast, under the UMPA she owns half of the marital property and therefore has testamentary control over that half.

Shared ownership also promotes joint management of the marital property during the marriage. Both husband and wife are encouraged to make joint decisions concerning the allocation of family resources because each spouse owns half of the property. On the other hand, common law jurisdictions promote individual control and decision making; whoever has title to the property owns it. The other spouse has no interest in the property and is neither encouraged nor required to participate in its management.

Third parties are also encouraged to treat the family as an economic unit. Each spouse can seek credit in his or her own name. Even non-wage earners could qualify for credit based on their share of the marital property. The Act promotes equal access to credit, but also

78. Lacey v. Lacey, 45 Wis. 2d 378, 173 N.W. 2d 142 (1970).
80. The UMPA could also inhibit joint management of the family assets because of its title based management system: whoever holds title controls the property. The difference is that under the UMPA, the husband and wife both retain a one-half ownership interest in the property, regardless of title. The title holder owes his spouse a duty of good faith in all transactions involving marital property and must remain aware of his partner's interests. More importantly, the non-title holder has a right to have his or her name added to the title, thereby guaranteeing a right to joint management. Ultimately, the concept of joint ownership will encourage mutual participation in the allocation of the marital resources. See UMPA, supra note 3, at § 15 comments (citing W. DE FUNIAC & M. VAUGHN, supra note 7, at 360-65 § 151).
81. Bugge, Credit under Wisconsin’s Marital Property Act, 57 WIS. BAR BULL No. 7, 21 (1984). The UMPA does not prohibit creditors from demanding that both spouses be responsible for all credit extensions. If both spouses are obligated, then either the husband’s or the wife’s property can be reached by the creditor to satisfy the debt and any property owned jointly by them could be reached as well. Of course, if both spouses are required to sign, then neither has individual access to credit. The Equal Credit Opportunity Act, however, prohibits creditors in community property states from requiring both spouses’ signature when the applicant spouse controls enough assets to justify the extension of credit in their own name. See Equal Credit Opportunity, 12 C.F.R. § 202.7(d)(3) (1985). If control determines who has a right to get credit without their spouse’s signature, the
imposes equal responsibility for family debt. Any credit purchases by
husband or wife are presumed to be for the benefit of the family.\(^8\)
The "family" creditors can reach all marital property as well as any
separate property owned by the incurring spouse.\(^8\) If the debt is not
incurred for the benefit of the family, then the creditor can reach only
the separate property of the incurring spouse and his or her share of
the marital property.\(^8\) This system protects third parties who extend
credit to either spouse and also permits spouses to develop their own
credit history.

B. Principle 2: Title-Based Management and Control

The purpose of title-based management is to ensure the protection
of third parties dealing with the marital partnership and to provide a
simple and reliable method for transferring marital assets.\(^8\) Because
it is derived from the common law,\(^8\) title-based management will also
make it easier for separate property jurisdictions to make the transi-
tion to the UMPA.

If marital property is titled in the name of one spouse only, the
UMPA gives that spouse the right to manage and control it.\(^8\) Without
the consent of their partner they can sell, transfer, or lease the prop-
erty. If the marital property is titled jointly, then both spouses have a
right to manage and control the property, and consent from each
spouse is required for a valid transfer.\(^8\) This is analogous to the effect
of joint titling in common-law jurisdictions. If the property is titled in
the disjunctive, then each spouse has the right to manage and control
the property and either spouse can transfer an interest in the property
to a third party without the consent or joinder of the other spouse.\(^8\)
Finally, either spouse acting alone has a right to manage and control
untitled marital property such as household goods, furniture and

82. UMPA, supra note 3, at 8 (Supp. 1985).
83. Id. at § 8(b)(ii).
84. Id at § 8(b)(iv). While the UMPA is intended to protect creditors, its purpose is
not to enhance their position. Hence, an obligation incurred by a spouse prior to
marriage can be satisfied only out of property that would have been available to
the creditor had there been no marriage. If a spouse incurred a debt prior to
marriage, the creditor could reach the earnings of the debtor spouse to satisfy the
debt, but the creditor could not reach the debtor's marital interest in property
produced by their partner. But for the marriage, this property would not be owed
by debtor. Id at § 8(b)(iii).
85. Cantwell, supra note 64, at 673-74.
86. Id. at 697.
88. Id. at § 5(6).
89. Id. at § 5(a)(6).
While title is nearly synonymous with ownership in common law states, the same is not true under the UMPA. Vis-a-vis third parties, the spouse with the right of management and control is treated as the "owner." In relation to each other, the partner with the right of management and control holds only a one-half ownership interest in the marital property.

In practice, the title-based management system could defeat the sharing principle of the UMPA. Each spouse could use their salary to purchase property and then title it in their individual names. As title holder, they would then have a right to exclusive control of that property during the marriage. They could then destroy their partner's ownership interest by transferring or consuming the property without their spouse's consent, reducing the sharing principle to nothing more than a fiction. Title-based management might also discourage joint decision making since only one spouse would be in control of the property.

In response to these concerns, the Act incorporates two safeguards.

First, in all matters involving marital property, spouses owe their partners a duty of good faith. The good faith requirement was added to balance the sharing principle of the UMPA with its title-based management system. The title holder can control the property, but not in a way that benefits the title holder at the expense of his or her spouse.

The act does not define the parameters of the good faith requirement. The drafters of the UMPA make it clear, however, that the spouses do not hold marital property as trustees, nor must they succeed in every venture involving marital property. Although the good faith standard does not create a fiduciary relationship between husband and wife, the non-title holder is not required to prove fraud in order to establish a breach of the good faith standard.

Because there are no definitive guidelines for determining when the duty of good faith has been breached, the court should consider the purpose of the UMPA and the good faith requirement. The title holder does not have a duty to be perfect, but neither should the title holder be allowed to take advantage of the spouse's trust and confidence. A husband and wife are expected to care for each other, and should not engage in a property transaction that benefits one at the expense of the other.

90. Id. at § 5(a)(2).
91. See id. at § 5 comment.
92. See generally Cantwell, supra note 64, at 673-74.
93. See supra note 80.
94. UMPA, supra note 3, at § 2 (Supp. 1985).
95. Cantwell, supra note 64, at 674.
96. UMPA, supra note 3, at § 2 comments (Supp. 1985). See also id. at § 5 comment.
expense of the other. This would undermine the trust that is an essential component of the marital relationship. Conduct that breaches that trust should be a violation of the good faith requirement.97

The good faith requirement is meaningless unless there is some penalty for breaching it. If the title holder violates the good faith standard by transferring marital property to a bona fide purchaser, can the non-title holder retrieve it? The answer is no. A bona fide purchaser for value has the right to rely on title to determine who has the power to dispose of marital property.98 Even if the title holder breaches his duty of good faith, the bona fide purchaser for value takes the property free of any claim that the other spouse might have.99

While the bona fide purchaser is not affected by the violation of good faith, the UMPA does provide the injured spouse with a remedy. The Act recognizes that a right without a remedy is a nullity. Hence, the drafters of the Act developed methods for protecting the spouse without title.

The Act permits a court to retitle marital property to insure joint management and control.100 For example, the husband could be ordered to add his wife's name to the title so that neither could act without the consent of the other. The Act also authorizes the court to order an accounting and to determine the right of beneficial enjoyment and access to marital property. These remedies appear to be discretionary, but it is unclear what a court should take into account when making the decision to grant or deny the requested relief. If there has been a violation of the duty of good faith, then an accounting, title change, or an action for damages would clearly be appropriate. But what if the title holder is just a bad business person? Should the court add the other spouse's name to the title so that joint management is required? Could the title holder be enjoined from disposing of or encumbering the property without the partner's consent? The Act is drafted in such general terms that these questions cannot be answered with any certainty. The purpose for the interspousal remedies, as stated in the UMPA comments, gives some guidance.

The Basis: The rationale of the section is well explained in de Funiak and Vaughn, Principles of Community Property, § 151 (1971). There it is pointed out that in community property jurisdictions "it must follow as a logical result that each is entitled to protect or enforce against the other his or her rights in the common property or to enforce or protect as against the other his or her

97. The good faith requirement is difficult to define and as a result it will be difficult to predict when it has been violated. On the other hand, because the term requires judicial interpretation, the objectionable conduct can be evaluated on a case by case basis. Predictability may be lost but flexibility is preserved.
98. Id. at § 7 (Supp. 1985).
99. For a discussion of who can qualify under the Act as a bona fide purchaser, see Wellman, supra note 63, at 718-30.
100. UMPA, supra note 3, at § 15 (Supp. 1985).
rights in separate property, even by civil action. . . . If this right to sue did not exist, one spouse, especially if the title to the property were in his or her name, might be enabled to appropriate community property to his or her own use or otherwise deny or injure the rights therein of the other spouse without the other spouse having any remedy whereby to defeat such conduct.101

Remedies should therefore be crafted to ensure that both spouses can, if they wish, participate in the management of marital property. If consensus cannot be reached, then the court has the right to divide the marital property and permit each spouse to control his share alone.

It may be correct that a marriage is in serious trouble when these interspousal remedies are required, but they at least give a spouse the option to preserve the relationship. If no interspousal remedies were permitted, the injured spouse would have no recourse but to seek a dissolution in order to assert his or her property rights. These remedies would give the spouse of an alcoholic or gambler an opportunity to maintain the marriage and preserve the family assets as well. Some spouses may prefer to remain in the marriage, but not at the risk of their economic security. The interspousal remedies could also benefit the children of a marriage by preventing the dissipation of family income.

C. Principle 3: Marriage Contracts Approved

At common-law marital agreements that altered the obligations of the parties during the marriage were unenforceable.102 Marriage was regarded as a civil contract to which the state was a party; the husband and wife alone could not alter the relationship that the state deemed appropriate.103 Marital agreements, however, that controlled the disposition of property at death were valid.104 Recently there has been a significant trend toward enforcing ante-nuptial agreements at divorce as well as death.105 The Uniform Marital Property Act expands this

101. Id. at § 15 comment (Supp. 1985). The Wisconsin legislature made substantial changes in the interspousal remedy section before it enacted the UMPA. In Wisconsin the injured spouse may request an order that limits or terminates their spouse’s right to participate in the management of marital property. The court is also authorized to enter an order that permits each party to classify property that they acquire in the future as individual so that their spouse has no interest in it. For additional remedies see Wis. Stat. Ann. § 766.70 (West Supp. 1984).

102. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPITAL CONTRACTS pt. 4,
§ 90, at 90-31 to 90-36 (1985).


897, 901 (1973); In re Estate of Moss, 200 Neb. 215, 263 N.W.2d 98 (1978); In re
Paulson’s Will, 254 Wis. 258, 36 N.W.2d 95 (1949).

105. Ferry v. Ferry, 588 S.W.2d 782 (Mo. Ct. App. 1979). Originally, ante-nuptial
agreements that contained provisions concerning alimony or the division of prop-
trend and permits a husband and wife to define their respective property rights during the marriage. The Act provides that a husband and wife may determine by contract the ownership rights to all property that they own or which will be acquired during the marriage. They may also provide for the disposition of their property at dissolution, death, or any other point in their relationship. With some exceptions, they can even contract to modify or eliminate spousal support.

All contracts must be in writing and signed by both husband and wife. They can be executed either before or after the marriage. Marital agreements entered into during the marriage, however, are subject to much greater scrutiny than those executed prior to marriage. The UMPA recognizes that a post-nuptial agreement cannot be classified as an arms-length transaction. The trusting relationship between a husband and wife makes both parties susceptible to accepting an agreement without carefully reviewing it. The parties may be more skeptical of property arrangements proposed prior to marriage and are, therefore, better equipped to look after their own interests. Thus, an agreement executed prior to marriage will be enforced even if it is unfair, so long as the property and financial obligations of each spouse have been fairly disclosed prior to signature. On the other hand, an agreement made after marriage will not be enforced unless (1) it is conscionable, and (2) each spouse has been provided with a fair and reasonable disclosure of his or her partner's assets and liabilities.

Property at divorce were suspect. The courts were concerned that these provisions would induce divorce if the contract rights were very favorable to one of the spouses. Generally these provisions were unenforceable. See, e.g., Reynolds v. Reynolds, 217 Ga. 234, 253-55, 123 S.E.2d 115, 132-34 (1961); Ranney v. Ranney, 219 Kan. 428, 431-32, 548 P.2d 734, 737-38 (1976); Crouch v. Crouch, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964). In recent years, in the wave of the no-fault divorce statutes, the courts have begun to enforce contractual provisions that relate to property division at the time of divorce. See In re Marriage of Stokes, 43 Colo. App. 461, 608 P.2d 824 (1979); Singer v. Singer, 318 So. 2d 438 (Fla. Dist. Ct. App. 1975); Tomlinson v. Tomlinson, 170 Ind. App. 331, 340, 352 N.W.2d 785, 791 (1976).
There are certain results that a marital property agreement may never achieve, regardless of when it is executed. First, the agreement may not adversely affect the right of a child to support.\textsuperscript{112} Second, the marital agreement cannot alter the requirement of good-faith dealing.\textsuperscript{113} Third, a marital property agreement cannot adversely affect the interests of a creditor unless the creditor had actual knowledge of the pertinent provisions when the obligation to the creditor was incurred. Fourth, marital property agreements cannot affect the rights of a bona fide purchaser.\textsuperscript{114}

D. Principle 4: Marital Property Statute Only

The UMPA is not intended to govern the division of property at the termination of the marriage by either divorce or death. It is solely a property statute that regulates the rights of the marital partner during marriage. The equitable division statutes applicable in most common law property jurisdictions will still control the disposition of property at divorce, even after the Act is adopted.

For example, in a UMPA jurisdiction, a husband and wife would each own one-half of the marital property during marriage, but, if the marriage were terminated by divorce, the court need not divide the property equally. Rather, it would make a division on the basis of the state's dissolution statute. For example, one party might receive more than half of the marital property at the time of divorce because their financial outlook is inferior. Adoption of the UMPA would not affect a trial court's authority to make this reallocation of ownership at divorce.\textsuperscript{115}

The UMPA does not mesh with probate provisions as well as it does with existing equitable distribution statutes. The Act gives each spouse one-half of the marital estate during marriage without regard to title. Therefore, spouses should be able to devise their share of the marital property as they see fit. In common law jurisdictions all of the decedent's property is subject to the elective share statute. The surviving spouse is entitled to a statutory share, usually one-third or one-half, of the decedent's estate regardless of the terms of the will. These elective share statutes are essential in separate property jurisdictions because the husband and wife do not share the marital property during marriage. The elective share statute is the only guarantee that the marital partners will share in the property that has been acquired during the marriage.\textsuperscript{116}

\textsuperscript{112} Id. at \$ 10(b).
\textsuperscript{113} Id. at \$ 2(a).
\textsuperscript{114} For a general discussion of the rights of a creditor or bona fide purchaser when a marital agreement is in existence, see Wellman \textit{supra} note 63.
\textsuperscript{115} See \textit{infra} text accompanying notes 187-89.
\textsuperscript{116} See \textit{supra} text accompanying notes 42-43.
The UMPA, however, gives each spouse one-half of the marital property during marriage. The elective share statute would then give the surviving spouse an additional right to one-third or one-half of the decedent's half of the marital property. The combination of the UMPA and the elective share statute would guarantee the surviving spouse substantially more property than she now receives in a common law jurisdiction, and it would defeat the right of the decedent to dispose of his other half of the marital property as he chose. While this may be a desirable result, it is one that should be considered when the UMPA is adopted. The draftsmen of the UMPA say that the Act only governs property rights during marriage but it necessarily has an impact on testamentary devises if the elective share statute is retained.117

IV. POLICY CONSIDERATIONS RAISED BY THE UNIFORM MARITAL PROPERTY ACT

While there is no universal agreement that the law is an effective tool in social engineering,118 there is a strong argument that legislative action and public policy do indeed affect societal behavior and attitudes.119 Without careful consideration of the values that will be promoted or subverted by the enactment or retention of a specific law, legislators may affect societal behavior in an unintended way. As one commentator noted:

No government, however firm might be its wish, can avoid having policies that profoundly influence family relationships. This is not to be avoided. The only option is whether these will be purposeful, intended policies or whether they will be residual, derivative, in a sense concealed ones . . . . A nation without a conscious family policy leaves to chance and mischance an area of social reality of the utmost importance . . . .120

Therefore, as legislators decide whether to adopt or reject the Uniform Marital Property Act, they should first focus on what values a marital property system should reflect.

In the past there has been too little legislative attention paid to the values that are promoted by the common law property scheme. This

117. Some community property jurisdiction have statutes analogous to the common law elective share provisions. There are, therefore, justifications for retaining them in a modified form even in a jurisdiction that adopts the UMPA. See Greene, supra note 6, at 104-05.
scheme developed out of the unique legal institutions of medieval England, and our ancestors retained it because it was familiar and consistent with their English heritage. While this system has not remained static, its basic premise is intact. During marriage, a husband and wife are not required to share their property with each other. They are not treated as an economic unit. Rather, their property interests are largely unrelated to their status as husband and wife. This common law marital property system promotes the ideal of individuality. Equality between the spouses is achieved by giving each of them the right to keep whatever they can produce.

In contrast, the UMPA promotes the ideal of marital sharing. Marriage is treated as an economic partnership. Each partner is expected to sacrifice their individual rights in order to promote the best interests of the partnership. The loss of individual rights is justified by the identifiable benefits that result from participation in the marital unit. Economic equality between the spouses is achieved by giving each one-half of the fruits of the marital partnership.

The thesis of this Article is that this ideal of sharing should be reflected in our marital property system. The common law system that reflects the ideal of individuality should be discarded and replaced by the UMPA. This is so even though the adoption of the UMPA will, at least temporarily, produce some increased litigation and confusion. Major law revisions are naturally disruptive. Lawyers must learn new ways of doing things. Judicial interpretation is often needed to flesh out the statutory language, and implementation can reveal mechanical defects that require legislative correction and refinement. The burden of change, however, must be measured against the benefit that the revision may achieve.

In the late 1930's and 40's several American jurisdictions decided to risk a change to community property in order to reduce the federal tax bill that their citizens would pay. Their legislators recognized the potential problems that such a switch might generate but the financial rewards were deemed to be high enough to justify the potential harm. As one legislator noted:

The purpose of the recent legislation is primarily to effect savings on Federal Income Tax. I have been advised that the minimum savings to taxpayers of Pennsylvania under this bill will be $100,000,000 a year. This is a consideration that cannot possibly be overlooked.

I am not unaware that such a radical change in the law of Pennsylvania will cause some confusion and will be the cause of considerable litigation; but the fact that $100,000,000 will be saved to the taxpayers of the Commonwealth is such a vast amount of money, particularly at a time the taxes are generally

121. See supra notes 26-28 and accompanying text.
122. See supra notes 36-63 and accompanying text.
123. Prager, supra note 2, at 6.
124. See generally supra note 49.
so onerous, that I believe that it is in the interest of the people of the Com-
monwealth to approve the bill and run the risk of the confusion that will be
cauised by the new legislation.125

It is likely that all forty-two common law jurisdictions would have
switched to community property had Congress not enacted the Reve-
nue Act of 1948.126 The question today is whether our legislators are
willing to risk the same change in order to promote sharing as the
appropriate behavior in the marital relationship.

A. The Child Rearing Function of Marriage

The institution of marriage has been recognized by jurists as one of the
most important components of western civilization. In recognition
of the interlocking function of marriage, the family, and government,
legislators and judges have concluded that the marital relationship
must be subject to state regulation.127 One court observed:

Marriage is more than a personal relation between a man and a woman. It
is a status founded on contract and established by law. It constitutes an ins-
itution involving the highest interests of society. It is regulated and controlled
by law based upon principles of public policy affecting the welfare of the peo-
ple of the state.128

By according rights to a husband and wife and imposing respon-
sibilities on them, the law seeks to stabilize the institution of marriage
and to define it in a way that promotes the best interests of the soci-
ety.129 Hence, not everyone has the same rights that a man and wo-
man acquire upon marriage. Only spouses are entitled to hold
property as tenants by the entirety, to file a joint income tax return, to
elect a share of a decedent’s estate, or to claim a loss of consortium.
The law also imposes certain burdens on the marital partners. They
can not sever the relationship without judicial approval, and in some
jurisdictions a husband and wife have reciprocal duties of support.130
Their right to sue each other may be limited by the doctrine of inter-
spousal tort immunity,131 or they could be prevented from testifying
at a trial because of the husband and wife communication privilege.132

125. History of Senate Bills, Session of 1947 122 (Pa).
126. Younger, supra note 2, at 69. See also Surrey, supra note 48, at 1104.
127. Reynolds v. United States, 98 U.S. 145, 165 (1878); H. CLARK, LAW OF DOMESTIC
RELATIONS IN THE UNITED STATES 32-35 (1968); C. VERNIER, supra note 38, at 45.
(1971).
129. See generally, H. CLARK, supra note 126, at 36; C. VERNIER, supra note 38, at 45-
48; Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy -
(1983).
131. Ebel v. Ferguson, 478 S.W.2d 334 (Mo. 1972) (en banc).
This intensive governmental regulation of marriage has been the subject of substantial criticism as an unjustified interference with an essentially private relationship: "Of all actions of man's life, his marriage does least concern other people, yet of all actions of our life 'tis most meddled with by other people."133

In response, judges have, paradoxically, labeled marriage as "intimate to the degree of being sacred,"134 but so important to the "morals and civilization of a people" that it must be subject to governmental regulation.135 Legal scholarship has, however, paid surprisingly little attention to the justifications for this extensive regulation of the family. As one commentator noted:

Perhaps because family life is so much a part of the unspecifiable bedrock of society, there has been a puzzling inattention in both legal and other literature to the broad social policies underlying the preference historically given by the law to family relationships. This contrasts remarkably with the voluminous scholarly work on individual rights.136

Sociologists point to one primary reason that all societies have regulated the family unit in one way or another: the necessity for a stable environment in which to nurture children.137 Humans have an extended period of dependency during childhood. While other animals mature in a few weeks or months, it takes years for a human to become self-sufficient. Furthermore, because of our complex neurological systems, humans are less instinctive and more a product of learned behavior. Humans can use abstract concepts such as language and problem solving to adapt to their environment, but it takes time for such skills to be learned.138 A stable societal unit is needed to teach these skills and to transmit political and cultural values.139

In western civilization, this unit has traditionally been the family, headed by a man and woman who have married each other.140 One of the reasons that marriage is an important component of the familial relationship is that it regulates sexual relations so that conflict and jealousy will not interfere with the stable and benign environment that is needed for child-rearing.141

Marriage also ensures that two persons, not one, will be ultimately responsible for their offspring. Among other species, the mother is normally responsible for the care of the young. If she dies then her offspring die as well. Humans regard their children as too valuable to

133. TABLE TALK OF JOHN SELDON 75 (F. Pollock ed. 1927).
136. Hafen, supra note 129, at 472.
138. Id. at 37-81.
139. Hafen, supra note 129, at 476-84.
141. B. YORBURG, supra note 137, at 39.
be lost just because one parent is gone. If both a mother and father are responsible for the child, there is a greater likelihood that one will remain to provide the care that is necessary. The need for two parents is most acute among humans because it takes so long for the young to mature; there is a greater likelihood that one parent will die or leave while the child is still dependent.142

Another characteristic of humans is that we have a longer lifespan than most species. Because of this, there is often an extended period of dependency for the elderly in our society. It has been the family that has been primarily responsible for both groups. Even now with Medicare, Medicaid, and nursing home facilities, it is the family in America that most often meets the needs of the dependent elderly: "Most impaired older people who receive care at home receive it from a household member, and most receive it for a long period of time. Family members give 80 percent of the medically related and personal care to the chronically limited elderly."143 Thus, a primary function of the family in general, and the marital unit in particular, is to provide the matrix in which to nurture our young and to care for our elderly. Both functions further fundamental social concerns, and both explain the substantial governmental regulation of marriage.

B. Sex-Linked Roles Within the Marriage: Historical Perspective

Historically, women have been largely responsible for homemaking and child care. They have also been the principle care givers to the dependent elderly. Because women tend to live longer than their spouses, elderly men are more likely to be cared for by their wives than vice-versa.144 When a marital partner is not available to care for an aged relative, then the responsibility usually falls upon a female in the next generation—normally the adult daughter or daughter-in-law.145

It is not yet clear why women in most human societies have assumed these nurturing roles.146 Freud said that biology was

142. Even in societies where the biological father cannot be identified it is common for a sociological father to be designated to share the responsibility of raising a child. See B. YORBURG, supra note 137, at 40. See also B. FARBER, FAMILY ORGANIZATION AND INTERACTION 457 (1964).
145. Id. at 14-16.
146. From a benign perspective sex-linked roles might be explained by the biological differences between men and women. Because of her reproductive function, a woman could efficiently care for the home and the children. Hormonal differences might also account for the sex linked roles. The male hormone androgen
destiny. But his theories and those of other male therapists are beginning to be seriously questioned by both male and female professionals who are exploring in increasing numbers the genesis of sex-based discrimination. Regardless of the origin of these sex-linked roles within the family, it is unquestionable that they do exist and that the law has played an important role in enforcing them.

The common law dictated that child rearing and homemaking were the wife's responsibility. The husband's reciprocal obligation was to provide support for the wife and the dependent children. Because he was the legal head-of-household, the husband could decide what level of support was appropriate. As long as he kept his spouse and children from being a burden on society, he was free to run the household as he chose.

The Married Women's Property Acts did little to modify this patriarchal system. While women regained their legal identity, vestiges of the unity doctrine, which merged a husband and wife into a legal unit, remained. The doctrine of interspousal tort immunity was a product of this common law merger, and it was not until 1960 that two spouses were capable of violating the criminal conspiracy laws. Additionally, even after the Married Women's Property Act was enacted, the law continued to designate the husband as head of the household. Because the household was dominated and controlled by the husband, the wife's legal domicile followed her husband. In some jurisdictions she was required to take his surname at the time of marriage.

makes men more aggressive and the female hormone estrogen makes women more passive and receptive. Thus it has been argued that men should assume leadership positions and women should be nurturers:

Such arguments have been used so long that they seem to us "just common sense." However, the evidence that suggests any necessary connection between these biological differences and the specific jobs/characteristics which our society ascribes to male and female is weak and contradictory. It could with as much reason and as little evidence be argued that women would make better political leaders because they are naturally less "assertive" than men and more sensitive to the needs and feelings of others. Similarly, women would make better brain surgeons because they are "naturally" so good at detailed and close work. F. Cox, supra note 1, at 182.

S. Freud, Some Psychical Consequences of the Anatomical Distinctions Between the Sexes (1925).


Id. at 720.

See supra note 132.


New York Trust Co. v. Riley, 16 A.2d 772, 783 (Del. 1940).

and in others she could not transfer her own separate property unless he joined in the transaction.\textsuperscript{155} Often, a wife had no right to claim the loss of consortium when her husband was injured on the theory that she had no enforceable right to her husband’s companionship. In contrast, a husband could claim loss of consortium for his wife’s injury because he was entitled to her services as a matter of law.\textsuperscript{156}

Reality also perpetuated this patriarchal system. Women had few options. Society did not permit them to assume responsible, leadership roles outside the home. Women had little ability to control the number of children that they had because contraceptives were unavailable, and abortion posed substantial health and legal risks. Women assumed their designated role because it was difficult for them to assume any other. Because they had limited access to education or the political process, it was difficult for women to change their position within the society.

A woman was also conditioned by the society to conform. If she rejected her role, she could expect criticism.\textsuperscript{157} If she assumed the role of homemaker she could expect praise:

A woman who is an effective homemaker must know something about teaching, interior decoration, cooking, dietetics, consumption, psychology, physiology, social relations, community resources, clothing, housing, household equipment, hygiene and a host of other things . . . . The young woman who decides upon homemaking as her career need have no feeling of inferiority . . . . One may say, as some do, “men can have careers because women make homes.”\textsuperscript{158}

Yet women received mixed messages. Their role was important, but not worth economic compensation. Their role was valuable, but not as valuable as their husband’s achievements outside the home. Female psychologists, in fact, are now beginning to perceive that women have been conditioned to think of themselves as inferior: “To be born female in this culture means that you were born ‘tainted,’ that there is something intrinsically wrong with you that you can never change, that your birthright is one of innate inferiority.”\textsuperscript{159}

\begin{footnotes}
\footnote{Supervisors of Elections, 266 Md. 440, 295 A.2d 223 (1973); Chapman v. Phoenix Nat’l Bank, 85 N.Y. 437, 449 (1881).}
\footnote{See Peddy v. Montgomery, 345 So. 2d 631 (Ala. 1977), which declared unconstitutional the Alabama statute that required a husband to join in all real estate transactions involving property titled solely in his wife’s name.}
\footnote{Smith v. United Construction Workers, 271 Ala. 42, 122 So. 2d 133 (1960). This case was overruled in Swartz v. United States Steel Corp., 293 Ala. 439, 304 So. 2d 881 (1974).}
\footnote{Bradwell v. Illinois, 83 U.S. 130 (1873).}
\footnote{H. Bowman, Marriage for Moderns 66-67 (1942), quoted in B. Friedan, The Feminine Mystique 121 (1974).}
\footnote{See A. Schaefer, supra note 148, at 27.}
\end{footnotes}
C. Breakdown of the Patriarchal System and Its Impact on the Child-Rearing Function of Marriage

It is little wonder, then, that the Married Women's Property Act did little to change the legal, moral, and economic forces that kept the patriarchal system intact. There is evidence, however, that this patriarchal system is beginning to crack. Women now have more options. For the first time in history, they have some effective control over their reproductive systems. They have access to education and are beginning to exercise more and more political power.160 Most importantly, women work outside the home and are no longer dependent on their husbands for economic survival.161 They still have substantial barriers in the work force, but welfare is no longer the alternative to an unhappy marriage.

Furthermore, the civil rights movement of the 1960's made it socially acceptable to challenge the status quo. During that period women became more conscious of sex biases in their society. The power of the pen (or television) was critical in this process.162 Women were bombarded with information about the tangible consequences of sex discrimination and began to recognize that their roles as homemaker and caregiver had contributed to their inferior economic and societal status.163

If indeed this patriarchal system is breaking down, what will replace it? One option is that women will adopt the values that have normally spelled success for white males. Given the chance, women have demonstrated that they can be just as competitive, aggressive, and dedicated to their careers as men have been. Furthermore, women have a strong motivation to adopt these "male" characteristics. Because western society has been dominated by white males, they have determined what values are worthwhile. They have defined success, and whoever does not meet the standard is inferior. As doors have opened to women, it is little wonder that they have quickly learned what is expected of them:

If we cannot behave like 'real' women, then we had better become adept at behaving like men! Whole industries have sprung up that purport to teach


163. See, e.g., Griffiths, How Much is a Woman Worth - The American Public Policy, in Chapman, supra note 161.
women how to succeed in business. The major underlying message of these programs is nothing more than a variation on the theme of "why can't a woman be more like a man?" So we try. We try very hard . . . . We carry briefcases and learn to assert ourselves.\textsuperscript{164}

To compete by traditional male standards, women must be willing to work overtime, to change job locations when needed, and to forego the parent-teacher conference when it conflicts with work schedules.

But if women begin to assume roles and lifestyles normally reserved for males, then who will be the homemakers? Who will care for the children and the elderly? If the patriarchal system is breaking down, what will bind the marital unit together so that its traditional nurturing function can continue effectively?

One answer is to make the ideal of sharing the social and legal organizational principle of the marital unit. Husband and wife would be expected to focus on the needs of the partnership, foregoing their individual rights for the good of the whole. The nurturing function of the marital unit would be the responsibility of both the husband and the wife, but the partners would be free to allocate the tasks of caregiving, income production, and domestic chores as they chose. Some partnerships may conclude that it is more cost effective for the woman to be a homemaker. In others, the husband might assume that role.\textsuperscript{165} In some partnerships the husband and wife would share the tasks of income production, child care, and domestic chores. In any case, the ultimate responsibility for the nurturing and income production functions of the marital unit would be shared by husband and wife. Success could be claimed by both and failure would be the responsibility of each.\textsuperscript{166}

\textsuperscript{164} A. Schaefer, supra note 148, at 41.

\textsuperscript{165} There are 5.9 million families (or 12 percent of all married couples) in which wives earn more than their husbands. In 1.9 million of these families, only the wife works outside the home. One reason that there has been an increase in the number of "house husbands" is the massive layoffs at factories during the late seventies and early eighties. See Sanoff, \textit{When Wives Earn More Than Their Husbands}, U.S. News \& World Rep. (Jan. 23, 1984), at 69-70. For a discussion of what factors might be utilized to determine when it is most cost effective to the family for the marital partner to remain at home, see M. Geerken \& W. Gove, \textit{At Home And At Work} 123-51 (1983).

\textsuperscript{166} There have been numerous articles and television shows (for example, The Jane Pauley Special, aired on NBC Saturday, Mar. 16, 1985) that discuss the impact on family life of women working outside the home. Women have been blamed and praised, but the focus is always on how women are affecting their family. Rarely is there an acknowledgement that a husband's decision to work outside the home also affects the quality of family life. If the emancipation of women means that they are not solely responsible for the home, then husbands must assume part of the responsibility. Both husband and wife will be expected to moderate their career objectives for the well-being of the family. Likewise, if a wife's income is needed for the welfare of the family, then she must be willing to assume the responsibility. See Krauskopf \& Thomas, supra note 2, at 580-81.
The marital partners would thus be bound by a mutual commitment to the welfare of the family. This voluntary commitment would replace the patriarchal system that held the marital unit together by legal, moral, and social force. It would also reinforce the importance of the nurturing function of marriage. In the past, this nurturing function has been enshrined in platitudes and cliches but has not received serious consideration by judges and lawmakers. The legal structure left a homemaker in a submissive position that was financially disadvantageous. This is not surprising; most judges and lawmakers were men and were responsible for income production, not nurturing. Male jurists emphasized those issues that were most important and familiar to them. They simply lacked the experiential background to see the law from any other perspective.

At one time the second-class status of the nurturing role did not substantially affect family stability. Women had to assume that role by virtue of law and social pressures. As women learn to make choices, it is now necessary for the law to reinforce the importance of nurturing. It is not in the best interest of society for women to discard their values in order to succeed in a male-dominated culture. For women this would be the ultimate loss of identity, and society would lose a different but valuable perspective. The “female” values must receive increased recognition by the whole society. They can no longer be the basis of discriminatory treatment. If our legal and social institutions continue to punish individuals who assume the role of nurturer, both men and women will be discouraged from performing these tasks. It is no longer enough for jurists to talk about how important the family is. It is now necessary that the laws be changed to insure that neither spouse suffers economically because they have performed caregiving functions.

V. THE UNIFORM MARITAL PROPERTY ACT AS AN ALTERNATIVE

A. The Advantages of the UMPA

Adoption of the Uniform Marital Property Act is one change that can be made to reemphasize the importance of the family and marriage in America. By promoting shared responsibility as the accepted and desirable norm, both husband and wife will be encouraged to focus on the needs of the marital unit. By giving financial recognition to both income production and nurturing, the law elevates the status of the caregiver and reemphasizes the importance of the child-rearing function of marriage. Regardless of the role they assume, husband and wife each receive one-half of the partnership property under the

167. See Hafen, supra note 129, at 472.
168. See generally A. Scheaf, supra note 148.
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Thus, during marriage neither partner suffers if he or she is willing to perform caregiving tasks; the partners are free to allocate these tasks as they see fit.

By according property rights to the husband and wife during marriage, the UMPA also reinforces the special status of the marital partnership in various ways. First, as previously discussed, the law has encouraged marriage, rather than cohabitation, by offering benefits contingent upon a marital status. Second, the sharing principle of the UMPA encourages each partner to invest in the relationship. As one commentator stated, "the will to labor and the will to invest depend on rules which assure [people] that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings." Finally, the UMPA promotes effective child rearing. Self-sacrifice, commitment and compromise are essential to effective child rearing. These skills are first learned in the family and then tested and refined in the marital relationship. By promoting sharing in the marriage we are also promoting the attitudes that a husband and wife must have to care adequately for their children.

In contrast, the modern common law marital property system does little to promote the ideal of marriage. This system, which focuses on individual needs and self-fulfillment, is inconsistent with the child rearing function of marriage. The common law property system fails to treat the husband and wife as a unique economic unit during the marriage; in fact, it treats them as if they were single. The common law property system, therefore, does not reinforce the special status of marriage as a means to discourage cohabitation.

There are, of course, other ways to view marriage. In Sweden, the primary function of marriage is to promote individual happiness. A decision was made in Sweden that during marriage each partner should have more freedom. Equality was promoted by emphasizing individual rights. The uniqueness of the marriage relationship and the commitment to sharing are therefore deemphasized.

This attitude toward marriage has been reflected in Swedish marital property reform. Sweden has rejected its community property heritage and has substituted the "deferred community." During marriage, the deferred community is analogous to the common law system. Neither spouse has any ownership interest in their partner's

169. See supra text accompanying note 130.
property. It is not until death or divorce that the marital property is divided pursuant to community property principle.\textsuperscript{174} Hence, Sweden promotes the principle of sharing at the time of death and divorce, but not during the marriage. This approach is almost identical to the marital property system that has evolved in most American jurisdictions.

In Sweden, however, the financial responsibility for the care of children falls on the state welfare system.\textsuperscript{175} Communities within the United States are not willing to accept the state as the appropriate unit for providing economic security for children.\textsuperscript{176} Nor does the American public regard marital partners as equal and independent cohabitants. At least for now, the predominant attitude toward marriage in America is that husband and wife are mutually dependent on each other and are both responsible for the maintenance of the family. Their individual happiness is not the only reason for getting married. Yet, the common law marital property system in forty-two states promotes the same ideal of individuality that Sweden has embraced.

On the other hand, some have argued that the institution of marriage, and the roles of men and women in it, are changing so rapidly that separate property may be the trend of the future.\textsuperscript{177} Professor Glendon, for example, has argued that when equality between men and women is achieved, a husband and wife would be better off if their assets were kept separate.\textsuperscript{178} It is true that the institution of marriage has changed in America since World War II.\textsuperscript{179} Divorce is more preva-

\textsuperscript{174} Glendon, \textit{supra} note 2, at 318. \textit{See generally supra} note 8.

\textsuperscript{175} Glendon, \textit{supra} note 2, at 325.

\textsuperscript{176} The policies of the Reagan Administration reflect a growing conviction that the government should be less, not more, responsible for children. \textit{See W. Grubb \& M. Lazerson, Broken Promises} (1982).

\textsuperscript{177} Changes are accelerating so rapidly in post World War II America that it is impossible to define with any precision the public's attitude toward marriage. That attitude may, in fact, vary from age group to age group or depend upon economic and educational status. Bjorksten \& Stewart, \textit{supra} note 160, at 36. Most literature that discusses family life in America, however, has a recurring theme that marriage is a unique institution that involves commitments that cohabiting individuals have not made. \textit{See} T. Caplow, \textit{Middletown Families: Fifty Years of Change and Continuity} \textit{122-24} (1982); B. Yorburg, \textit{supra} note 337 at 200; Hafen, \textit{supra} note 129, at 486. \textit{See also Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204} (1979). \textit{But cf: Anastasi v. Anastasi, 544 F. Supp. 866} (D.N.J. 1982).

\textsuperscript{178} Glendon, \textit{supra} note 2, at 327.

\textsuperscript{179} The stability of American marriage was greatly challenged by the Second World War. The war made it necessary for women to enter the labor force in order to support their families. \textit{See C. Depler, At Odds: Women and the Family in America from the Revolution to the Present} \textit{417-24} (1980). It was also necessary for women to take over traditionally "male jobs" in order to support the American economy. \textit{See S. Scarr, Mother Care/Other Care} \textit{111-14} (1984); Eskin, \textit{Source of Wartime Labor Supply in the United States, 59 Monthly Lab. Rev.} \textit{264-78} (1944). After WWII, a continuing shift of population from the farm to
lent. More women work outside the home. Research seems to indicate, however, that marriage, as opposed to cohabitation, is flourishing. Sharing is still the norm, not the exception.

The fragmentation and alienation of modern society has, in fact, enhanced the importance of the marital relationship:

We seek a private home, a private means of transportation, a private laundry . . . and do-it-yourself skills of every kind. An enormous technology seems to have set itself the task of making it unnecessary for one human being ever to ask anything of another in the course of going about his daily business . . . . We seek more and more privacy, and feel more and more alienated and lonely when we get it. This technological isolation increases our need to socialize within the marriage. People do not get married to preserve individuality. That is best accomplished by staying single. People get married because they do not want to be alone. A lifetime commitment to sharing gives a sense of security and identity.

The extended family is a disappearing phenomenon. Mobility has decreased the importance of community ties. The days are gone when neighbors got together to quilt or raise a barn. The sense of isolation is heightened. Marriage has become the hoped-for panacea. Divorce has increased because people expect so much from their marriage, not because they think it unimportant. The rate of remarriage after divorce demonstrates the continued vitality of the system.

Implementation of the sharing model during the course of marriage may also serve to reduce some of the acrimony associated with the division of property at divorce. Nothing will eliminate that acrimony completely, but it should not be exacerbated. Our present law does not require either spouse to share his property during marriage.

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182. F. Cox, supra note 1, at 245; Bjorkstein & Stewart, supra note 160, at 40-43.
183. See Bjorksten & Stewart, supra note 160, at 53-57.
Yet at divorce, when tensions are heightened, the judge can take one spouse's property and give it to the other. The parties perceive that they are being deprived of their rights as a result of the divorce process, in part because the law governing property ownership during marriage has not promoted the concept that marriage is an economic partnership. The divorce process may be less disruptive if we promote the sharing paradigm during the course of the relationship, and not just when it ends.

There is, of course, no expectation that a marital property system, in and of itself, will prevent divorce or eliminate the tensions associated with it. Nor will the UMPA ensure that both men and women will recognize the value of nurturing. The impact of the UMPA, however, should not be underestimated merely because it may not be able to revolutionize societal attitudes. With time, experience, and refinement, society usually accepts more widely the policies that its laws promote. The question is what principles will be governing society when our grandchildren are raising their families. The UMPA is more likely to promote a rededication to the child rearing function of marriage than will a common law system that contributes to the notion that marriage is only a vehicle for individual fulfillment.

B. Opposition to the UMPA: Marriage is Not an Economic Partnership

There are opponents to the partnership concept of marriage. They argue that the introduction of economics into the personal and spiritual relationship that marriage represents is a deviation from the basic purposes of the institution:

Shall we adopt the rather characteristic tendency of our country and of our time, to think dominantly in terms of money, of wealth, of things and embody the modern view of the equality of man and woman in a pronunciamento that justice as between husband and wife consists in the having of equal shares in all the things' acquired during marriage through the efforts of either or both? Or shall we accept an approach simultaneously less mercenary and more individualistic, and regard marriage as a sharing of experiences, not primarily concerned with wealth, by two coordinate persons each of whom should be accorded by law the power to acquire, to control and to dispose of such wealth as his separate abilities may enable him to secure?184

Jackson M. Bruce, Jr., past chairman of the ABA Section of Real Property, Probate and Trust Law, has concluded that “[m]arriage is not an economic partnership. That's a lot of baloney. It might be a partnership of some other kind.”185 In Sweden, the concept of community property has also been criticized as bourgeois because of its

preoccupation with economics.186

These arguments do not recognize that there have always been economic consequences to marriage. Social security benefits are affected by marital status, and our taxation system treats the married different from the unmarried. Insurance coverage and pension benefits are closely related to marital status. Trust law can be traced in large measure to the need in the Middle Ages to regulate property interests because of the marital relationship.187 The elective share and intestacy provisions of the Uniform Probate Code recognize that marriage does have economic consequences, and the Uniform Marriage and Dissolution Act is based on the premise that marriage is an economic partnership.

The real question then is whether the economics of marriage should be recognized only when the relationship is terminated by either death or divorce, or whether it should be recognized while the relationship is still viable.

C. Opposition to the UMPA: The Act Will Hurt Divorced Women

The UMPA has also been criticized as detrimental to the best interest of women.188 Opponents argue that the equal division of assets during the marriage will influence divorce courts to make the same fifty-fifty split when the marriage is terminated. This will adversely affect women because they are likely to need more than 50 percent of the property at divorce because of their inferior economic position.

First, the divorced woman is frequently the custodial parent of young children. Her financial responsibilities are increased, but she has less opportunity to generate income because of her child care role. Second, a woman has less opportunity to produce sufficient income because of the pervasive discrimination against women in the work community. Finally, a woman who has removed herself from full-time employment to care for children and the home will not have the job skills and seniority that may be necessary to make her self-supporting at the time of divorce.189 The concern is that the UMPA will put so much emphasis on equality that the courts will lose sight of the disparate economic needs of women.

These opponents of the UMPA acknowledge the Act is not intended to have any effect on the division of property by a divorce court.\textsuperscript{190} The commissioners have stated expressly that the Act takes the parties "to the door of the divorce court only."\textsuperscript{191} It defines the rights of the parties only during the marriage. The existing equitable distribution statutes will control what percentage of the property will be taken by the husband and what percentage will be taken by the wife at the time of divorce. Title does not control this division. Nor is a fifty-fifty division mandated by most equitable distribution statutes.\textsuperscript{192} The divorce court is expected to take into account both the economic disparity of the parties and to compensate them for the contributions that each has made to the partnership.

Nonetheless, the opponents contend that as a practical matter the court will be influenced by the UMPA: "[T]he inevitable tendency would be to freeze property distribution to an equal allocation, since this is the easiest thing to do for the divorce court."\textsuperscript{193} If this occurs it will not be because of the UMPA. Instead it will result if the courts and attorneys either do not understand the dual function of property division at divorce, or because they refuse to use it.\textsuperscript{194}

\textsuperscript{190} FairShare, supra note 188, at 19.
\textsuperscript{191} UMPA, supra note 3, at § 1 (Supp. 1985).
\textsuperscript{192} For a breakdown of the statutory factors that a divorce court is required to consider when dividing property in each of the fifty states, see Freed & Walker, Family Law in the Fifty States: An Overview, 18 Fam. L.Q. 369, 390-95 (1985). None of the so called equitable distribution statutes require a fifty-fifty division. Some, however, have a presumption that the division should be fifty-fifty. See, e.g., Ark. Stat. Ann. § 34-1214(A)(1) (Cum. Supp. 1985); N.C. Gen. Stat. § 50-20(c) (1984).
\textsuperscript{193} FairShare, supra note 188, at 18.
\textsuperscript{194} There is a substantial amount of evidence that divorce courts are not giving much weight to the disparate financial needs of the parties at the time marital property is divided and maintenance is awarded and denied. There is a growing attitude that if women want equality they will get it with vengeance. For example, if maintenance is awarded at all, it will continue for only a short time on the theory that a homemaker can take care of herself after a few months or years of "rehabilitation." Aella, Economic Adjustment on Marriage Breakdown: Support, 4 Fam. L. Rev. 1 (1981). See generally Weitzman & Dixon, The Alimony Myth: Does No Fault Divorce Make a Difference, 14 Fam. L.Q. 141 (1980). Likewise, child support orders and maintenance orders cannot exceed the husband's "ability to pay." In applying this standard, however, the courts have failed to recognize that this often means that the husband's standard of living is protected at the expense of his wife and children. See Aella, supra, at 6. As one commentator has observed:

[Researchers in Michigan found that] over [a] seven-year period, the economic position of divorced men, when assessed in terms of need actually improved by 17 percent. In contrast, over the same period divorced women experienced a 29 percent decline in terms of what their income could provide in relation to their needs . . . .

How does this striking contrast in economic experiences of former husbands and wives come about? One explanation is that the wife typically assumes most of the costs of raising the couple's children. Thus,
When the Uniform Marriage and Divorce Act was first introduced, its opponents argued that no-fault divorce would permit marriage to be easily terminated, leaving women at a financial disadvantage. To insure that both parties retained some semblance of financial security, property division was to be based on both contributions and need. The Act directs the court to evaluate the contribution that each party has made to the partnership, but the judge is also to take into account the economic disparity between the spouses when the marital property is divided. This dual function of property division has been recognized in most equitable distribution states.

The dual function of property distribution takes into account contributions and also the opportunity cost of those contributions. Women have traditionally provided child care and homemaking skills to the marital partnership. These contributions enhance the quality of life that the family enjoys, but the woman incurs a substantial opportunity cost for these contributions. When her marriage ends, she lacks the skills or the current education that are necessary to secure more

her need for help and services increases as a direct result of her becoming a single parent, while at the same time her income declines.

A second explanation lies in the inadequacy of the child support (and in rarer cases, the alimony) which the wife is awarded. All too often this support does not come close to compensating her for her actual costs. Thus, she must somehow make up the deficit alone, even though she earns much less than her former husband.

A third reason for the discrepancy is the reduced gap between the husband's income and his needs after divorce. Although the husband has fewer dollars than before divorce, he is not constrained to share those dollars with his former wife and his children. Thus, the demands on his income have diminished. As a result, the husband is left with more surplus income than he enjoyed during marriage.

Fourth, many divorced men have received salary increases over the years, while their obligations for alimony and child support have remained fixed or diminished; some support obligations have ended, others have been reduced (for example, a child may have reached majority), and a good many men have simply decided to reduce or stop their support payments despite the existence of a court order. The result, once again, is that divorced men are able to enjoy the surplus income themselves.


These problems, though, seem to exist whether there is a presumption of equal division or not, and even in jurisdictions where the statutes specifically direct the court to take into account the financial status of the parties.


196. Freed & Walker, supra note 192, at 392. Not all states have statutes directing the courts to take into account financial need, "but [a] major purpose of equitable distribution in many states is to provide for future support needs." J. Krauskopp, CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION 226 (1983).
than a subsistence level living. She also lacks pension benefits that are normally accumulated as a result of steady employment outside the home.197

Men have traditionally produced income. These contributions enhance the quality of life that the family enjoys. The husband produces immediate benefit for the family, but he also makes a long-term investment in himself. When his marriage is terminated, he already has the seniority, the skills, the education, and retirement benefits to maintain his standard of living. It is for these reasons that the UMDA and equitable distribution statutes take into account not only contributions to the acquisition of property, but also the relative financial position of the parties at the termination of the marriage. Both opportunity cost and contribution are relevant factors because, as in any partnership, the costs and benefits of the relationship are shared equally. A system that fails to acknowledge the opportunity cost of child care and homemaking would discourage people from assuming those responsibilities, to the detriment of society.

This dual function of property division is still needed even though there are substantially fewer full time homemakers in the United States today than twenty years ago. Thousands of marriages are still based upon the traditional model.198 Even women who have opted for employment outside the home are generally not able to pursue their careers in exactly the same way that their husbands do. Statistics indicate that women often leave the job market when their children are young.199 Furthermore, many of them engage in part-time work so that they can also manage the home.200 Even when they work full-time, women are still primarily responsible for child care and domestic work, leaving them less time and energy to devote to their careers.201 For working women, then, as well as for the traditional homemakers, the commitment to the family will have an impact on their earning capacity, seniority, and retirement benefits.

Whether women or men fulfill the homemaker/child care role, the law should not penalize the partner who is willing to balance career advancement with the needs of the home and children. Nor should the law be based on the erroneous premise that full-time employment

198. Approximately 13 percent of American families can be classified as single-breadwinner nuclear families, and approximately 16 percent as dual breadwinner nuclear families. Bjorksten & Stewart supra note 160, at 36.
200. Id. at 304.
201. M. GEERKEN & W. GOVE, supra note 165, at 87. In fact, there is evidence that women who work outside the home receive less help from their husbands than does the traditional homemaker. Id. at 91.
means equal opportunity. The divorce courts, therefore, should con-
tinue to recognize the dual function of equitable property division,
even if the two paycheck marriage is the norm and not the exception.

The adoption of the UMPA should have no impact on the manner
in which the equitable distribution statutes are applied. The sole focus
of the UMPA is on contributions. The Act recognizes that husband
and wife each make an equal contribution to the partnership and are
therefore entitled to 50 percent of the marital property as long as the
relationship continues. The UMPA does not need to focus on oppor-
tunity cost, because as long as the partnership continues, the cost of
those contributions are shared equally. If the partnership has fewer
assets because one spouse or both have reduced their earnings capacity
to care for the needs of the family, then each spouse bears the reduc-
tion in assets equally. The assets that are produced are shared equally
so neither spouse is disadvantaged. It is only when the marriage is
ended by divorce, and future assets will no longer be shared equally,
that the opportunity cost factor becomes important. Then the court
should consider the economic disparity between the parties as well as
their contributions.

Opponents of the UMPA, who are concerned that focusing on
equality will be disadvantageous to homemakers, also fail to take into
account the ominous possibility that divorce courts will distribute less
than half of the marital property to a wife on the assumption that her
contributions are not equal to her husband's. If the court starts with
the assumption that all of the property is owned by the husband, the
court might need to award the wife a substantial part of the husband's
property to equalize the economic disparity between the parties. If,
however, the court starts with the assumption that the husband and
wife each own one-half of the marital property, then a smaller per-
centage of the husband's property would be needed to equalize the
economic disparity between the parties. Thus, in an UMPA jurisdic-
tion, the judge should be more inclined to use property division to sat-
isfy the needs of the homemaker.

Nonetheless, neither the UMPA nor the common law marital
property system guarantees that the divorce courts will accept the
dual function of property division. Proper selection and education of
judges is key to that issue. It is also important that attorneys empha-
size this dual function of property when representing a spouse whose
economic status has been impaired because of the caregiving tasks per-
formed during the marriage.

VI. CONCLUSION

An important function of the Uniform Marital Property Act wil be
to focus debate on the values that our society should promote within
the institution of marriage. In the past, the choice between commu-
nity property or separate property has been based on historical accident rather than rational choice. In France, community property served to encourage the continued independence and strength of the nobility. In England, the marital property system facilitated the consolidation of power in a central authority. Many jurisdictions in the United States adopted the common law scheme of marital property merely by passing legislation implementing all common law doctrines that existed prior to 1776. The scheme was consistent with their cultural heritage from England. It maintained the status quo, and there is no evidence that its retention was a conscious choice arrived at after public debate.

Improved communication and cultural changes now require us to consider the alternatives. The cultural aversion to community property that was common during the colonial and the westward expansion periods has been neutralized by improved communications. We have a better understanding of both the strengths and weaknesses of community property. In fact, the common law has now been reformed to reflect the value of sharing when a marital partnership is terminated by death or divorce. As a result, the concept of an economic partnership is no longer foreign.

Improved communications and cultural changes have also precipitated the breakdown of the patriarchal system. Women, as well as men, can now choose the role that they wish to assume: “For the first time in history all women in this country can see themselves in a role other than that of full-time mother and homemaker.”202 Children will continue to be produced and the elderly will continue to need care, but the forces that allocated those responsibilities to women are weakening. Legislatures must now consider whether the government or the family should be responsible for these tasks when women chose to work outside the home. If the family is to remain responsible, what incentives will those legislators offer to family members who are willing to perform these tasks? If the stick is no longer available, then a carrot must be substituted.

The UMPA is one incentive that the legislature can offer. The Act encourages family members to assume responsibility for the care of the young and the old because it assures that the caregivers and income producers receive the same reward. There is equality between the husband and wife, but the UMPA takes us one step beyond simple equality. By promoting the value of sharing, it refocuses the energies of the husband and wife on the needs of the marital unit as a whole, not just on the rights of the individuals within it.

202. Krauskopf & Thomas, supra note 2, at 583.