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MARRIAGE AS A BAD BUSINESS DEAL: DISTRIBUTION OF PROPERTY ON DIVORCE†

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While reasonableness is rarely the main ingredient in the decision to marry, the law should not make the choice to marry unreasonable *per se*.¹

ALTHOUGH many factors can be involved in the reasonableness of marriage, this Essay focuses on only one—the financial settlement in the event of divorce. Recent changes in divorce law and in demographic patterns of marriage and divorce are making marriage an unreasonable decision for an increasingly large segment of the population. If marriage is to become an economically reasonable decision for persons affected by these changes, divorce laws pertaining to financial settlements need to be revised.

Ironically, the recent changes in divorce law were intended to correct inequities in the law. While the changes may produce more equity in divorces that conform to past patterns of marriage and divorce, they unfortunately tend to produce inequity in those that conform to more modern patterns.

Recent changes in laws concerning financial settlements upon divorce concern what property is to be divided, how that property is to be divided, and if and how much alimony or maintenance is to be awarded. A pervasive trend has been to increase the property to be divided. One aspect of this trend has been the classification of more property as marital or community and, therefore, less as nonmarital or separate.² Another aspect has been the expansion of the category of

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1. H.D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 365 (2d ed. 1986).

2. Some states permit courts to distribute both marital or community property and separate property. See Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 *FAM. L.Q.* 417, 453-54, Table IV (1988); see also L.J. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* § 2.02 (1983).

property to include, for example, unvested pensions.³ Additionally, there has been a decrease in the importance of marital fault to the division of property upon divorce.⁴ Finally, alimony as a life-long award to a dependent spouse has generally been replaced with short-term "rehabilitative" alimony to enable a dependent spouse to acquire job training and become economically independent.⁵

During the 1970's, partly in response to the drive for equality of the sexes, equal division of property and diminution of alimony were emphasized. An equal division of property supposedly reflects the equality of the sexes, while alimony is often considered demeaning and is, in practice, usually not fully collected. Recently, however, equal division of property has been viewed less favorably.⁶ To provide an equal division of property, the family home may have to be sold, sometimes leaving a spouse having custody of children with inadequate housing. Moreover, one spouse, usually the husband, may have a higher earning capacity. Consequently, postdivorce economic equality and, thus, sexual equality, does not necessarily result.⁷

Recent divorce law changes, as well as some suggestions for further changes, have been based on the most prevalent past pattern of marriage and divorce. This traditional pattern was of couples marrying at a young age, the wife staying home to raise a family, and the couple divorcing after a substantial number of years. However, two other patterns of marriage are becoming increasingly significant. One prominent pattern involves the rise in the number of second and subsequent marriages.⁸ These marriages naturally occur at a later age than first marriages.⁹ Moreover, one or both of the participants in these marriages may have been through a financially difficult divorce and,

3. See, e.g., *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (Cal. Ct. App. 1979), *appeal dismissed for want of a substantial federal question*, 444 U.S. 1028 (1980) (pension); *Evans v. Evans*, 96 Mich. App. 328, 296 N.W.2d 248 (Mich. Ct. App. 1980) (social security); *Elliott v. Elliott*, 274 N.W.2d 75 (Minn. 1978) (social security); see also M.A. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 67 (1981).

4. Freed & Walker, *supra* note 2, at 462-63, Table V, 467.

5. L.J. WEITZMAN, *THE DIVORCE REVOLUTION* 163-64 (1985); see also H.H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 175 (2d ed. 1987).

6. See, e.g., L.J. WEITZMAN, *supra* note 5, at 105-09.

7. See *id.* at 378 ("For without equality in economic resources, all other 'equality' is illusory.')

8. In 1970, 31.4% of marriages taking place in the United States involved at least one previously married partner. By 1975, this percentage had risen to 39.9%, and by 1980, to 43.8%. By 1985, this percentage had risen to 45.7%. BUREAU OF STATISTICS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 85, Table 129 (109th ed. 1989) [hereinafter *STATISTICAL ABSTRACT*].

9. In 1985 the median age at first marriage was 23.0 years for women and 24.8 years for men. The median age for divorced people remarrying was 32.7 years for women and 36.0 years for men. *Id.* at 86, Table 130.

therefore, may be more apt to consider the financial aspects of marriage than people entering their first marriage. The other growing pattern is simply marriage at an older age.¹⁰ Because marriages that fit into both of these patterns involve older people, it is more likely that both partners will enter the marriage with established jobs or careers in which they expect to continue. In both of these newer patterns, spouses are more likely to bring significant property into the marriage than in the traditional pattern.

This Essay focuses on the law governing the division of financial assets and concludes that the law, as it now exists, can make marriages that fit into the newer patterns unwise and unfair. Because both partners in such marriages are more likely to have established employment or careers, the decrease in alimony awards is less significant. Additionally, the classification of property as marital and nonmarital, together with the current method of distribution, is unreasonable and unfair when applied to marriages that fit into these new patterns and that end in divorce.

A significant minority of states classify all property as marital. Even in the majority of states which distinguish between marital and nonmarital property, the classification is likely to be unfair in marriages conforming to these newer patterns. New ways of treating pensions on divorce also contribute to making such marriages financially unwise. The principles of distribution do not correct and may exacerbate the problems that arise from the classification of property.

I. MARRIAGE AS AN ECONOMIC PARTNERSHIP

Divorce law's purposes can significantly affect its contours. Divorce law, especially as it relates to property distribution, can be assumed to

10. In 1975, 65.3% of people who got married in the United States were 24 years old or younger. By 1980, this percentage had dropped to 58.2%. By 1985, people 24 or younger accounted for only 48.3% of people married in the United States. While these percentages were dropping, the percentage of people who got married between the ages of 25 and 34 rose from 21.1% in 1975, to 28% in 1980, and to 34.1% in 1985. Likewise, the percentage of people who got married between the ages of 35 and 44 rose from 6.7% in 1975, to 7.8% in 1980, and to 11.1% in 1985. *Id.* at 85, Table 128.

If, as argued, the divorce law discourages marriage, one might wonder why marriage rates continue to be so high. Four possibilities suggest themselves. First, the rates would be even higher were it not for the divorce laws. Second, the effect is not so much discouragement of marriage but discouragement of marriage outside of one's economic class. Thus, divorce law affects who people marry but not whether they marry. Third, economic considerations are not the only factor involved in determining the overall reasonableness of marriage, so when other factors are considered, marriage might still be reasonable. Fourth, perhaps some decisions to marry are simply not rational or reasonable; whom one loves does not seem to be rationally based. Whatever the case may be, the law need not and should not contribute to marriage being economically unreasonable.

have at least three purposes. First, the law should provide a sharp and clean break so that the ex-spouses can get on with their lives with minimal personal and financial contact. Of course, where there are children, continued contact regarding them should occur. Second, the law should have predictable results so that spouses can plan for the consequences of divorce. Third, the law should be fair,¹¹ since fair laws tend to diminish disputes.¹² Basic to these purposes is the concept that marriage should not be discouraged by society.

The traditional concept of marriage underlying the law has both moral and economic aspects. The moral aspect involves public recognition and protection of an intimate sharing and loving relationship that provides a setting deemed desirable for child rearing.¹³ Historically, this moral aspect was reflected in the law by the prohibition of adultery, by fault-based divorce, and by the distinction between legitimate and illegitimate children. With the trend against legal enforcement of morality and the demise of fault-based divorce, the moral aspect has become less significant, especially for divorce.

The historical economic aspect of marriage was an identity in the husband. That concept has been replaced by one of an (equal?) economic partnership.¹⁴ Three principles underlie the economic partnership concept of marriage.¹⁵ First, the principle of "all efforts" is that each spouse will contribute all time and effort to the marital unit. Second, the "enablement" principle is that homemaking enables the income producer's activities. Third, the "sharing" principle is that spouses expect to share in the financial fortunes of the marital unit. The reasonableness and fairness of current laws for second¹⁶ and late marriages that result in divorce depend largely on the appropriateness of these principles.

The partnership conception of marriage omits some considerations relevant to the total well-being of the marital unit and its partners. For example, in the partnership model there is no consideration of psychological well-being or of love and commitment. Although the principles of "all efforts" and "enablement" are meant to include intangible as well as tangible aspects, the concept is of a semi-arm's-

11. Whatever "fair" is.

12. Of course, the public interest in fairness transcends dispute minimization.

13. See Bayles, *Marriage, Love and Procreation*, in *PHILOSOPHY AND SEX* 130, 138-42 (R. Baker & F. Elliston 2d ed. 1984).

14. See H.H. CLARK, *supra* note 5, at 194.

15. Krauskopf, *Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 1019 (1987).

16. The expression "second marriage" is used throughout to describe any marriage after the first.

length relationship and does not represent a full conception of marriage, especially as viewed by participants. Nonetheless, the law probably cannot adequately handle a full concept of marriage. The following criticisms reveal that the partnership model is inadequate even as a concept of the economic aspects of marriage.

The "all efforts" principle is both psychologically and economically inappropriate. The once popular notion that couples should share everything no longer seems realistic. To maintain their separate identities and independence, people now expect to have some separate and individual activities. This is especially true of persons marrying for a second time or at a late age. They have significant past lives as separate individuals. Psychological identity and independence often depend on financial independence. Financial independence can rest on individual income or separate property brought to the marriage that one may expect to manage and retain. If both spouses are working, they often think of at least some of their income as separate; not all efforts are devoted to the marital unit.¹⁷

The "enablement" principle seems more plausible. Surely, one spouse managing all homemaking chores enables the other spouse to devote more time to producing income.¹⁸ However, this principle assumes that the income producing spouse can devote more time to producing income and that the time spent performing homemaking chores comes from time spent producing income. Neither of these assumptions is necessarily true. People in hourly paid jobs cannot unilaterally increase their hours of work, and salaried workers are not directly paid for overtime. Moreover, homemaking activities usually decrease recreational time rather than work time. The "enablement" principle becomes even less plausible if it is interpreted to mean that the enablement function's value increases in proportion to the income produced.¹⁹ If one simply values homemaking time as the cost of hiring someone to do the work, then of course it does not increase proportional to the income produced. If one thinks of it as saving the income producer time, then it would be proportional. However, this view is based on the mistaken assumption that homemaking time is

17. In roughly one-third of marriages where both spouses work, they view their earnings as individual, not family, income. M.A. GLENDON, *supra* note 3, at 65 n.55.

18. I have found that I have more time for professional activities when single, even performing household chores myself, than when married. The loss of time when married stems from activities that might be considered their own reward—for both partners. These self-rewarding aspects are not considered in the partnership model, but as each partner benefits, they do not affect the economic aspects.

19. See, e.g., Krauskopf, *supra* note 15, at 998.

taken from time that would be used to produce income rather than from time that would be used for recreation.

Although this proportionality interpretation of the "enablement" principle is incorrect, a concept of the "sharing" principle based on proportionality is possible. A general formula for each spouse's share of marital assets is $S = Sf \times T$, where T is the total of marital assets and Sf is one spouse's fractional share. Thus, even if a spouse's activity is homemaking, assuming Sf remains constant, the value of that spouse's share increases in proportion to the total. However, the general formula does not indicate what fraction of the total marital assets belongs to a spouse. That is, the division need not be in proportion to the amount each contributed or produced. Spouses probably have different conceptions about appropriate shares, and the expectations of a particular couple might change over time. These expectations cannot be the sole basis for determining what the law should be, for they are shaped partially by what the law is. Consequently, while a minority of states divide marital property equally, a large majority distribute it equitably, which allows for unequal shares.²⁰

II. MARITAL AND NONMARITAL PROPERTY

Partners' expectations of the share of assets they will receive on divorce can reasonably be understood to depend in part on the amount of property they bring to the marriage. In first marriages at a young age, neither partner usually has much property. However, that is often not the case in second and late marriages. For people contemplating such marriages, marriage can be viewed as economically unreasonable. Consider an example of each of these trends. Person *A*, who is considering a second marriage, owns a car, furniture, and a house valued at \$85,000 with a remaining mortgage of \$50,000. Person *B*, who is contemplating a first marriage, is thirty years old, has a full-time job that pays \$28,000 a year, owns a car and 135 shares in the employer's company bought under an employees' stock purchase program, and has \$5600 in a mutual fund. Suppose that each is contemplating marriage to a person who, though employed, has an income some \$5000 to \$10,000 less per year and no significant property other than an automobile.

A and *B* can both lose a significant amount of their property should their marriages end in divorce in, say, five years. Crucial to this potential loss is the classification of property as marital or nonmarital. In a significant minority of states, no distinction is made between

20. See Freed & Walker, *supra* note 2, at 453-54, Table IV.

marital and nonmarital property.²¹ In these "hotchpot" states, the judge dividing the assets presumably considers how much property each person brought to the marriage.²² However, that is only a presumption, and the judge need not do so. Consequently, both *A* and *B* risk losing a portion of the property they bring to their marriages if the marriages end in divorce. In this respect, marriage is economically unreasonable and unfair for *A* and *B*.²³

Community property and common law states that distinguish between marital and nonmarital property face similar problems.²⁴ In the majority of states which make such a distinction, property possessed prior to marriage and property acquired by gift or inheritance during marriage are normally classified as nonmarital. Moreover, except in one state,²⁵ the classification of property as marital or nonmarital largely depends on the source of funds expended to buy the property. In these states, *A*'s and *B*'s separate property seems secure. Not so!

The doctrine of transmutation provides several ways by which the actions of one or both spouses can cause separate property to become marital property.²⁶ First, property can be transmuted by gift or by placing it in joint title.²⁷ For example, suppose *B* sells a few shares of the mutual fund to purchase a stereo television as a Christmas gift for *B*'s spouse. In some states, the gift becomes the recipient spouse's separate property. However, other states explicitly except interspousal gifts from being separate property, in which case the gift becomes marital property.²⁸ Similarly, suppose that after a few years *A* and *A*'s spouse decide to sell their house and purchase a larger one. In many states, mortgage lenders require that the new house be taken in joint title. In this case, the house becomes marital property, and *A*'s previously separate equity is converted to marital property.

Second, suppose *A* avoids placing the house in joint title. It still could be readily transmuted to marital property through the doctrine of commingling. *A*'s income is marital property. If this income is used to make mortgage payments, marital and nonmarital property has been commingled and the nonmarital property is therefore possibly

21. See *id.*; L.J. GOLDEN, *supra* note 2, at § 2.02.

22. See C. FOOTE, R.J. LEVY & F.E.A. SANDER, *CASES AND MATERIALS IN FAMILY LAW* 658 (3d ed. 1985).

23. See M.A. GLENDON, *supra* note 3, at 63.

24. H.H. CLARK, *supra* note 5, at 177-78. Actually, the common law states have often incorporated community property doctrines. See *id.*

25. See Freed & Walker, *supra* note 2, at 453-54, Table IV, 455 (In Mississippi the classification of property depends solely upon the state of title to that property.).

26. See generally Krauskopf, *supra* note 15, at 1002-09.

27. See, e.g., *Carter v. Carter*, 419 A.2d 1018, 1022 (Me. 1980).

28. See, e.g., FLA. STAT. § 61.075 (3)(a)(3) (Supp. 1988).

subject to division upon divorce.²⁹ The same occurs if *B* purchases more shares of stock under the employee plan or buys more shares of the mutual fund. When marital property is combined with nonmarital property, the resulting whole will usually be classified as part marital and part separate property, the percentages depending upon the source of the funds.³⁰ Thus, if *A* had \$35,000 worth of equity in the house at the time of marriage, at least that much will remain *A*'s separate property.

A has not, however, avoided the possibility of having the equity at marriage transmuted to marital property. A third form of transmutation occurs when property is used by the marital unit. Thus, if *A* and *A*'s spouse live in the house and use the furniture, this property can become marital.³¹ With this version of transmutation, *A*'s only method of retaining the house as separate property is to refrain from using it as the marital home. *B*, however, will avoid this form of transmutation, because the stock and mutual fund are not "used" by the marital unit.

There is another way *A* and *B* can find marriage financially disadvantageous. Suppose *B*'s mutual fund is a high income bond fund with the income re-invested. In some states, the income received from separate property during marriage is marital property,³² so the shares bought by re-investing are also marital. Similarly, if *A* rents the house, the rental income is often marital property. Accordingly, if this rental income is used to pay off the mortgage, that part of the equity in the house becomes marital property. In short, if income from separate property is marital property, separate property brought to a marriage cannot increase due to re-investment of income.

A and *B* might still be able to increase the value of their separate property; they might have capital gains. Whether this is so depends on the principles used for dividing the appreciation in value between commingled marital and nonmarital property. In some cases, appreciation other than that caused by inflation is simply classified as marital property.³³ If this principle is employed, *A* and *B* will not retain as separate any growth in the real value of their separate property.

29. *In re Marriage of Marsden*, 130 Cal. App. 3d 426, 181 Cal. Rptr. 910 (Cal. Ct. App. 1982); *Sturgis v. Sturgis*, 663 S.W.2d 375 (Mo. Ct. App. 1983).

30. See Krauskopf, *supra* note 15, at 1000.

31. See, e.g., FLA. STAT. § 61.075(3)(b)(3) (Supp. 1988) (Income from separate property ceases to be separate if "treated, used, or relied upon . . . as a marital asset.").

32. See, e.g., H.H. CLARK, *supra* note 5, at 189; Krauskopf, *supra* note 15, at 1000; IDAHO CODE § 32-906 (1983).

33. See, e.g., *Sousley v. Sousley*, 614 S.W.2d 942 (Ky. 1981) (appreciation in value treated as income and divided).

Two other principles are often used, especially for private businesses, depending on whether the major source of funds invested in the business is marital or nonmarital.³⁴ If the primary source of increase to separate property is the skill and activity of one spouse, such increase will likely be categorized as marital property.³⁵ If the primary source of increase to separate property is independent of the marital unit, then such increase will likely be categorized as separate property. Thus, if *A* rents the house, the marital unit is entitled to reasonable compensation for *A*'s managerial effort. If *B* does nothing with the shares of stock and does not re-invest dividends, then *B* might be able to retain their full value as separate property, even if the shares appreciate in value.³⁶

The point is that *A* and *B* have little chance to do better than retain as separate property the value they bring to marriage adjusted by inflation. At best, they can retain full appreciation of unmanaged assets. At worst, the whole could become converted to marital property. If their intended spouses have little property, no property, or property of significantly less value, they are not entering the economic partnership on equal terms. Without assurance that the division of marital assets upon divorce will reflect their greater contributions, *A* and *B* are faced with a bad business deal.

III. PENSIONS

Pension rights brought to marriage are separate property, but those acquired during marriage are now generally considered marital property. The distribution of marital pension rights upon divorce is complex. Only a few points regarding possible unfavorable distributions are mentioned here. Suppose *CH* and *CW* have approximately equal incomes, but *CW* has a better pension plan because her employer contributes more. Upon divorce, pensions acquired by both during their marriage are treated as marital property. Suppose they are divided equally. In this case, *CW* receives a smaller pension for the years of marriage than she would receive if she had been single during those years. But, one might say, this is appropriate if one assumes that marriage is an equal partnership. Nonetheless, it is an unwise economic decision to put more into a partnership than the other partner if assets are to be divided equally. Moreover, the variety of pension plans and

34. See generally Krauskopf, *supra* note 15, at 1024-33.

35. Remember that any effort put into managing a business is, by the principle of all efforts, a marital contribution.

36. See, e.g., *In re Estate of Ney*, 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (Cal. Ct. App. 1963); *Cord v. Cord*, 98 Nev. 210, 644 P.2d 1026 (1982).

methods of valuing them render it difficult to be sure that one will not lose simply by miscalculation of benefits.

IV. OTHER CONSIDERATIONS

Persons entering a second or late marriage with significantly more property than their intended spouses are making a bad business deal. All of the property they possessed before the marriage might be considered in the distribution of assets upon divorce. Some of their formerly separate property may become marital property, the income from property retained as separate may be considered marital property, and the appreciation in value of property retained as separate may be considered marital property.

However, mere classification of property as marital does not necessarily imply that one will lose it upon divorce. One might lose some of such property in equal division states, but, even there, judges often consider the source of the funds with which the property was purchased. In states in which property is divided equitably, if one has an equitable claim to a larger share of marital assets, that claim may be recognized. The classification of assets as marital or separate, though, is not the dispositive issue. Regardless of what property will be considered available for distribution, whether marriage is economically unwise depends crucially on how property is to be divided.

The problem with the current laws is the uncertainty of what will be considered an equitable distribution. In effect, equitable distribution is discretionary distribution.³⁷ In some states, statutes provide courts only general guidance with regard to the distribution of assets.³⁸ In other states, statutes require that certain factors be considered.³⁹ These factors include the length of the marriage, the age and health of the parties, the occupations of the parties, the amounts and sources of each party's income, the vocational skills and employability of each party, and each party's contributions to, or dissipations of, the marital assets.⁴⁰ No reasonably precise formula exists to determine what distribution will result from the application of these factors. Some of these factors pull in opposite directions. For example, contribution supports a larger share for the person who brought greater assets into the marriage or who has a higher income. Vocational skills and employability, on the other hand, can support a greater share for the

37. See M.A. GLENDON, *supra* note 3, at 63-64.

38. See, e.g., ALASKA STAT. § 25.24.160 (Supp. 1988); MICH. COMP. LAWS ANN. § 25.99 (West 1984).

39. See, e.g., FLA. STAT. § 61.075(1) (Supp. 1988).

40. For a more complete list, see Freed & Walker, *supra* note 2, at 465-66.

person who has fewer vocational skills and is less employable, even though that person probably contributed less to the marriage than did the more highly skilled and employable spouse. In the final analysis, one must marshal a large amount of data to support one's claim, and then trust in judicial discretion.

If the preservation of formerly separate property upon divorce is uncertain, then one can make an antenuptial agreement to provide specific guidelines for the division of property upon divorce.⁴¹ However, the validity of an antenuptial agreement is uncertain.⁴² Indeed, the Uniform Marriage and Divorce Act merely cites an antenuptial agreement as another factor for a judge to consider in the division of the property.⁴³ Thus, the remedy for uncertainty is itself uncertain.⁴⁴

V. CONCLUSION

Second and late marriages are two growing patterns of marriage and divorce. Persons entering such marriages are more likely to have substantial financial assets than those marrying earlier in life. Divorce law primarily regards marriage as an economic partnership. The underlying principles of "all efforts," "enablement," and "sharing" are questionable.

A party entering a marriage with substantially more assets than the other party faces significant risks of losing those assets in the event of divorce. In some states, no distinction is made between marital and nonmarital property for purposes of distribution on divorce. Even if a distinction is drawn, separate property can be transmuted into marital property by joint title, use by the marital unit, and perhaps mere comingling with marital property. Income from separate property is often marital, and the property's appreciation in value can become mostly marital. In addition, one might lose some of the value of a pension accrued during marriage. Consequently, marriage can be an economically unreasonable decision for people with significant property.

In the majority of states, equitable distribution upon divorce can provide such a person a greater portion of the assets. However, various principles compete, and several support giving a larger share to the person who probably contributed less. The results depend on judicial discretion and are uncertain. Antenuptial agreements might pro-

41. See Krauskopf, *supra* note 15, at 1034.

42. See, e.g., *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Mulford v. Mulford*, 211 Neb. 747, 320 N.W.2d 470 (1982); *Duncan v. Duncan*, 652 S.W.2d 913 (Tenn. Ct. App. 1983).

43. UNIF. MARRIAGE AND DIVORCE ACT § 307(A), 9A U.L.A. 238 (1973).

44. Moreover, antenuptial agreements can involve significant legal expense.

vide protection for assets brought to a marriage, but their validity is sometimes risky, and even if valid they are not always decisive.

Consequently, many second and late marriages are bad business deals. Considerable uncertainty exists about how marital property will be distributed should divorce occur. The economic reasonableness of marrying decreases, and marriage is thus discouraged. The uncertainty undermines predictability of results, thus fostering disputes. The law's fairness is also doubtful, at best depending on the discretion of judges. As one scholar put it, "What person will enter a business or professional partnership or joint venture if the only liquidation rule is that a court will have discretion to make any order it thinks fit in regard to all the money and property?"⁴⁵ Finally, the economic partnership concept of marriage is misleading.

Financial assets possessed prior to marriage should not so readily be considered a contribution to the marriage. Those assets, and their income and increase in value, should normally remain nonmarital property. They should become marital only if the owner makes an affirmative act to contribute them to the marriage. Mere use of tangible assets such as a house or automobile should not count as such an act. Use of income to purchase assets for joint use would be such an act. If such assets are the primary source of income, such as a business, then at least all income should be deemed marital. Unless stronger protection is given to assets brought to a marriage as separate property, many potential second and late marriages will be economically unwise and could be discouraged. The laws governing the division of property upon divorce must be revised if the law is to encourage, or at least not discourage, marriage.

45. Baxter, *Family Law Reform in Ontario*, 25 U. TORONTO L.J. 237, 261 (1975).