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Equalizing the Cost of Divorce Under the Uniform Marriage and Divorce Act: Maintenance Awards in Illinois

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"The first of earthly blessings, independence."
Edward Gibbon[1]

"To be poor and independent is very nearly an impossibility."
William Cobbett[2]

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1. OXFORD DICTIONARY OF QUOTATIONS 224 (1979).
2. THE MACMILLAN DICTIONARY OF QUOTATIONS 442 (1989).

I. INTRODUCTION

During the nineteenth century, American society expected women to be dependent on men. Ostensibly, God had ordained a hierarchy in which men were wage earners and women were housewives. As Justice Bradley explained: "Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."[3] The "law of the Creator" did not apply, however, to the poor, recent immigrants, and minority women, many of whom worked outside of the home.[4] For the white middle class, though, it was socially unacceptable for married women to be employed.[5] Because women were financially dependent, alimony was essential to protect them from husbands who misbehaved.

In the twentieth century, even though more women entered the work force and the emphasis on dependency receded, alimony continued to be important as a form of damages for wrongful conduct.[6] When the no-fault divorce movement swept away fault as the sole grounds for divorce, alimony remained, but the rationale behind it became unclear. Moreover, in states like Illinois that retain fault as grounds for divorce, but refuse to consider it when making financial allocations,[7] the purpose of alimony seems particularly obscure.

Accordingly, as legal scholars began to search for a purpose of alimony, several theories emerged to justify continuing the concept of alimony. To begin with, Herma Hill Kay, one of the principal consultants[8] for the Uniform Marriage and Divorce Act

3. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

4. *See* June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 970 n.70 (1991).

5. *See id.* at 969-70.

6. *See, e.g.*, ILL. ANN. STAT. ch 40, para. 504 historical note (Smith-Hurd 1980).

7. ILL. REV. STAT. ch. 40, para. 401(a)(1) (1989) (providing for divorce upon proof of one of the following: impotency, bigamy, adultery, desertion, drug abuse, attempted spousal homicide, other physical or mental cruelty, or infection with a venereal disease); ILL. ANN. STAT. ch. 40, para. 504 historical note (Smith-Hurd 1980) ("[S]ubsection (b) details the factors to be considered by the court in determining . . . maintenance without regard to marital misconduct.").

8. The Uniform Marriage and Divorce Act was written by the American Law Institute and amended as a result of a dialogue with the American Bar Association. Accordingly, no one person can be said to have drafted the Act. However, two reporters for the American Law Institute, Herma Hill Kay and Robert Levy, were instrumental in creating the Act. For a fascinating account of the creation of the UMDA, see Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987) [hereinafter Kay, *Equality and Difference*].

("UMDA"),[9] views alimony as a means to help women become financially independent.[10] Therefore, the preferable form of alimony under the UMDA is rehabilitative—designed to enable the recipient to develop marketable skills. Kay views permanent alimony as somewhat suspect because it reinforces traditional divisions of labor.[11] As a result, Kay prefers spouses to be financially independent and needy spouses to be provided for by the division of property whenever possible.

In contrast, some scholars influenced by the law and economics movement argue that it is efficient to have one spouse specialize in the home, while the other specializes in the job market.[12] Not surprisingly, these scholars would prefer that women stay at home, and some even go so far as to assert that women are biologically better equipped to stay at home.[13] Others would prefer that women specialize in the home, but continue earning outside income as well.[14]

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9. 9A U.L.A. 156 (1987).

10. Kay, *Equality and Difference*, *supra* note 8, at 80 ("In the long run, however, I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence on men . . . .").

11. *Id.* For discussions on the relationship between alimony and the division of labor, see Carbone & Brinig, *supra* note 4, at 965, and Jane Rutherford, *Duty in Divorce: Shared Income As a Path to Equality*, 58 FORDHAM L. REVIEW 539, 559-64 (1990).

12. *See* GARY BECKER, A TREATISE ON THE FAMILY 14-17, 21-32 (1981); Ira Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 62 (1989). Becker and Ellman both make the economic argument that it is efficient for women to stay home and take care of the children. Therefore, alimony should be provided as an economic incentive for them to forego their earnings in the market. For a criticism of this view, see Carbone & Brinig, *supra* note 4, at 975-76. For a criticism of the dichotomy between the market and the home, see Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499-1501 (1983).

13. *See, e.g.*, BECKER, *supra* note 12, at 22 ("[A]n efficient household with both sexes would allocate the time of women mainly to the household sector and the time of men mainly to the market sector."). Specifically, Becker argues that women are biologically better equipped to stay home because they can bear children and breast feed: "Women . . . have a heavy biological commitment to the production and feeding of children. . . . [A] mother can more readily feed and watch her older children while she produces additional children than while she engages in most other activities." *Id.* at 21-22. Such an argument assumes that it is the wife's, not the husband's, sole duty to provide child care. Becker justifies assigning the burdens of child care solely to women by suggesting that these role definitions are universal in human societies. *Id.* at 23. He errs in assuming that what has been must continue. Indeed, it is far from obvious why women are biologically more suited to change diapers than men. Becker seems to believe that men are biologically incapable of forming a sufficient commitment to their offspring. For a telling criticism of this assignment of sex roles, see Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991).

14. *See* June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1467 (1990) (suggesting that Ellman's theory

In theory, spouses will only specialize (either by staying home or by working fewer hours at paid jobs) if it is economically efficient for the family as a unit.[15] As a result, if the couple stays married, both individuals share the costs and benefits of one spouse's reduced income. If, however, the couple divorces, the homemaker bears all the costs because those who stay home are deterred from developing their human capital in education and job-related experience. Accordingly, this theory advocates that alimony should recompense spouses for lost earning potential.[16]

Other scholars, however, find this form of reliance interest too narrow. For example, June Carbone and Margaret F. Brinig view alimony as restitution for unjust enrichment, which compensates recipients not only for their lost earning potential, but also for what they may have contributed to the marriage.[17] The payors of alimony, typically men, depend on the services the recipients, typically women, provide at home, and earn more money as a result. Moreover, the payors, as parents, benefit from the childcare and love the recipients invest in their children. Therefore, payors receive a windfall if they do not have to share these benefits derived from their former spouses. Accordingly, any time one spouse's contributions produce gains that survive the marriage, the recipient should compensate the contributor.[18]

For those who consider marriage to be a contract,[19] it makes more sense to view alimony as expectation damages for breach of a

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of alimony "can be justified only by a conclusion that married women should be encouraged to remain in the work force *and* continue to bear the primary responsibility for childrearing") [hereinafter Carbone, *A Reply*].

15. For many women the choice is not merely economic. They do more than their share of the home chores because their husbands refuse to do these chores. Others are reluctant to relinquish precious time with children.

16. *See* Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 262-66 (1989); Joan M. Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 261-63 (1985); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 391-95 (1980).

17. Carbone & Brinig, *supra* note 4, at 986.

18. Carbone, *A Reply*, *supra* note 14, at 1494.

19. Marriage is more than a mere contract, however. For example, one of the authors of this Article has argued previously that marriage vows really operate like a constitution by setting up structural ground rules for a relationship that develops over time. *See* Rutherford, *supra* note 11, at 543. All future contingencies cannot be planned for, so the relationship must remain more flexible than the typical contract. Moreover, the legal rules are designed not merely to enforce private agreements, but also to advance independent social policies and to protect third parties, like children and creditors. *Id.* at 544-52.

contract.[20] One measure of reasonable expectations is the standard of living during the marriage. Of course, in actuality, the marital standard of living may not fulfill the parties' expectations. For example, a spouse who works to put a mate through medical school may have a low standard of living, but reasonably expect a high future return on the investment. Therefore, it is unfair to freeze the recovery to the amount available at the time of the divorce; alimony should compensate for future gains as well as past contributions.

For others, the reason for alimony is obvious: many spouses need it. Alimony may keep recipients off welfare and off the streets.[21] If ex-spouses fail to provide support, then the burden will fall on society. As a result, alimony must give at least subsistence. However, need-based alimony does not have to be limited to subsistence. Need also can be measured by the standard of living during the marriage or the relative income after divorce.[22]

Disparate income raises the final possible justification for alimony—fostering equality. Jane Rutherford argues that just as couples should share the benefits and burdens equally during marriage, they also should share the costs of divorce equally.[23] Current law reflects a vicious circle in the division of labor within marriage. Some spouses, typically women, assume greater burdens at home, partly because it is more efficient for the lesser-paid earner to do so. On the other hand, the market pays women less because they are perceived to place a higher priority on their families than on their jobs.[24] So long as the market and the division of labor at home move in tandem, women will never achieve full financial equality with men.[25]

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20. LENORE WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW 66-71 (1981); Carbone & Brinig, *supra* note 4, at 988. However, viewing marriage as a contract and divorce as a breach of contract inevitably requires a determination of how the contract was breached or who was at fault. *See* Rutherford, *supra* note 11, at 551-52. For a criticism of the fault-based system, see Kay, *Equality & Difference*, *supra* note 8, at 55-77. At least one scholar has taken the contractual view even further arguing that parties should formally contract for their future alimony at the time they marry. *See* Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

21. LENORE WEITZMAN, DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 143-83 (1985).

22. *See infra* parts V, VI.

23. *See generally* Rutherford, *supra* note 11 (arguing that through income sharing, divorce law can treat the parties equally rather than merely reflecting the existing power structure).

24. *See* BECKER, *supra* note 12, at 25.

25. Even single women without children are affected by the stereotypes as they continue to earn less than their single male counterparts. To illustrate, single men without families have median earnings of $412 per week, while single women without families

Herma Hill Kay disagrees with this analysis and would refuse to give alimony to women who "choose" to be financially dependent on men.[26] Yet, Kay's solution merely undervalues the services most married women contribute and makes divorce much more costly for women than men. Instead, divorce should be equally costly for both men and women. Then, there would be no incentive to choose any particular division of labor. Without financial incentives, the home chores might be split more evenly. But even if women continue to do most of the work at home, they should not be financially penalized for it at divorce. Therefore, alimony should allocate financial resources so that both parties enjoy comparable post-divorce standards of living. Alimony should be a form of shared income.[27]

In summary, six different justifications for alimony remain after fault is excluded: (1) fostering independence,[28] (2) compensating for reliance,[29] (3) compensating for contributions,[30] (4) providing for reasonable needs,[31] (5) retaining the standard of living,[32] and (6) fostering equality.[33] Despite the marked differences among these various theories of alimony, they share a common trait. Each recognizes that the way we justify alimony also defines how spouses are supposed to act in ongoing marriages.[34] In particular, each theory of alimony reflects a value judgment about the nature of marriage.[35]

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have median earnings of $345 per week. U.S. DEP'T OF COM., BUREAU OF THE CENSUS, 1990 STATISTICAL ABSTRACT OF THE UNITED STATES 409, chart no. 671 (1990) [hereinafter STATISTICAL ABSTRACT].

26. Kay, *Equality and Difference*, *supra* note 8, at 79-82.

27. Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351, 361-65 (1989); Rutherford, *supra* note 11, at 577-84; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-21 (1989).

28. *See infra* part II.

29. *See infra* part III.

30. *See infra* part IV.

31. *See infra* part V.

32. *See infra* part VI.

33. *See infra* part VII.

34. For a discussion of the role of divorce law in creating standards for ongoing marriages, see Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REF. 217, 262-64 (1990), and Carbone & Brinig, *supra* note 4, at 972, 1009-10.

35. For example, the old fault-based alimony, which provided support only if a spouse was innocent, clearly articulated the duty to be faithful, temperate, and kind in marriage. *See* EPAPHRODITUS PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS § 45, at 162-68 (3d. ed. 1930) (explaining the causes for divorce). Similarly, the theory that alimony should foster independence recognizes a duty to be financially independent either through paid employment or accumulated wealth. *See infra* part II. The reliance theory, that alimony compensates spouses for lost earning potential, assumes that spouses should not share income except to induce the recipient to stay at home to

The UMDA[36] combines these diverse theories into a single Act,[37] but neither explains how these theories relate to each other nor articulates marital duties to replace those supplied under fault statutes.[38] As a result, courts have had difficulty reconciling the different theories in the context of specific cases.

This Article is presented in six parts. Each part tests the validity of one of the six predominant theories of alimony by demonstrating its practicality as applied by Illinois courts. This Article then concludes that of the six justifications for alimony, the most equitable theory determines alimony based on an equal division of post-divorce per capita income between the spouses.

II. FOSTERING INDEPENDENCE

Although proponents of the no-fault regime claim that their primary purpose was to eliminate fault from divorce law,[39] the divorce statutes that were actually drafted expect women to become financially independent. It is unclear the extent to which this emphasis on independence was a result of the women's movement.[40] Herma Hill Kay claims that it was actually men who were responsible for this emphasis.[41] Whatever the source, the California law

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rear children. *See infra* part III. The unjust enrichment (contribution) theory rests on the assumption that marriage may result in a benefit to the payor, and it creates a duty to contribute in some economically measurable way in order to receive alimony. *See infra* part IV. For example, would a spouse who became physically and mentally disabled shortly after marriage be able to prove a sufficient contribution to be entitled to alimony under Carbone and Brinig's theory of unjust enrichment? Just how would the payor have been unjustly enriched? Such a disabled spouse, however, would be able to recover alimony under a need, fault, or shared income theory. Finally, the shared income model stresses gender equality both during and after marriage. *See infra* part VII.

36. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 156 (1987).

37. UMDA § 308.

38. Although the text of this Article primarily refers to the UMDA, the Illinois Marriage and Dissolution of Marriage Act is equivalent to the UMDA such that the analysis and thesis of this Article are applicable under both Acts. "Section 504 of [the Illinois Marriage and Dissolution of Marriage Act ("IMDMA")] derives from section 308 of the Uniform Marriage and Divorce Act. The former term 'alimony' is replaced by the term 'maintenance.'" ILL. ANN. STAT. ch. 40, para. 504 historical note (Smith-Hurd 1980). For the differences between the two Acts, see *infra* notes 46-49 and accompanying text.

39. *See* Kay, *Equality and Difference*, *supra* note 8, at 46.

40. *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 297-304 (1987) [hereinafter Kay, *Appraisal*]; *see also* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 20 (1991) ("Actually, feminists had almost nothing to do with divorce-law reform .... The 1970 California no-fault law ... was drafted by a largely male advisory board. The American Bar Association, not the National Organization for Women, instigated the national 'divorce revolution'. ...").

41. Specifically, Kay claims that Representative James Hayes of California drafted parts of the California code to help him reduce his own alimony obligation to his wife.

became the prototype for the UMDA, and American divorce law substituted a duty to be financially independent for the duty to be virtuous.

Even though the women's movement may not have been the inspiration for these changes, financial independence seems appealing. So long as women are financially dependent on men, they will be controlled by them. Studies indicate that women who do not hold paying jobs have less bargaining power in their marriages.[42] Similarly, dependent women have less freedom to leave bad marriages. Even after divorce, dependent women continue to be controlled by their former spouses because their alimony may be terminated if they either remarry or conjugally cohabit.[43]

Financial independence also may encourage a more equitable division of labor within the home. In practice, however, as women have entered the job market, they continue to bear the brunt of most of the home chores, in addition to their paying jobs. Indeed, one of the major drawbacks of the push toward financial independence for women is its failure to recognize the extent to which men are dependent on women for domestic services.[44] Nevertheless,

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Kay, *Appraisal*, *supra* note 40, at 300; *see* RIANE EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 28 (1977); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 58-59 (1988) (discussing the role of James Hayes).

42. Rutherford, *supra* note 11, at 569 (citing Hallenbeck, *An Analysis of Power Dynamics in Marriage*, 28 J. MARRIAGE & FAM. 200, 200 (1966)).

43. *See, e.g.*, ILL. REV. STAT. ch. 40, para. 510(c) (1989) ("[T]he obligation to pay future maintenance is terminated upon the death of either party, on the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis."). Chastity may be the price of alimony. Rutherford, *supra* note 11, at 587 n.290. Payors of alimony can control the sex lives of their former spouses by threatening to withhold financial support, claiming that the former spouse is "cohabiting" with another. Courts, however, increasingly are skeptical of these claims and have emphasized that maintenance is not purchasing chastity, but is an alternative source of support. *See, e.g., In re* Marriage of Arvin, 540 N.E.2d 919, 923 (Ill. App. Ct. 2d Dist. 1989). Therefore, cohabitation should only terminate maintenance if the new mate is financially supporting the former spouse.

One commentator offers a more cynical reason why alimony should not cease at remarriage. *See* Lloyd Cohen, *Marriage, Divorce and Quasi-Rents; Or, "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1987). As Cohen points out, the market value of an item depends on demand, and the more available an item is, the lower a price it commands. *Id.* at 278. Women outlive men and the percentage of women in the population steadily increases with age. *Id.* at 280-81. As a result, as women grow older, their value on the marriage market declines. *Id.* at 281. The inverse is true for men, who become increasingly scarce with age. *Id.* Therefore, if one views a husband's income as the price of a wife, one would expect each successive husband to earn less than the previous one. *Id.* at 287.

44. The influx of middle-class women into the job market did not mean that men assumed half of the burdens of the home tasks. Many women continue to work both at

forcing women to become financially independent is one of the central goals adopted by the UMDA.[45]

The UMDA imposes the duty to be independent in section 308(a):

> [T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property to provide for his reasonable needs; and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.[46]
>
> [The Illinois version added the language: or
>
> (3) is otherwise without sufficient income.][47]

Thus, section 308(a) may be read as a threshold, permitting alimony only if a spouse cannot be independent. The first preference is to provide property for spouses, but if that is not sufficient, then the potential recipient has a duty to find employment. If a spouse can meet her "reasonable needs" through either property or employment, then maintenance should not be provided.[48]

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home and at their jobs. To the extent tasks are reassigned, free female labor at home often is replaced by cheap female labor. Nearly all paid household helpers are women. STATISTICAL ABSTRACT, *supra* note 25, at 391, chart no. 645. Frequently, this labor comes from the black market. Black market workers do not receive benefits, do not have taxes withheld, and do not participate in social security or unemployment compensation. Many black market workers are either recent immigrants or minorities. Thus, entrance into the job market was not a great step forward for women's equality. For a discussion of this phenomenon of subspecialization, see Carbone, *A Reply*, *supra* note 14, at 1489-90.

45. *See In re* Marriage of Wilder, 461 N.E.2d 447, 456 (Ill. App. Ct. 1st Dist. 1983) ("The objective of the Act in authorizing rehabilitative maintenance is to enable a formerly dependent spouse to become financially independent in the future.").

46. UMDA § 308(a), 9A U.L.A. 348 (1987).

47. ILL. REV. STAT. ch. 40, para. 504(a)(3) (1989). Section 504(a) provides in full:

> (a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse, only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home, or
>
> (3) is otherwise without sufficient income.

Id.

48. UMDA § 308 cmt. The comment to § 308 further provides:

> [T]he court may award maintenance only if both findings listed in (1) and (2) are made. The dual intention of this section and Section 307 is to encourage the

Spouses who meet the requirements of subsection (a) are entitled to maintenance. The dollar amount of maintenance is determined after considering a number of additional factors enumerated in section 308(b).[49] The purpose of the threshold requirements in section 308(a) and (b) is to encourage, if not require, spouses to be financially independent.[50] The statutory language suggests that section 308(a) creates a strict threshold for maintenance, while section 308(b) merely lists the factors that determine the maintenance amount. The amount of maintenance, however, is to be based, in part, on the marital standard of living.[51]

Accordingly, the UMDA appears to divide alimony or maintenance recipients into two classes: (1) those without property or jobs, who are entitled to be supported at their marital standard of living, no matter how high; and (2) those who are independent and thus entitled to nothing, no matter how greatly their standard of living declines.[52] As Justice Steigmann stated:

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court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Id.

49. *Id.* § 308(b). Subsection (b) provides:

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, after consideration of all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Id. The Illinois version adds: "(7) the tax consequences of the property division upon the respective economic circumstances of the parties." ILL. REV. STAT. ch. 40, para. 504(b)(7) (1989).

50. *See, e.g.*, UMDA § 308(b)(1), (2) (examining the alimony recipient's potential to support herself).

51. *Id.* § 308(b)(3); *see supra* note 49.

52. Generally, women and children suffer a greater decline in their standard of living after divorce than men. Lenore Weitzman claims that while the standard of living of men increases 42% after divorce, the standard of living of women and children declines 73%. WEITZMAN, *supra* note 21, at 323. Other studies have found a 30% decline in the standard of living for women after divorce. Greg J. Duncan & Saul D. Hoffman, *Economic*

> It makes no sense to say that a party is not entitled to maintenance because she is able to support herself at some level of subsistence, and then to say that if she is entitled to maintenance, it should be in an amount consistent . . . with "the standard of living [established] during the marriage."[53]

Thus, such a reading of the UMDA penalizes those who try to support themselves, thereby discouraging independence, especially in a job market that consistently has paid women considerably less than men.[54]

Courts have responded to this problem in one of three ways. Some courts interpret the UMDA literally and refuse to provide maintenance, no matter how draconian the results.[55] More typically, courts either define the threshold of "reasonable needs" broadly to include most, if not all, of the factors listed in subsection (b);[56] or they read subsections (a) and (b) together to create a list of factors to consider when awarding maintenance.[57] Either way, the courts have nearly unlimited discretion regarding both whether to award maintenance and the amount of maintenance.

The result of such unlimited discretion is inconsistency. For example, consider three recent Illinois cases: *In re Marriage of Frus*,[58] *In re Marriage of Zeman*,[59] and *In re Marriage of Krupp*.[60] All three raised the issue of whether the former wife now earned enough money so that alimony was no longer necessary.[61] The fol-

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Consequences of Marital Instability, *in* HORIZONTAL EQUITY, UNCERTAINTY AND ECONOMIC WELL-BEING 427-71 (1985). Even five years after the divorce, only those women who remarry are able to return to their pre-divorce standard of living. Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985). The authors of this Article have verified a substantial decline in the standard of living for women and children as measured by per capita income. *See infra* Charts Nos. 2-6.

53. *In re* Marriage of Hart, 551 N.E.2d 737, 745 (Ill. App. Ct. 4th Dist. 1990) (Steigmann, J., concurring).

54. *See infra* notes 160-62.

55. *See In re* Marriage of Frus, 560 N.E.2d 638, 639-40 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134); *In re* Marriage of LaSota, 465 N.E.2d 649, 652-53 (Ill. App. Ct. 1st Dist. 1984).

56. *See, e.g.*, *In re* Marriage of Ingrassia, 489 N.E.2d 386, 392 (Ill. App. Ct. 2d Dist. 1986).

57. *See* Chambers v. Chambers, 466 N.E.2d 262, 263-64 (Ill. App. Ct. 5th Dist. 1984); *In re* Marriage of Siegel, 463 N.E.2d 773, 781 (Ill. App. Ct. 1st Dist. 1984); *In re* Marriage of Carini, 445 N.E.2d 412, 417 (Ill. App. Ct. 1st Dist. 1983).

58. 560 N.E.2d 638 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

59. 556 N.E.2d 767 (Ill. App. Ct. 2d Dist. 1990).

60. 566 N.E.2d 429 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409).

61. *Frus*, 560 N.E.2d at 639; *Zeman*, 556 N.E.2d at 769; *Krupp*, 566 N.E.2d at 435.

lowing chart shows how much each party earned at the time of the hearing to modify maintenance.[62]

CHART NUMBER 1

Spousal Earnings

	H's Income	W's Income
Frus	$342,000	$29,124
Zeman	$194,000	$26,505
Krupp	$169,000 (avg.)	$64,000

Mrs. Frus and Mrs. Zeman earned comparable amounts of money, but Mrs. Frus still had a minor child at home[63] and her former husband earned significantly more than Mr. Zeman. Therefore, under the UMDA, one would expect Mrs. Frus to receive at least as much maintenance as Mrs. Zeman.[64] Mrs. Krupp, on the other hand, earned substantially more than either of the other two wives, and her former husband earned the least of the three husbands. As a result, one would expect Mrs. Krupp to receive the least maintenance. Nevertheless, the court in *Frus* held that Mrs. Frus was self-sufficient and terminated the maintenance provided in her settlement agreement.[65] In contrast, both Mrs. Zeman and Mrs. Krupp were deemed needy enough to receive maintenance in spite of significant earnings.[66] The following chart summarizes the outcome of each case.[67]

62. The cases in this Chart and in following Charts are ordered according to descending Husband income. The information contained in Chart No. 1 may be found on the following pages of the reported cases: *Frus*, 560 N.E.2d at 639; *Zeman*, 556 N.E.2d at 770-71; *Krupp*, 566 N.E.2d at 433-34.

63. *Frus*, 560 N.E.2d at 639. In this example, maintenance includes both alimony and child support.

64. UMDA § 308(a)(2), (b)(1), 9A U.L.A. 348 (1987). For the text of § 308(a) and (b), see *supra* text accompanying notes 46-47; *supra* note 49.

65. *Frus*, 560 N.E.2d at 639-40.

66. *Zeman*, 556 N.E.2d at 776; *Krupp*, 566 N.E.2d at 441.

67. The information contained in Chart No. 2 may be found on the following pages of the reported cases: *Frus*, 560 N.E.2d at 639; *Zeman*, 556 N.E.2d at 770-71, 790; *Krupp*, 556 N.E.2d at 433-34.

CHART NUMBER 2

Spousal Financial Situation After Maintenance

	H's Income	W's Income	Awarded Maintenance	H's Per Capita Income	W's Per Capita Income
Frus	$342,000	$16,962	0	$337,200*	$16,812*
Zeman	$194,000	$26,505	$10,800	$183,200	$37,305
Krupp	$169,000 (avg.)	$64,000	$30,000	$139,000	$94,000

* Reflects annual child support of $4,800

Mrs. Krupp, who earned the most, received the most maintenance. Conversely, the husband who earned the most, Mr. Frus, paid the least.

Thus, the threshold created by section 308(a) creates at least three distinct problems. First, it emphasizes financial independence, which is inconsistent with some of the factors for determining the amount of maintenance in subsection (b). Second, because the UMDA fails to define "reasonable needs," courts reach inconsistent results in similar cases. Finally, because the UMDA ignores the disparate income available to women, women often end up in disproportionately reduced circumstances as compared to their former husbands.[68] In 1991, the Illinois legislature recognized these problems and amended the Illinois statute to eliminate the threshold.[69] Unfortunately, Governor Edgar vetoed the legislation; consequently, these problems of statutory interpretation remain.

A. The Duty to Own Property

The UMDA duty to be independent has two components: the duty to own property and the duty to work for pay.[70] The UMDA prefers to meet financial needs with property division rather than maintenance.[71] That preference, however, is entirely unrealistic. Few couples own enough income-producing property to provide adequate support. For example, in order to generate $20,000 in

68. *See supra* note 52.

69. S. 548, 87th Leg., 1991-92 Reg. Sess. (1991) (vetoed by Governor Edgar in October 1991).

70. UMDA § 308(a), 9A U.L.A. 348 (1987).

71. *See, e.g.*, UMDA § 308 cmt. ("[The intention] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance."). Some courts also express a preference to provide for spouses through the division of property. *See, e.g., In re* Marriage of Durante, 559 N.E.2d 56, 61 (Ill. App. Ct. 1st Dist. 1990).

income at seven percent interest, a couple would need to own $285,714 of debt-free, investment property. In fact, however, many divorcing couples have little or no property at all.[72] When couples do own property, the major asset usually is the family residence, which is often mortgaged and produces no income.[73] As a result, if spouses must rely on property to provide a source of income, they may have to liquidate scarce assets.

Forced liquidation is both harsh and unwise and should be discouraged. When the family home is sold, it is very disruptive for children who may be wrenched away from the stabilizing influences of their school, neighborhood, and friends. Indeed, because the UMDA specifically gives preference to the custodial parent in allocating the family home,[74] courts often award the house to the custodial parent.[75]

If the custodial parent receives the house, that parent also must be able to pay the mortgage. Accordingly, property should be divided before setting maintenance,[76] and the maintenance should be large enough to cover the housing expenses.[77] As one court explained: "Since [the wife] and [daughter] were to retain the marital residence until [the daughter] enrolled in a different school, with [the wife] responsible for the mortgage payments and other costs, it

72. A Detroit survey in the 1950s revealed that 40% of divorced families had no property to divide. *See* Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. REV. 1181, 1189 n.34 (1981) (citing WILLIAM J. GOODE, AFTER DIVORCE 217 (1956)). A more recent California study showed that approximately half of divorcing couples had less than $11,000 worth of property. *Id.* at 1189.

73. Less than half of the owner-occupied homes in the United States are owned "free and clear." *See* STATISTICAL ABSTRACT, *supra* note 25, at 722, chart no. 1278.

74. UMDA Alternative B, § 307(4); *see* ILL. REV. STAT. ch. 40, para. 503(d)(4) (1989).

75. *See, e.g., In re* Marriage of Frederick, 578 N.E.2d 612, 614 (Ill. App. Ct. 2d Dist. 1991) (awarding family house to the custodial father); *In re* Marriage of Zirngibl, No. 1-89-3344, 1991 Ill. App. LEXIS 1686, at *19 (1st Dist. Sept. 30, 1991) (awarding the house to the custodial father); *In re* Marriage of Zummo, 521 N.E.2d 621, 627 (Ill. App. Ct. 4th Dist. 1988) ("Since [the mother] has custody of the children, assignment of the house to her is justified."). *But see In re* Marriage of Agazim, 530 N.E.2d 1110, 1116-17 (Ill. App. Ct. 2d Dist. 1988) (finding that the husband's high debts and obligation to support a second family required the custodial mother to sell the family home).

76. *In re* Marriage of Douglas, 552 N.E.2d 1346, 1349-50 (Ill. App. Ct. 5th Dist. 1990).

77. *See, e.g., In re* Marriage of Schroeder, 574 N.E.2d 834, 839 (Ill. App. Ct. 4th Dist.) (reversing the trial court's award of $333 per month in maintenance because it was insufficient to meet the recipient's housing costs, even when combined with her monthly gross income), *appeal denied*, 580 N.E.2d 134 (Ill. 1991) (Table No. 72237); *In re* Marriage of Seymour, 565 N.E.2d 269, 272 (Ill. App. Ct. 2d Dist. 1990) (affirming a maintenance award of $750 per month when the wife's housing costs were found to be $675 per month).

was reasonable for the court to order sufficient maintenance to pay the housing costs."[78] Because women typically earn less than men,[79] a rule that the custodial parent alone must pay the housing costs might result in more custodial fathers than mothers being able to keep the house. For example, compare two cases in which the total family income is approximately the same. In *In re Marriage of Frederick*,[80] the court allowed the custodial father to keep the family home until his son reached majority. In contrast, in *In re Marriage of Agazim*,[81] the custodial mother was forced to sell the family home over her objections. The following chart summarizes the outcome of these cases.[82]

CHART NUMBER 3

Ownership and Forced Disposition of the Family Home

	H's Income	W's Income	Total Income	House	Custody
Frederick	$144,000-$218,000	0	$144,000-$218,000	H	H
Agazim	$92,000	$80,000-$100,000	$172,000-$192,000	Sold	W

Although *Agazim* may be explained by the husband's other obligations,[83] high-income custodial fathers may have an advantage in keeping the family home. Courts must be careful not to give the impression that only high-income parents can afford to keep the family home. Of course, not all families will be able to afford to keep the house, as large debts and the costs of adding new households may require everyone to scale down significantly.[84] Yet, when a custodial parent cannot pay the housing costs from her

78. *Seymour*, 565 N.E.2d at 272.

79. *See infra* notes 160-62.

80. 578 N.E.2d 612, 614 (Ill. App. Ct. 2d Dist. 1991).

81. 530 N.E.2d 1110, 1117 (Ill. App. Ct. 2d Dist. 1988).

82. The information contained in Chart No. 3 may be found on the following pages of the reported cases: *Frederick*, 578 N.E.2d at 620; *Agazim*, 530 N.E.2d at 1112.

83. The court found that the husband in *Agazim* had outstanding debts and a new family to provide for, and that these obligations alone would be difficult to manage on his business income. *Agazim*, 530 N.E.2d at 1117.

84. As the *Agazim* court stated:

> Keeping the children in the marital home is but one factor to be addressed in distributing the marital property. Here that factor was clearly outweighed by the need to give [the husband] sufficient funds so that he could pay child support, provide for his new family's needs, and pay off his outstanding debts.

Id.

own income, a forced sale of the home should not be automatic. As long as the couple jointly can afford to keep the home, the children should not be uprooted.

Liquidating assets also may be unwise because forced sales rarely bring full market value. Moreover, appreciating assets with little equity (like many houses) may be worth far more as an investment than as a liquidated sum. If property is held as an investment, it may continue to appreciate or generate income over many years. However, once an asset is sold and the money spent, nothing remains. Illinois courts have adopted the general rule that recipients need not sell property in order to be self-supporting.[85] Accordingly, spouses can and should get maintenance even when they receive substantial property settlements.[86]

Since spouses are not required to sell their property in order to support themselves, the question becomes: when does a spouse have "sufficient property to provide for his reasonable needs?"[87] "Sufficient property" must be sizable. For example, one court ruled that a spouse who owned a house and a 200-acre farm did not have sufficient property to provide for her needs.[88] On the other hand, property totaling over one million dollars apparently is sufficient.[89] Thus, if the settlement is large and includes sufficient income-generating assets, maintenance may be unnecessary. For example, in *In re Marriage of Davis*,[90] the wife had not worked during the twenty-year marriage, but her share of the marital assets totalled $1,335,049. In that instance, the court did not award maintenance.[91]

The amount of the property alone, however, is not the determinative factor. The crucial factor is whether the property produces

85. *In re* Marriage of Landfield, 567 N.E.2d 1061, 1075 (Ill. App. Ct. 1st Dist.), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754); *In re* Marriage of Courtright, 540 N.E.2d 1027, 1030 (Ill. App. Ct. 3d Dist. 1989); *In re* Marriage of Ryman, 527 N.E.2d 18, 25 (Ill. App. Ct. 2d Dist. 1988); *In re* Marriage of Heller, 505 N.E.2d 1294, 1300-01 (Ill. App. Ct. 1st Dist. 1987); *In re* Marriage of Weinberg, 466 N.E.2d 925, 934 (Ill. App. Ct. 1st Dist. 1984).

86. *See, e.g., Landfield*, 567 N.E.2d at 1075 (awarding maintenance even though the spouse also received $797,074 in marital property).

87. UMDA § 308(a)(1), 9A U.L.A. 348 (1987); ILL. REV. STAT. ch. 40, para. 504(a)(1) (1989).

88. *In re* Marriage of Courtright, 507 N.E.2d 891, 895 (Ill. App. Ct. 3d Dist. 1987).

89. *See In re* Marriage of Harding, 545 N.E.2d 459, 469-70 (Ill. App. Ct. 1st Dist. 1989) (refusing to award maintenance because the wife received $1,629,529 in property).

90. 576 N.E.2d 44, 52 (Ill. App. Ct. 1st Dist.), *appeal denied*, 580 N.E.2d 110 (Ill. 1991) (Table No. 72379).

91. *Id.*

income. In *In re Marriage of Heller*,[92] Justice Murray of the Illinois Appellate Court explained that "[i]t is the income produced by the property, rather than its value, which must be considered in determining appropriate maintenance."[93] The mere fact that a spouse receives a substantial amount of property is not grounds for denying maintenance when maintenance is otherwise appropriate. For example, in *In re Marriage of Landfield*,[94] the court held that a wife who was awarded $797,074 in marital property nevertheless was entitled to permanent maintenance in order to meet her needs.[95] Therefore, a property division should preclude maintenance only when there is enough income-generating property to fully support a spouse.[96]

B. The Duty to Be Employed

The UMDA also tries to foster independence through paid employment.[97] Although the imposition of this duty varies depending on whether both spouses work, how much the spouses earn, and whether they have children, this duty to earn money devalues the work women do in the home. The duty to earn disadvantages women whether they are full-time homemakers, unequal earners, or even equal earners.

1. Full-time Homemakers

The most dramatic disparity occurs with the full-time homemaker. In an intact marriage, the homemaker contributes services at home while the earner contributes money earned in the job market. In most cases, the earner gets his money's worth. Homemakers often do the cleaning, cooking, shopping, driving, hiring, teaching, babysitting, nursing, banking, decorating, entertaining, washing, sewing, and other errands. The cost of replacing these services in the job market has been estimated to be anywhere from $18,000[98] to $46,000 per year.[99] The homemaker may work seven

92. 505 N.E.2d 1294 (Ill. App. Ct. 1st Dist. 1987).

93. *Id.* at 1300 n.3 (citing *In re* Marriage of Thornton, 412 N.E.2d 1336 (Ill. App. Ct. 1st Dist. 1980)).

94. 567 N.E.2d 1061 (Ill. App. Ct. 1st Dist.), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754).

95. *Id.* at 1066, 1073. *But see In re* Marriage of Durante, 559 N.E.2d 56, 63 (Ill. App. Ct. 1st Dist. 1990) (refusing maintenance to a spouse awarded $679,000 in property).

96. What constitutes full support will be considered in the portion of this Article dealing with the need-based approach. *See infra* part V.

97. UMDA § 308(a)(2), (b)(2), 9A U.L.A. 348 (1987).

98. This figure represents an average amount spent by the authors' colleagues for full-

days a week and provide love and personal care; accordingly, the homemaking spouse's services may be much more valuable than a hired substitute. If the marriage dissolves, however, a homemaker will find that her life has been changed irreparably. The years spent homemaking were not invested in job experience; the body changed by childbirth will not be the same; the free time available before the birth of children cannot be recaptured. Age, lack of experience, and limited hours available for work will be detriments in the job market. In contrast, years of experience and contacts in the job market may be assets for the wage earner. Therefore, even if the two spouses are equally well educated, the earner spouse will have a considerable advantage.[100]

If the homemaker spouse cannot find a job due to age or inexperience, she is entitled to maintenance that will support her at her pre-divorce standard of living, as long as the husband can afford it.[101] Illinois courts recognize that displaced homemakers may have limited income potential. Accordingly, most courts provide some maintenance to former homemakers if their income after divorce is substantially below that enjoyed by the couple during the marriage.[102] The following chart reflects the maintenance awards to housewives who received diminished earnings when they returned to the work-force.[103]

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time babysitting and cleaning help. Of course, hired housekeepers do not perform all the services a homemaking spouse does. For example, most housekeepers will not do the banking, balance the checkbook, hire the housekeeper, do business entertaining, or work seven days a week.

99. *See* Goldfarb, *supra* note 27, at 357 n.46 (citing Minton, *Valuing the Contribution of a Homemaker at Trial*, 1 FAIRSHARE 7, 11 (Oct. 1981)). Note that this valuation was made in the early 1980s; consequently, the replacement value of these services today may be even higher.

100. *See infra* note 164.

101. *See, e.g., In re* Marriage of Courtright, 540 N.E.2d 1027, 1029 (Ill. App. Ct. 3d Dist. 1989); Simmons v. Simmons, 409 N.E.2d 321, 327 (Ill. App. Ct. 1st Dist. 1980).

102. *See, e.g., In re* Marriage of Marthens, 575 N.E.2d 3, 5-7 (Ill. App. Ct. 3d Dist. 1991) (granting $8,400 annual maintenance to a 47-year-old wife who earned $6,097 per year after the divorce); *In re* Marriage of Courtright, 507 N.E.2d 891, 893, 895-96 (Ill. App. Ct. 3d Dist. 1987) (granting $13,200 annual maintenance to a 55-year-old wife who earned only $8,300 per year after the divorce, while her husband earned $100,000 per year).

103. The information contained in Chart No. 4 may be found on the following pages of the reported cases, which are listed below in the order they appear on the chart: *In re* Marriage of Scafuri, 561 N.E.2d 402, 404, 408, 412 (Ill. App. Ct. 2d Dist. 1990); *In re* Marriage of Landfield, 567 N.E.2d 1061, 1073, 1073-75 (Ill. App. Ct. 1st Dist.), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754); *In re* Marriage of Frederick, 578 N.E.2d 612, 614, 619-20 (Ill. App. Ct. 2d Dist. 1991); *In re* Marriage of Krupp, 566 N.E.2d 429, 431, 433-36 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409); *In re* Marriage of Harding, 545 N.E.2d 459, 461, 465, 469-70

CHART NUMBER 4

Maintenance Awards Based on Full-time Homemaker Income After Divorce

	W's Age	H's Income	W's Income	Main./Yr.	Duration
Scafuri	married 17 yrs.	$350,000-$450,000	$5,000	0 remanded	0 yr. remanded
Landfield	Div. 53 Now 65	$153,000	0	$36,000	perm.
Frederick	Div. 53	$144,000-$218,000	0	$30,000	N/A
Krupp	Div. 53	$169,000 (avg.)	$64,000	$30,000	perm.
Harding	Div. 56	$129,228-$217,999	0	0	0 yr.
Kusper	Div. 50	$92,711-$131,163	0	$14,400	5 yr.
Courtright	Now 55	$83,000-$100,000	$8,000	$13,200	2 yr. review
Marthens	Div. 47	$98,931	$6,097	$8,400	5 yr.
Lehr	61 when modified	$86,000	$37,782	$19,200	perm.
Jones	married 26 yrs.	$77,000	0	$9,000	4 yr.
Haas	Div. 52	$49,000-$65,000	$14,524	$7,200	1.5 yr.
Gentry	married 35 yrs.	$47,232	0	$9,000	2 yr.
Orlando	Div. 60	$44,000	0-$10,000	$2,904	2 yr. review
Girrulat	Div. 46	$36,400-$41,791	$6,240-$8,320	$7,800	N/A
Kerber	Div. 50	$34,668	$5,340-$5,820	$7,200	perm.
Campise	Div. 51	$25,128 (net)	0	$6,000	5 yr. review
Gable	Div. 56	$24,000	0	>$3,000 remanded	perm.

As these cases illustrate, although the majority of Illinois courts

(Ill. App. Ct. 1st Dist. 1989); *In re* Marriage of Kusper, 552 N.E.2d 1023, 1024, 1026-27 (Ill. App. Ct. 1st Dist. 1990); *Courtright*, 507 N.E.2d at 893; *Marthens*, 575 N.E.2d at 5,7; *In re* Marriage of Lehr, 578 N.E.2d 19, 20-22, 26 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Jones, 543 N.E.2d 119, 122, 133, 135 (Ill. App. Ct. 1st Dist. 1989); *In re* Marriage of Haas, 574 N.E.2d 1376, 1377-78 (Ill. App. Ct. 3d Dist. 1991); *In re* Marriage of Gentry, 544 N.E.2d 435, 436, 438-39 (Ill. App. Ct. 3d Dist. 1989); *In re* Marriage of Orlando, 577 N.E.2d 1334, 1337, 1342 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Girrulat, 578 N.E.2d 1380, 1381, 1383 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Kerber, 574 N.E. 2d 830, 831-33 (Ill. App. Ct. 4th Dist. 1991); *In re* Marriage of Campise, 450 N.E.2d 1333, 1335 (Ill. App. Ct. 1st Dist. 1983); *In re* Marriage of Gable, 563 N.E.2d 1215, 1216-17 (Ill. App. Ct. 5th Dist. 1990).

provide some maintenance to displaced homemakers, a few refuse to provide any maintenance at all, insisting that these women must support themselves fully.[104] The UMDA does not require such harsh results; the Act expressly provides that spouses who cannot support themselves through suitable employment should receive maintenance.[105]

Moreover, most Illinois courts hold that the ability to be self-supporting should be measured in terms of the standard of living during the marriage.[106] It is not sufficient that the displaced homemaker can scrape up enough money merely to survive. For example, in *In re Marriage of Marthens*,[107] a forty-seven-year-old homemaker started her own business, but earned only $6,097 per year, while the husband earned close to $100,000. The court ruled that the wife was entitled to maintenance to bring her post-divorce standard of living closer to her marital standard of living.[108] In determining whether she could support herself, the court claimed that it looked at her marital standard of living, but the maintenance payments awarded were relatively low compared to her prior joint income with her husband.[109] Thus, the articulated rule in Illinois is that the duty to obtain a job must be balanced against the likelihood that the homemaker will be able to support herself at the same standard of living that she enjoyed during the marriage.[110] However, few courts actually follow these articulated

104. Trial courts have the discretion to set maintenance and even to deny it completely, but their decisions can be reversed on appeal. *See, e.g., Scafuri*, 561 N.E.2d at 410 (finding an abuse of discretion when the court reserved the question of maintenance for a later date); *In re* Marriage of Henzler, 480 N.E.2d 147, 149-50 (Ill. App. Ct. 4th Dist. 1985) (reversing the trial court's modification of maintenance and instead remanding for maintenance termination since the recipient was able to support herself). *But see Harding*, 545 N.E.2d at 469-70 (refusing to find an abuse of discretion when the trial court denied maintenance finding that the award of child support and other assets adequately satisfied the petitioner's needs); *In re* Marriage of Mittra, 450 N.E.2d 1229, 1233 (Ill. App. Ct. 4th Dist. 1983) (holding that the trial court did not abuse its discretion by granting indefinite maintenance because the trial court is better able to assess the parties' needs than the appellate court).

105. UMDA § 308(a)(2), 9A U.L.A. 348 (1987).

106. *See, e.g., Marthens*, 575 N.E.2d at 7; *In re* Marriage of Cheger, 571 N.E.2d 1135, 1140 (Ill. App. Ct. 4th Dist. 1991); *In re* Marriage of Carney, 462 N.E.2d 596, 603 (Ill. App. Ct. 1st Dist. 1984); *In re* Marriage of Wilder, 461 N.E.2d 447, 456 (Ill. App. Ct. 1st Dist. 1983); Hellwig v. Hellwig, 426 N.E.2d 1087, 1096 (Ill. App. Ct. 1st Dist. 1981); Lukas v. Lukas, 404 N.E.2d 545, 553 (Ill. App. Ct. 1st Dist. 1980); Simmons v. Simmons, 409 N.E.2d 321, 327 (Ill. App. Ct. 1st Dist. 1980).

107. 575 N.E.2d 3, 5 (Ill. App. Ct. 3d Dist. 1991).

108. *Id.* at 7.

109. *See supra* Chart No. 4.

110. *In re* Marriage of Courtright, 540 N.E.2d 1027, 1030 (Ill. App. Ct. 3d Dist. 1989) ("It is not realistic or fair to expect a recent divorcee who has worked solely as a

standards when setting maintenance amounts.[111]

The problems of a homemaker may be exacerbated if she has to care for children. The UMDA recognizes that children make it harder for the custodial parent to be self-supporting. Young children may require a parent at home full-time. As a result, the UMDA creates an exception to the duty to be employed for "the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home."[112] Nevertheless, some courts refuse to award maintenance to parents of school-aged children who choose to stay at home. For example, in *In re Marriage of Scafuri*,[113] the court refused to let a mother of school-aged children continue as a homemaker and specifically charged her with the duty to get a job.

Thus, the cost of divorce increases for custodial parents (typically women) who remain full or part-time homemakers, while it decreases for non-custodial parents (typically men). Men can continue to work at their previous jobs and bear no burden to increase their earnings. In addition, the outside demands on their time are likely to diminish, because the mothers are likely to gain custody of the children,[114] and the fathers have no legal duty to care for or

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homemaker for 28 years to quickly and smoothly transform herself into a financially-independent member of society, with a standard of living approaching the standard she enjoyed during the marriage."); *see also Marthens*, 575 N.E.2d at 7 ("[W]here the spouse is not employable or is employable only at a lower income, as compared to her previous standard of living, then permanent maintenance would be appropriate."); *Cheger*, 571 N.E.2d at 1140 ("The benchmark for a determination of maintenance is the reasonable needs of a spouse seeking maintenance in view of the standard of living established during the marriage, the duration of the marriage, [and] the ability to become self supporting . . . ."); *Carney*, 462 N.E.2d at 603 (recognizing that the duty to become self-sufficient "must be balanced against a realistic appraisal of the likelihood that the spouse will be able to support herself in some reasonable approximation of the standard of living established during the marriage"); *Hellwig*, 426 N.E.2d at 1096 (noting that permanent maintenance is appropriate when the spouse cannot simulate the marital standard of living, while limited maintenance is appropriate when the spouse can achieve a standard of living that is "not overly disproportionate" from the earlier standard).

111. *See, e.g. In re* Marriage of Courtright, 507 N.E.2d 891, 893 (Ill. App. Ct. 3d Dist. 1987) (awarding $13,200 per year in maintenance to a woman with only two years of sporadic employment even though her husband earned over $80,000 for each of the four years prior to the divorce).

112. UMDA § 308(a)(2), 9A U.L.A. 348 (1987); ILL. REV. STAT. ch. 40, para. 504(a)(2) (1989).

113. 561 N.E.2d 402, 410 (Ill. App. Ct. 2d Dist. 1990). The court noted that granting maintenance created a situation in which the wife "ha[d] no incentive to be cost conscious, or to become gainfully employed." *Id.*

114. After divorce, 90% of children live with their mothers. E. Mavis Hetherington et al., *Marital Transitions, A Child's Perspective*, 44 AM. PSYCHOLOGIST 302-12 (1989), *reprinted in* FREDERICA K. LOMBARD, READINGS IN FAMILY LAW 45, 51 (1990) [hereinafter Hetherington et al., *Marital Transitions*].

even visit the children.[115] If the fathers choose to see their children at all, they are likely to do so only once every week or two.[116] The mothers, on the other hand, must cope with the demands of the children every day, in addition to the duty to significantly increase their earnings, even though they may have lost all help at home with the children or the other household chores. Consequently, the mothers' lives will change radically because they must simultaneously find a better job, arrange longer child care, and take on extra burdens at home. Moreover, the number and type of jobs that they will be able to accept is limited by the availability of childcare. Finally, if the mothers are forced into unsatisfactory jobs, it can adversely affect the children.[117]

In re Marriage of Scafuri[118] illustrates some of these problems. In *Scafuri*, the father was a doctor earning $350,00 to $450,000 per year.[119] Although the mother was certified as a special education teacher, she stayed at home throughout the seventeen-year marriage to raise their three children.[120] Before the divorce, the family had a per capita income of approximately $80,000 per year ($400,000 divided by 5). The appellate court refused to award the wife maintenance, but granted her $72,000 per year in child support.[121] As a result, after the divorce, the mother and three children had a per capita income of $18,000 per year.[122] Thus, the household income dropped $62,000 per year, per person. Even if the mother returned to full-time work as a special education teacher, it would be impossible to replicate the pre-divorce standard of living. She might be able to earn $18,000 per year as a teacher, but that salary would only raise the per capita income of

115. *See generally* Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619 (1989). Czapanskiy argues that the current method of visitation and support does children a disservice. She advocates the creation of a dual-parent/dual-responsibility system that imposes parental duties on non-custodial parents over and above the mere financial responsibilities normally imposed. *Id.* at 620-21.

116. One study found that two years after the divorce, less than half of the non-custodial fathers saw their children once a week or more. E. Mavis Hetherington et al., *Divorced Fathers*, *in* FREDERICA K. LOMBARD, READINGS IN FAMILY LAW 23 (1990).

117. *See* Hetherington et al., *Marital Transitions*, *supra* note 114, at 54 ("[I]f a mother resents or feels unhappy working or manages only to obtain part-time or temporary jobs requiring frequent job changes, the child may be negatively affected by interactions with an anxious, dissatisfied mother.").

118. 561 N.E.2d 402 (Ill. App. Ct. 2d Dist. 1990).

119. *Id.* at 408, 412.

120. *Id.* at 404, 408.

121. *Id.* at 407.

122. This figure has not been adjusted for the increased costs that might result from full-time employment, such as childcare, commuting costs, and professional clothing.

the household to $22,500 per year.[123] In contrast, the husband's per capita income soared after the divorce from $80,000 per year to $328,000 per year. Accordingly, under the current law, post-divorce standards of living increase for men while they decrease for women and children.[124]

In contrast, the court's approach in *In re Marriage of Hensley*[125] was much more equitable. The *Hensley* court permitted a mother of school-aged children to work part-time while her children were in school, rather than requiring her to obtain a full-time position.[126] The court expressly approved of the role of the homemaker:

> [P]art-time employment plus acting as a homemaker for her children is *fully equivalent* to. . . obtaining full-time employment and placing those children in day care. . . . [S]ection 504(a)(2) of the Act . . . is simply reflective of the legislative judgment of the importance, dignity, and worth of the role of [the] homemaker.[127]

The role of the homemaker is limited, however, to caring for minor children. If a spouse stays home to care for other family members, that spouse is considered to be a mere "volunteer."[128] For example, in *In re Marriage of Zeman*,[129] a couple had a disabled daughter who gave birth to a child,[130] and the wife assumed guardianship of this grandchild.[131] The court held that the costs associated with the grandchild could not be considered in setting maintenance, even though the husband was the child's grandfather.[132] Similarly, in *In re Marriage of Reich*,[133] a father who lived

123. The *Scafuri* court noted that if the mother returned to teaching, she would be able to earn $18,000 per year. *Id.* at 408.

124. *See supra* note 52.

125. 569 N.E.2d 1097 (Ill. App. Ct. 4th Dist.), *appeal denied*, 580 N.E.2d 114 (Ill. 1991) (Table No. 72043).

126. *Id.* at 1102-03.

127. *Id.* Unfortunately, the financial allocations did not match the court's rhetoric. Including maintenance and child support, the wife and her two children had $15,888 for their household, while the husband had $14,264 for his household. *Id.* at 1098, 1101. Thus, the wife still was left with less than half her husband's per capita income ($5,296 compared to $14,272). Such a result, however, may reflect the minimum amount the court perceived to be necessary to run a household.

128. *See In re* Marriage of Riech, 566 N.E.2d 826, 830 (Ill. App. Ct. Dist. 4th Dist. 1991). *But see In re* Marriage of Holman, 462 N.E.2d 30, 39 (Ill. App. Ct. 2d Dist. 1984) (implying that the wife was justified in staying out of the job market to care for her 92-year-old mother and her disabled daughter).

129. 556 N.E.2d 767 (Ill. App. Ct. 2d Dist. 1990).

130. *Id.* at 769, 771.

131. *Id.* at 771, 774.

132. *Id.* at 774-75. The *Zeman* court read the settlement agreement as only requiring the husband to help support the daughter, not her family. *Id.* at 774. Thus, the court

with and helped bathe, dress, feed, and care for the couple's adult, quadriplegic son, was not allowed to consider those demands on his time and income when setting maintenance payments for his wife.

Accordingly, these cases illustrate that a narrow definition of homemaker is disingenuous. Maintenance should reflect the realities faced by former spouses. Although there may be no legal duty to support these relatives, family members who behave responsibly should not be financially penalized. The spouse who leaves escapes the burden of physically caring for these family members. There is no reason why that spouse should be financially rewarded for doing so.[134] Moreover, it is a mischaracterization to suggest that a spouse "volunteers" to take responsibility for an adult, handicapped child or an abandoned grandchild. Most people would prefer not to face these issues. When one spouse is generous enough to assume the personal responsibility, however, the other spouse should contribute financially through increased maintenance.[135]

Even when full-time homemakers receive maintenance, the awards are small and short-lived. Part of the reason is that homemakers are expected to "rehabilitate" themselves.[136] Some courts are willing to take this duty to find work or to get training to nearly ridiculous extremes. For example, in *In re Marriage of LaSota*,[137] the court held that the wife had a duty to find a job within a reasonable period of time and that her failure to find one justified terminating maintenance, even though the woman had ap-

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held that the trial court's determination that the wife's actions were "purely voluntary" was not in error. *Id.* at 775.

133. 566 N.E.2d 826, 830 (Ill App. Ct. 4th Dist. 1991).

134. In other contexts, Illinois has recognized that the duties of a divorced family may be greater than the duties of an intact family. For example, divorced parents may have a duty to pay for college, while intact families have no such duty. *See* ILL. REV. STAT. ch. 40, para. 513 (1989).

135. Maintenance is an appropriate means to share the costs without jeopardizing other sources of income that may be available to these families, such as tort recoveries. With the disappearance of familial immunity, spouses may now sue each other for torts such as assault and battery. This recovery is separate from maintenance. *See* ILL. REV. STAT. ch. 40, para. 1001 (1989) ("A husband or wife may sue the other for a tort committed during the marriage.").

136. Although the UMDA does not use the words "rehabilitative maintenance," the Act sanctions rehabilitative maintenance in § 308(b)(2) by providing that maintenance should reflect "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment." UMDA § 308(b)(2), 9A U.L.A. 348 (1987); *see* ILL. REV. STAT. ch. 40, para. 504(b)(2) (1989). For a penetrating criticism of rehabilitative alimony, see Linda Ballif Marshall, Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667, 668 (1985).

137. 465 N.E.2d 649, 652-53 (Ill. App. Ct. 1st Dist. 1984).

plied for eighty different jobs. The court stated that job-hunting, alone, was not enough; the woman had an obligation to get training that would help her find work.[138] Since the court awarded the woman only $11 to $35 per week in maintenance,[139] however, it is unclear how the court expected the woman to survive, pay for education, and look for work on $572-$1,924 per year. The maintenance award initially had been set to reflect the husband's unemployment.[140] When he later found a job, the wife asked for an increase.[141] Instead of granting the increase, the court terminated the wife's maintenance because she had not been retrained.[142]

Although *LaSota* seems unfair because it placed unreasonable expectations on the wife, the court may have discontinued maintenance because the marriage was relatively short-lived.[143] However, even long-term homemakers risk losing their maintenance if the court finds that they did not put forth sufficient effort to become independent. For example, in *In re Marriage of McNeeley*,[144] the court reversed a maintenance award for a fifty-three-year-old woman who had been married for thirty-two years because she had not tried to find a job.

The very concept of "rehabilitation" implies that there is something wrong with being a homemaker. It also assumes that homemakers can make up for the lost years contributed to the marriage. Unfortunately, however, lost years cannot be recovered. Homemakers lose job experience, youth, the opportunity to build pensions and savings, and the options available to those without parental responsibilities. None of these opportunities can be fully recovered.

Gradually, Illinois courts are beginning to recognize that not all spouses can or should be required to "rehabilitate" themselves. Some displaced homemakers will not readily re-enter the job market. For them, permanent maintenance is the appropriate solution. For example, in *In re Marriage of Kerber*,[145] the trial court awarded rehabilitative maintenance to a fifty-year-old woman with a high school education, who had been married for thirty years and

138. *Id.* at 652.
139. *Id.* at 650-51.
140. *Id.*
141. *Id.* at 650.
142. *Id.* at 652-53. Education alone, however, will not make women equal earners. *See infra* note 164.
143. *LaSota*, 465 N.E.2d at 650. The parties were married for just over four years. *Id.*
144. 453 N.E.2d 748, 754 (Ill. App. Ct. 1st Dist. 1983).
145. 574 N.E.2d 830, 832-33 (Ill. App. Ct. 4th Dist. 1991).

raised four children. The appellate court reversed the award and ruled that the wife was entitled to permanent maintenance.[146] The court stated that "[u]nder these circumstances, it is inappropriate to review [the wife's] maintenance to ensure she will vigorously pursue employment."[147] Similarly, in *In re Marriage of Landfield*[148] and in *In re Marriage of Gable*,[149] women in their fifties were granted permanent maintenance without the obligation to look for employment.[150]

Reviewable maintenance is another option when a displaced homemaker appears unable to support herself. For example, in *In re Marriage of Campise*,[151] the court held that it was error to award rehabilitative maintenance because the wife had a bad back and had been out of the job market for fourteen years. Since she had not worked outside the home for a long period of time, the court held that it was wrong to speculate about how much she might earn.[152] Instead, the court found that her maintenance should be reviewed periodically to determine whether it was still necessary.[153] As evidenced by *Campise*, the trend seems to be toward reviewable maintenance awards.[154]

Although reviewable awards are preferable to denying maintenance altogether, they still impose a duty on displaced homemakers to re-enter the job market. That duty may be impossible to fulfill. Moreover, it is unclear who bears the burden of proof at the maintenance review hearing. If the original award provides for permanent maintenance, then the payor can later try to modify the

146. *Id.* at 833.

147. *Id.*

148. 567 N.E.2d 1061 (Ill. App. Ct. 1st Dist.), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754).

149. 563 N.E.2d 1215 (Ill. App. Ct. 5th Dist. 1990).

150. *Landfield*, 567 N.E.2d at 1073-75; *Gable*, 563 N.E.2d at 1217. *But see In re* Marriage of Scafuri, 561 N.E.2d 402, 408-10 (Ill. App. Ct. 2d Dist. 1990) (holding that a wife in a 17-year marriage, whose husband earned at least $350,000 per year, had a duty to become self-sufficient).

151. 450 N.E.2d 1333, 1336 (Ill. App. Ct. 1st Dist. 1983).

152. *Id.*

153. *Id.*

154. *See, e.g.*, *In re* Marriage of Hensley, 569 N.E.2d 1097, 1101 (Ill. App. Ct. 4th Dist.), *appeal denied*, 580 N.E.2d 114 (Ill. 1991) (Table No. 72043); *In re* Marriage of Marthens, 575 N.E.2d 3, 7 (Ill. App. Ct. 3d Dist. 1991); Asch v. Asch, 426 N.E.2d 1066, 1069 (Ill. App. Ct. 1st Dist. 1981); *In re* Marriage of Rothbardt, 425 N.E.2d 1146, 1152 (Ill. App. Ct. 1st Dist. 1981); *cf. In re* Marriage of Cheger, 571 N.E.2d 1135, 1141 (Ill. App. Ct. 4th Dist. 1991) (discussing modification of award). *But see Scafuri*, 561 N.E.2d at 409-10 (holding that it is only appropriate to review maintenance if the court is monitoring for a specific contingency such as health, ability to pay, or efforts at rehabilitation).

original award.[155] To do so, the payor must establish "substantially" changed circumstances,[156] and to prevail, the payor must prove the recipient no longer needs maintenance.[157] The maintenance continues if the payor fails to show substantial changes.[158] When, however, a reviewable maintenance award comes before the court, it is unclear whether the payor must prove changed circumstances or whether the recipient must prove continued need or inability to work. Either way, the homemaker's life-choices are judged by her former husband and the court on a continuing basis.

In summary, the UMDA duty to get a job places an inequitable burden on displaced homemakers. They may be forced to change their lives radically, incurring a burden to increase their income while they have less help at home. To require middle class women who have devoted their lives to their families to take menial jobs, while their husbands thrive, is inequitable. To require working class women to live in poverty is worse. Although the majority of cases measure the woman's ability to support herself by the marital standard of living, most women end up with significantly lower per capita income, even with maintenance, than their former husbands. Therefore, divorce is a more costly proposition for homemakers than their spouses.

2. Unequal Earners

Although the problems of displaced homemakers are serious, we might expect them gradually to diminish because the vast majority of married women work outside of the home.[159] Maintenance, however, is more than a form of marital unemployment insurance. Although most women work, typically, they do not earn as much

155. ILL. REV. STAT. ch. 40, para. 510(a) (1989).

156. UMDA § 316, 9A U.L.A. 489-90 (1987); ILL. REV. STAT. ch. 40, para. 510(a) (1989).

157. *In re* Marriage of Krupp, 566 N.E.2d 429, 437 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409). A mere increase in the wife's income, alone, is not sufficient to modify alimony, especially when the family income was higher before the divorce. Pearlman v. Pearlman, 266 N.E.2d 388, 391 (Ill. App. Ct. 1st Dist. 1970).

158. *See* Sullivan v. Sullivan, 424 N.E.2d 957, 962 (Ill. App. Ct. 3d Dist. 1981) (refusing to modify a maintenance award absent proof of a material change in circumstances).

159. Fifty-six percent of all married women are employed. STATISTICAL ABSTRACT, *supra* note 25, at 384, chart no. 635. If older women are excluded, the percentages are much higher. For example, 72.7% of married women between the ages of 35-44 are employed. *Id.* Finally, 72.5% of the married mothers of school-aged children work outside the home. *Id.* at 385, chart no. 636. Finally, 57.1% of married women with preschool-aged children are employed. *Id.*

as their male counterparts.[160] This disparity is even greater for married couples. On average, married women earn only forty-five percent of what married men earn.[161] Most of this difference is attributable to the extra work that women do at home,[162] whether or not they have children.[163] The time women spend on household chores is not available for earning or for building job experience. Furthermore, these problems are exacerbated by children. Women may feel pressured to have children while they are young and therefore forego education.[164] Moreover, unlike other household chores that can be neglected occasionally, children require constant and reliable attention. Working parents must arrange their schedules around daycare and often the additional needs of sick children. Even when spouses divide the labor evenly, the job market assumes women will not be as readily available and accordingly underpays women. These problems plague both families with children and childless families.

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160. In 1988, at all age and educational levels, men earned significantly more than women. For example, the mean male earnings were $29,885, while the mean female earnings were only $18,846. *Id.* at 455, chart no. 737.

161. In 1987, married women earned an average of $13,245, while married men earned an average of $29,154. *Id.* at 455, chart no. 736. However, in single person households where additional family responsibilities should not diminish earning capacity, men also earn more than women. For example, in 1987, the median income for a male householder was $24,804, but only $14,620 for a female householder. *Id.* at 453, chart no. 731.

162. Ellman, *supra* note 12, at 4 n.2. Ellman's conjecture is borne out by earning data. Although married women only earn 46.2% of what married men earn, single women earn 73.3% of what single men earn. STATISTICAL ABSTRACT, *supra* note 25, at 445, chart no. 718 (the median income of those who had never married was $21,493 for men and $15,759 for women, while the median income for married men was $31,534 but only $14,600 for married women). Some of the difference between the earnings of married and single women may be attributed to the fact that many married women work part-time. Among full-time, year-round workers, women earn 63% of what men earn ($18,846 for women and $29,885 for men). *Id.* at 455, chart no. 737.

163. Rutherford, *supra* note 11, at 566 ("[E]ven in childless families, one spouse tends to assume the majority of homemaking tasks at the expense of that spouse's career.").

164. In fact, the husband is more likely to be better educated in white, middle class families. For discussion of the relationship between education and sex roles, see Carbone & Brinig, *supra* note 4, at 961, and BECKER, *supra* note 12, at 60-62. However, even educated women do not earn as much as comparably educated men. For example, middle-aged women with graduate educations only earn 63% of what comparably educated men earn. STATISTICAL ABSTRACT, *supra* note 25, at 455, chart no. 737. In particular, for individuals age 45-54, men with more than five years of college earned an average of $54,298, while women with more than five years of college only earned an average of $31,060. *Id.* These statistics may reflect either that men have more post-graduate education than women, or that even well-educated women make more career compromises for their families. In fact, more women get bachelor's degrees or master's degrees, but more men get professional degrees or doctorates. *Id.* at 161, chart no. 274.

Such earning disparities are far from hypothetical. Upon divorce, courts divide the total available income among the various family members. Calculating the per capita income allows one to see how courts allocate the resources. Although child support and maintenance are legally distinct,[165] as a practical matter, both are used to support a common lifestyle that includes many shared resources: housing, utilities, transportation, entertainment, food, and clothing. Moreover, tax incentives may induce parties to disguise child support as maintenance or vice versa.[166] Indeed, it is common in Illinois for parties to provide for unallocated support which purposely blends the two for tax purposes.[167] The following chart examines several Illinois cases and compares the per capita income of couples after divorce when both spouses are earners.[168]

165. *See, e.g., In re* Marriage of Scafuri, 561 N.E.2d 402, 407 (Ill. App. Ct. 2d Dist. 1990) ("Child support is for the support of the children and maintenance is for the support of the spouse. While the two concepts are related, one should not be substituted for the other.").

166. The *Internal Revenue Code* specifically requires inclusion of income received as alimony, but excludes income "which the terms of the divorce or separation fix (in terms of an amount of money or part of the payment) as a sum which is payable for the support of children of the payor spouse." I.R.C. § 71(a), (c)(1) (1988).

167. *See, e.g., In re* Marriage of Kennedy, 573 N.E.2d 1357, 1363-64 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Garelick, 522 N.E.2d 738, 740 (Ill. App. Ct. 1st Dist. 1988); *In re* Marriage of Rapacz, 482 N.E.2d 441, 442 (Ill. App. Ct. 2d Dist. 1985).

168. Chart No. 5 describes how the court divides the family income among current family members. The per capita income is a measure of how much each spouse has available to spend on other choices. One such choice is to create a second family. Members of the second families, for either men or women, are excluded from the calculations.

The calculation of per capita income includes child support and maintenance, as well as earnings. The income available to the custodial spouse includes earnings, maintenance, and child support and is divided by the number of people to be supported. Child support and maintenance are subtracted from the payor's earnings. Similarly, children over the age of 18 are excluded, as are step-children and second spouses.

For purposes of comparison, in 1988, the national per capita income was $13,123. STATISTICAL ABSTRACT, *supra* note 25, at 456, chart no. 739. The national per capita income figure is not adjusted for racial differences. The per capita income for Blacks is $8,271, and $7,956 for Hispanics. *Id.*

The information contained in Chart No. 5 may be found on the following pages of the reported cases, which are listed below in the order they appear on the chart: *In re* Marriage of Frus, 560 N.E.2d 638, 639-40 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134); *In re* Marriage of Feldman, 557 N.E.2d 1004, 1005-06 (Ill. App. Ct. 2d Dist.), *appeal denied*, 561 N.E.2d 689 (Ill. 1990) (Table No. 70646); *In re* Marriage of Zeman, 556 N.E.2d 767, 768-71 (Ill. App. Ct. 2d Dist. 1990); *In re* Marriage of Krupp, 566 N.E.2d 429, 430-34 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409); *In re* Marriage of Schroeder, 574 N.E.2d 834, 836-38 (Ill. App. Ct. 4th Dist.), *appeal denied*, 580 N.E.2d 134 (Ill. 1991) (Table No. 72237); *In re* Marriage of Marthens, 575 N.E.2d 3, 5 (Ill. App. Ct. 3d Dist. 1991); *In re* Marriage of Agazim, 530 N.E.2d 1110, 1112-14 (Ill. App. Ct. 2d Dist. 1988); *In re* Marriage of Lehr, 578 N.E.2d 19, 21-22 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Seymour, 565 N.E.2d 269, 270 (Ill. App. Ct. 2d Dist. 1990); *In re* Marriage of

CHART NUMBER 5

Spousal Earnings After Divorce

	H's Income	W's Income	Maintenance	Child Support	H's Per Capita	W's Per Capita
Frus	$342,000	$29,124	0	$4,800	$337,200	$16,962
Feldman	$265,000	$29,440	$30,000	0	$235,000	$59,440
Zeman	$194,000	$26,505	$10,800	0	$183,200	$37,305
Krupp	$139,000 (avg.)	$64,000	$30,000	0	$139,075 (avg.)	$94,000
Schroeder	$112,087	$4,500	$4,000 (reversed)	$19,104	$88,983	$5,520
Marthens	$98,931	$6,097	$8,400	$39,600	$50,931	$10,819
Agazim	$92,000	$80,000-$100,000	0	$7,500	$84,500	$32,500 (avg.)
Lehr	$86,000	$37,782	$19,200	0	$66,800	$56,982
Seymour	$64,992	$9,499	$8,000	$6,384	$49,668	$12,442
Ryman	$53,500-$54,500	$1,900-$5,400	$3,600	$7,000 (avg.)	$43,400	$7,125
Haas	$49,000-$65,000	$14,524	$7,200	0	$49,800	$21,724
Drone	$46,183	$19,574	$4,080	0	$42,103	$23,654
Orlando	$44,000	$10,000	$2,904	0	$42,096	$6,452
Tatham	$45,000	$17,500	0	$9,000	$36,000	$13,250
Koral	$41,000-$26,400	$33,060	0	$6,000	$35,000	$19,530
Emery	$40,212	$3,768	$7,284	$5,160	$27,768	$8,106
Calisoff	$39,422	$12,483	$9,984	$9,000	$20,438	$10,489
Flory	$38,055	$6,250	$3,228	0	$34,827	$9,478
Girrulat	$36,400-$41,791	$6,240-$8,320	$7,800	0	$28,600	$14,040
Kerber	$34,668	$5,340-$5,820	$7,200	0	$27,468	$15,391
Einhorn	$29,525-$35,000	0	$840	$7,332	$24,090	$12,000 (avg.)
Hensley	$23,816	$6,292	$3,720	$5,824	$14,272	$5,549
Zummo	$19,488-$23,000	$7,000	$2,400	$4,872	$13,972	$4,757

Ryman, 527 N.E.2d 18, 21-22 (Ill. App. Ct. 2d Dist. 1988); *In re* Marriage of Haas, 574 N.E.2d 1376, 1379 (Ill. App. Ct. 3d Dist. 1991); *In re* Marriage of Drone, 577 N.E.2d 926, 928-29 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Orlando, 577 N.E.2d 1334, 1336-37 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Tatham, 527 N.E.2d 1351, 1365 (Ill. App. Ct. 5th Dist. 1988); *In re* Marriage of Koral, 551 N.E.2d 242, 245 (Ill. App. Ct. 1st Dist. 1989); *In re* Marriage of Emery, 534 N.E.2d 1014, 1018 (Ill. App. Ct. 4th Dist. 1989); *In re* Marriage of Calisoff, 531 N.E.2d 810, 812-13 (Ill. App. Ct. 1st Dist. 1988); *In re* Marriage of Flory, 525 N.E.2d 29, 31-32 (Ill. App. Ct. 1st Dist. 1988); *In re* Marriage of Girrulat, 578 N.E.2d 1380, 1381-83 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Kerber, 574 N.E.2d 830, 832-33 (Ill. App. Ct. 4th Dist. 1991); *In re* Marriage of Einhorn,

Chart Number 5 reveals a number of interesting facts. First, the difference between what men and women earn is substantial. Arguably, that difference merely reflects their relative worth in the job market. However, the amount women can earn is limited by the traditional division of labor that assigns women additional household chores.[169] Indeed, married women tend to earn less than their single counterparts.[170] Even if a particular couple divides the work evenly, employers may expect that women, as a class, are less available for work and pay them less. Of course, some part of the earning differential between men and women may be due to sex discrimination. Nevertheless, to rely upon the job market to replace shared income at divorce is to extend that market discrimination into the family.[171] Whatever the reasons, women earn substantially less than their husbands at the time of divorce.

Second, in virtually every case, the per capita income for custodial parents and children was substantially lower than the per capita income for noncustodial parents. In most cases, the wife had custody, but in the one case where the father had custody, *In re Marriage of Koral*,[172] he too suffered a decline in per capita income. Thus, the difference may be attributable to the fact that the custodial parents must share income with children who live with them. For example, in one case in which the wife earned as much or more than her husband,[173] the wife still had a smaller per capita income because she had to share it with her two children. Similarly, in *Koral*, although the husband earned as much or more than the wife, his per capita income dropped because he had to share it with his son. Consequently, custodial parents and their children bear a disproportionate share of the cost of divorce.

However, in most instances, children alone do not account for

533 N.E.2d 29, 31-32 (Ill. App. Ct. 1st Dist. 1988); *In re* Marriage of Hensley, 569 N.E.2d 1097, 1098-99 (Ill. App. Ct. 4th Dist.), *appeal denied*, 580 N.E.2d 114 (Ill. 1991) (Table No. 72043); *In re* Marriage of Zummo, 521 N.E.2d 621, 622, 624 (Ill. App. Ct. 4th Dist. 1988).

169. Ellman, *supra* note 12, at 4 n.6.

170. In 1987, married women earned an average of $13,245. STATISTICAL ABSTRACT, *supra* note 25, at 455, chart no. 736. On the other hand, women who never married had a median income of $15,759 in 1987. *Id.* at 445, chart no. 718, *see supra* note 162.

171. The United States Supreme Court has held that it is inappropriate for a state court to import society's racial discrimination into family decisions. Palmore v. Sidoti, 466 U.S. 429, 432-34 (1984).

172. 551 N.E.2d 242, 245 (Ill. App. Ct. 1st Dist. 1989); *see supra* Chart No. 5.

173. *In re* Marriage of Agazim, 530 N.E.2d 1110 (Ill. App. Ct. 2d Dist. 1988); *see supra* Chart No. 5.

the disparity. For example, in *In re Marriage of Tatham*,[174] the husband's earnings in 1986 were $45,000, while the wife earned $17,500 during that same year. Even if the husband had to share his income fully with the child so that his per capita income dropped to $22,500, the husband still would have a greater per capita income than the wife ($22,500 versus $17,500). Therefore, maintenance should not be reserved solely for mothers or displaced homemakers.

Indeed, Illinois courts have recognized that employed spouses often require maintenance in order to meet their reasonable needs.[175] For example, in *In re Marriage of Kristie*,[176] the court held that a wife who had been working for ten years nevertheless needed maintenance. In *Kristie*, the couple had been married for thirty-six years and raised six children.[177] The wife had been employed as a receptionist for ten years, but her earnings still were substantially below her husband's and were insufficient to meet her monthly expenses.[178] The court held that even though she was employed, the wife required permanent maintenance.[179]

Kristie involved a family of relatively modest means. The husband's net earnings were $18,824 per year.[180] Nevertheless, he was required to pay $4,800 per year in permanent maintenance.[181] Because higher earners can better afford to pay maintenance, one might expect per capita incomes in high income families to be more equal. However, Chart Number 5 reveals that income disparities are just as great or greater in high income families as in low income families. For instance, in *In re Marriage of Frus*,[182] although the couple had a joint income of $371,000, the family had the greatest disparity in per capita income.[183] The wife's per capita income amounted to less than five percent of her husband's.[184] Thus, the

174. 527 N.E.2d 1351, 1364-65 (Ill. App. Ct. 5th Dist. 1988).

175. Simmons v. Simmons, 409 N.E.2d 321, 327 (Ill. App. Ct. 1st Dist. 1980) ("[T]he law contemplates a permanent maintenance award where the wife has employment skills but there is a discrepancy between her probable future income and an income which would provide the standard of living she enjoyed while married.").

176. 510 N.E.2d 14, 15 (Ill. App. Ct. 1st Dist. 1987).

177. *Id.* at 15.

178. *Id.* at 15-16.

179. *Id.*

180. *Id.* at 15.

181. *Id.*

182. 560 N.E.2d 638 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

183. *Id.* at 639; *see supra* Chart No. 5.

184. *Frus*, 560 N.E.2d at 639; *see supra* Chart No. 5.

disparities cannot be explained by the husband's inability to pay maintenance.

One problem with the *Frus* decision is that it defines rehabilitation as an "all or nothing" proposition. The *Frus* court classified homemakers who manage to find jobs as rehabilitated, even if those jobs leave them with a per capita income that is a fraction of the former spouses'.[185] At least one other court has made a similar error.[186] However, other courts recognize that a spouse may be only "partially rehabilitated."[187] For example, in *In re Marriage of Garelick*,[188] the court found that the wife, who had increased her income from $12,949 to $23,580, was only partially rehabilitated in light of her husband's changed income from $64,609 to $53,200. As a result, the *Garelick* court reduced the support award for changed circumstances, but did not terminate it altogether.[189]

One possible explanation for the *Frus* decision is that it was a relatively short marriage (nine years).[190] The length of the marriage, however, fails to explain completely the disparities. For example, in both *In re Marriage of Drone*,[191] and *In re Marriage of Orlando*,[192] the husband earned about $45,000.[193] However, the durations of the marriages were drastically different. The Orlandos were married for forty-two years, while the Drones were married only five years.[194] In *Drone*, the wife earned more than twice as much as Mrs. Orlando and also received forty percent

185. *Frus*, 560 N.E.2d at 639-40.

186. *See In re* Marriage of Henzler, 480 N.E.2d 147, 150 (Ill. App. Ct. 4th Dist. 1985) (holding that a former homemaker who earned $20,000 was rehabilitated, even though her former husband earned more than $40,000).

187. *In re* Marriage of Krupp, 566 N.E.2d 429, 436 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409). *Krupp* rejected the "all or nothing" theory of maintenance in the context of assigning the burden of proof: "We interpret the respondent's argument to be that once a judge finds that maintenance should be modified, it should be modified to zero. . . . [T]he trial judge rejected that proposed rule; so do we." *Id.*

188. 522 N.E.2d 738, 742 (Ill. App. Ct. 1st Dist. 1988).

189. *Id.* at 743. The husband earned $53,200 per year and paid $14,640 in unallocated support, leaving him with a net income of $38,560. *Id.* at 741. The wife earned $23,598 and received $14,640 in unallocated support for a total income of $38,238. *Id.* However, the wife had to share her total income with their children, so her per capita income was substantially lower than her husband's. *Id.* at 740. Since the opinion does not indicate the number of children, it is not possible to calculate her per capita income. Accordingly, the *Garelick* case does not appear on the charts.

190. *In re* Marriage of Frus, 560 N.E.2d 638, 639 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

191. 577 N.E.2d 926 (Ill. App. Ct. 5th Dist. 1991).

192. 577 N.E.2d 1334 (Ill. App. Ct. 1st Dist. 1991).

193. *Drone*, 577 N.E.2d at 928; *Orlando*, 577 N.E.2d at 1337.

194. *Drone*, 577 N.E.2d at 928; *Orlando*, 577 N.E.2d at 1337.

more maintenance.[195] Accordingly, Mrs. Drone's per capita income was twice as high as Mrs. Orlando's. Thus, the correlation between the length of the marriage and the post-decree standard of living is questionable.

In addition, maintenance awards often end too soon.[196] Only one of the awards listed in Chart Number 5 was permanent;[197] most of the awards lasted five years or less.[198] Yet it is unclear how the situations will improve in a short period of time. Most of these women were between forty and sixty-one years old,[199] and all of them were already earning income.

The framers of the UMDA might respond that the purpose was not to treat women and children equally, but rather merely to render them "independent." Thus, the goal is self-sufficiency in order to create a "clean break."[200] However, when children are present, such "clean breaks" are neither possible nor desirable. Former spouses must arrange visits and exchange information, and absent parents should be involved in both the daily life and the financial support of their children.[201]

Although "clean breaks" may seem desirable in other circum-

195. In *Drone*, the wife had a yearly income of $19,000 and received $340 per month in maintenance. *Drone*, 577 N.E.2d at 933. In *Orlando*, however, the highest annual income Mrs. Orlando ever earned was $10,000, yet she received monthly maintenance payments of $242. *Orlando*, 577 N.E.2d at 1341-42.

196. Some commentators suggest that more maintenance awards should be permanent. *See e.g.*, Goldfarb, *supra* note 27, at 372; Marshall, Note, *supra* note 136, at 668.

197. *In re* Marriage of Kerber, 574 N.E.2d 830, 833 (Ill. App. Ct. 4th Dist. 1991).

198. *Drone*, 577 N.E.2d at 933; *Orlando*, 577 N.E.2d at 1342; *In re* Marriage of Haas, 574 N.E.2d 1376, 1379 (Ill. App. Ct. 3d Dist. 1991); *In re* Marriage of Marthens, 575 N.E.2d 3, 7 (Ill. App. Ct. 3d Dist. 1991); *In re* Marriage of Seymour, 565 N.E.2d 269, 272 (Ill. App. Ct. 2d Dist. 1991); *In re* Marriage of Feldman, 557 N.E.2d 1004, 1008 (Ill. App. Ct. 2d Dist.), *appeal denied*, 561 N.E.2d 689 (Ill. 1990) (Table No. 70646); *In re* Marriage of Zeman, 556 N.E.2d 767, 776 (Ill. App. Ct. 2d Dist. 1990); *In re* Marriage of Emery, 534 N.E.2d 1014, 1018 (Ill. App. Ct. 4th Dist. 1989); *In re* Marriage of Koral, 551 N.E.2d 242, 248 (Ill. App. Ct. 1st Dist. 1989) (awarding no maintenance); *In re* Marriage of Calisoff, 531 N.E.2d 810, 816 (Ill. App. Ct. 1st Dist. 1988); *In re* Marriage of Tatham, 527 N.E.2d 1351, 1366 (Ill. App. Ct. 5th Dist. 1988) (awarding no maintenance).

199. Only the women in *Agazim*, *Tatham*, *Hensley*, and *Zummo* were under 40. *See supra* Chart No. 5.

200. Herma Hill Kay is one advocate of "clean breaks." Kay, *Appraisal*, *supra* note 40, at 313, 318. Occasionally, courts also discuss this concept. *See, e.g., In re* Marriage of Durante, 559 N.E.2d 56, 62 (Ill. App. Ct. 1st Dist. 1990); Simmons v. Simmons, 409 N.E.2d 321, 327 (Ill. App. Ct. 1st Dist. 1980) ("The Marriage [and Dissolution] Act whenever possible, seeks to cut off all entanglements between the parties so that they may each go their separate ways in life. But, . . . [r]easonable needs are still to be measured by the standard of living the party seeking maintenance previously enjoyed.").

201. For a further criticism of "clean breaks," see Rutherford, *supra* note 11, at 585-86; Marshall, Note, *supra* note 136, at 668.

stances, it is important to ask, who gets the break?[202] As the charts above suggest, divorce is much more costly for women than men. Thus, women have a strong financial incentive to stay in bad marriages. Women who leave marriages do not get a "clean break"; they get a "free fall." To the extent that a "clean break" is merely a euphemism for financial irresponsibility, clean breaks ought not to be encouraged.

Although most men fare substantially better than their former wives, men may perceive that their own standard of living diminishes after divorce. Relatively few men become rich as a result of divorce. Divorce is costly. If both spouses already work, then divorce adds no new income to the family, but creates extra expenses for housing, transportation, and services, in addition to the cost of the divorce itself. For most families, courts divide the *loss* created by divorce. Even if men bear a smaller portion of that loss than women, their increased expenses may consume much of the increase in their per capita income.

Nevertheless, the cost of divorce falls disproportionately on women and children. Although maintenance awards help unequal earners, the awards are usually too small. Nearly all wives in the cases listed in Chart Number 5 suffered a significant decline in per capita income, while nearly all husbands experienced increased per capita income.[203]

3. Equal Earners

Although equal earners are better off than other divorced spouses, merely earning an equal salary is not sufficient to guarantee an equal post-divorce result. For example, in *In re Marriage of Agazim*,[204] the wife earned a larger salary but still ended up with a smaller per capita income because she also retained custody of the children.[205]

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202. "In fact, rehabilitative alimony allows divorcing husbands to make a clean break but discourages wives from making any break at all." Marshall, Note, *supra* note 136, at 668.

203. *In re* Marriage of Kristie, 510 N.E.2d 14, 15 (Ill. App. Ct. 1st Dist. 1987), is the only case in which the wife's per capita income exceeded the husband's following divorce. *Kristie* was excluded from Chart No. 5 because only net income figures were available, *see id.*, and it is unclear what expenses were deducted to arrive at those figures. Using the net figures from the case, the wife's per capita income following the divorce was $16,604, while the husband's per capita income was $14,024. The court justified the difference by noting that the husband could expect to earn an additional $260,000 in the future, while the wife could expect future earnings of $135,000. *Id.*

204. 530 N.E.2d 1110 (Ill. App. Ct. 2d Dist. 1988).

205. *Id.* at 1111-12.

Custodial parents are undercompensated. The Illinois child support guidelines virtually guarantee that the custodial parent will have a smaller per capita income. For example, the guidelines require a non-custodial parent to pay twenty-five percent of net income as child support for two children.[206] Assume that each parent earns $32,000 net, for a joint family income of $64,000. Before the divorce, this family of four would have $16,000 to spend per person. After the divorce, the non-custodial spouse would pay one-fourth of net income, or $8,000, in child support. As a result, the recipient and children would have $40,000 in income, or $13,333 to spend per person. The payor, on the other hand, would have $24,000 to spend on one person. Consequently, the non-custodial parent's per capita income increases by fifty percent, while the rest of the family's per capita income drops.

Some critics might argue that this result is justified because of the economies of scale that the custodial spouse can enjoy. The economies of scale argument cuts both ways, however, because it is nearly as expensive to run a household of three as a household of four. If the custodial spouse is allowed to keep the house,[207] the mortgage, taxes, and utilities will remain constant or may even increase, while the available income to pay these costs will decrease substantially. Similarly, the marginal cost in feeding an extra person is minimal,[208] so the household will continue to have to stock many bulk items. Accordingly, the decline in per capita income represents a genuine loss to the household.

These disparities are even greater for high income families because some Illinois courts have been willing to ignore the child support guideline amounts when the payor is in a high income bracket.[209] The theory seems to be that children do not need to share in their parents' earnings. That theory, however, fails to accept that needs should be defined in terms of the standard of living.[210] Even when it is inappropriate to spend enormous amounts

206. ILL. REV. STAT. ch. 40, para. 505(a)(1) (1989).

207. *See supra* notes 71-86 and accompanying text.

208. For example, in 1989 the food cost for a family of three (a couple with one child one- to five-years-old) was $81.60 per week, while the food cost for a family of four (a couple with two children one- to five-years-old) was $94.90 per week. STATISTICAL ABSTRACT, *supra* note 25, at 484, chart no. 783. Thus, the marginal cost for feeding one extra person is $13.30 per week, or $691.60 per year.

209. *See In re* Marriage of Scafuri, 561 N.E.2d 402, 406-07 (Ill. App. Ct. 2d Dist. 1990). The *Scafuri* court ordered a total award of child support of $216,000 per year for the three children. *Id.* at 407. Under the statutory guidelines, however, the father would have been required to pay $360,000 per year. *Id.* at 405.

210. In essence, the standard of living theory suggests that if the child support award

on the actual expenses of the child, savings are an appropriate part of the family standard of living.[211] Nevertheless, at least one Illinois court refused to enforce the guidelines to require the payor to pay support for savings.[212] In doing so, the court specifically cited the parents' relatively equal earnings as grounds for paying less than the statutory amount of child support.[213] However, as our statistics indicate, even equal earners need more child support.[214] When courts do not enforce the guideline amounts, they further increase the disparity between the payor's per capita income and the recipients'.[215] Courts lower child support awards in the cases in which the payor can most easily afford to pay.

In summary, alimony cannot be justified as a means to foster independence because marriages are inherently interdependent. Once spouses have invested in a particular division of labor, they lose other opportunities. Moreover, few families have enough income producing property to support their needs, and forced liquidation often is unwise. Similarly, the duty to get a job does not provide equal earning capacity or time to earn. By allocating most of the costs of divorce to women and children, courts have contributed to their impoverishment.[216]

III. RELIANCE

As an alternative to fostering independence, some scholars argue that alimony is justifiable as a form of damages for reliance.[217] Both homemakers and earning spouses detrimentally rely on marriage; marriage frequently requires spouses to forego careers or to

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provided for in the guidelines does not satisfy the child's standard of living, it is grounds to vary from the guidelines. ILL. REV. STAT. ch. 40, para. 505(a)(2)(C) (1989); *see infra* part VI.

211. *In re* Marriage of Krupp, 566 N.E.2d 429, 439 (Ill. App. Ct. 1st Dist. 1990) ("Future savings were an important part of the marital lifestyle, and we are not prepared to say that the petitioner has lost her right to future security because she is divorced."), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409).

212. *In re* Marriage of Cornale, 556 N.E.2d 806, 808 (Ill. App. Ct. 4th Dist. 1990). The *Cornale* court's ruling seems inconsistent with the general rule that divorced parents may be held responsible for college expenses. *See* ILL. REV. STAT. ch. 40, para. 513 (1989).

213. *Cornale*, 556 N.E.2d at 808.

214. *See supra* Chart No. 2.

215. The court's decision in *Cornale* makes more sense when viewed from this perspective. The court actually may have been trying to equalize the parties' per capita incomes.

216. *See supra* note 52.

217. *See supra* notes 12-16 and accompanying text. Reliance damages compensate parties for the loss that results when they change their position in reliance on others. RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1981).

limit their careers by working fewer hours or by declining opportunities to move. Although the UMDA does not specifically refer to reliance damages, some factors that influence the amount of maintenance, like the duration of the marriage[218] and the standard of living,[219] may be rough measures of reliance. Accordingly, Joan Krauskopf argues persuasively that alimony should repay homemakers for lost earning potential.[220]

Lost earning potential alone, however, will not resolve the income disparities between spouses. As the data indicates, the disparities occur for both employed and unemployed spouses.[221] Thus, lost earnings cannot recompense the earners who nevertheless suffer at divorce.

Illinois recognized that lost earnings are not an adequate measure of maintenance over a decade ago in *Simmons v. Simmons*.[222] There, the court rejected the argument that maintenance should only compensate spouses who earned less as a result of the marriage. In *Simmons*, because the wife worked throughout the marriage, the husband argued that she had not been harmed.[223] Therefore, he reasoned, the wife's reasonable needs should be measured by her own income.[224] The court held that the proper measure of her needs was the standard of living during the marriage, which incorporated their joint income.[225] Although the wife had a substantial salary ($15,000), the court noted that she could never match the husband's earning capacity.[226] Consequently, the court found that if the wife's needs were limited to what she could earn, her standard of living necessarily would decline.[227]

In essence, merely compensating Mrs. Simmons for past harms would fail to give her the benefit of the bargain of her marriage: her expectation interest. Although she may not be in a worse position for having married, she has lost the expected gains. When spouses make choices about how to divide the work in the mar-

218. UMDA § 308(b)(4), 9A U.L.A. 348 (1987); ILL. REV. STAT. ch. 40, para. 504(b)(4) (1989).

219. UMDA § 308(b)(3); ILL. REV. STAT. ch. 40, para. 504(b)(3).

220. *See* the three Krauskopf articles cited *supra* note 16.

221. *See supra* Chart Nos. 2-5.

222. 409 N.E.2d 321, 326-27 (Ill. App. Ct. 1st Dist. 1980).

223. *Id.* at 327. This emphasis on harm is inherent in the notion of detrimental reliance and may bring back the notion of fault in divorce. *See* Carbone & Brinig, *supra* note 4, at 957-61.

224. *Simmons*, 409 N.E.2d at 327.

225. *Id.* at 327-28.

226. *Id.* at 326-27.

227. *Id.* at 327-28.

riage, or how much education to pursue, they consider future benefits. They may be willing to perform services below market rates in order to secure their long-term prosperity. Spouses frequently rely on two types of future benefits. First, they expect early investments in careers to pay off in later years; second, they expect to have more disposable income once children are grown. Accordingly, any scheme of recompense that freezes the couple at a particular moment necessarily excludes future benefits or expectation damages.

In summary, reliance damages alone are inadequate because they cannot remedy the financial dislocations of divorce. Although spouses often detrimentally rely on their marriages, even spouses who do not may nonetheless find themselves financially at jeopardy. Because reliance looks backward to what has been lost, it fails to account for the future return on the investment that the spouses expected. In essence, reliance damages fail as a justification for alimony because they only look to remedy one part of the inequities caused by divorce.

IV. CONTRIBUTION/UNJUST ENRICHMENT

A contribution approach to alimony recognizes that marriage creates both gains and losses. For example, when one spouse handles all the household administration, the other spouse is free to devote more time to a career. That enhanced career is a marital gain that can be shared in the form of alimony. According to contribution theory, recipients should not only be compensated for their own lost earning potential, but also for what they may have contributed to the marriage. Whenever a spouse's contributions produce gains that survive the marriage, the contributor should be compensated. June Carbone cites children, professional degrees, and enhanced careers as examples of such gains that survive marriage.[228]

The UMDA expressly recognizes homemaker contributions as a consideration in property division,[229] but is silent as to the value of contributions in the maintenance provisions. Nevertheless, courts occasionally note that spousal contributions are relevant to maintenance determinations.[230]

228. Carbone, *A Reply*, *supra* note 14, at 1494.

229. UMDA Alternative B § 307(1), 9A U.L.A. 239 (1987).

230. *See, e.g.*, *In re* Marriage of Aschwanden, 411 N.E.2d 238, 241 (Ill. 1980) (implying that a spouse's contributions in housekeeping and business entertaining might be relevant to maintenance); *In re* Marriage of Weinstein, 470 N.E.2d 551, 559-60 (Ill. App. Ct.

The UMDA fails, however, to define contributions. Thus, spouses may disagree over whether a given activity amounts to a contribution. For example, an earner might claim that the homemaker wants to stay home with the children, while the earner prefers that the spouse find a full-time job.[231] From the earner's perspective, child-care is not a contribution, but a costly hobby. The homemaker might argue that the quality of the child-care is worth every dime of lost earnings and more. Therefore, at its worst, the contribution theory degenerates into a fault finding. For example, a homemaker might claim the value of services performed, while the earner might criticize the housekeeping. Any definition of acceptable contributions necessarily leads us closer to the old conundrum of marital fault.

However contributions are defined, both parties' contributions must be measured. Theoretically, each spouse could place a dollar value on all services performed during the marriage and demand payment, but few if any spouses keep accurate records of their services. Moreover, the market value of individual services might be difficult to estimate. For example, what is the value of carrying out the garbage once a day? Because it is easier to document the economic contributions of earning spouses, a contribution standard runs the risk of placing more value on financial contributions than services contributions.[232]

If market rates are used to measure the value of services, then the contributions many women make are likely to be undervalued. For example, consider a twenty-year marriage between a homemaker and an earner. The median income for families in 1986 was

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1st Dist. 1984) (holding that a spouse's contribution to a professional degree could be considered in awarding maintenance).

231. For example, in one recent case, a doctor claimed that her husband made no contributions as a homemaker, so he should get no share of the marital assets. *In re* Marriage of Rai, 545 N.E.2d 446, 449 (Ill. App. Ct. 1st Dist. 1989). The court rejected this argument, holding that there was sufficient evidence of contribution to entitle him to a share of the property. *Id.* This sort of argument over the sufficiency of homemaking contributions, however, is very similar to allegations of fault, and may return us full-circle to a fault based system.

232. *See, e.g., In re* Marriage of Jones, 543 N.E.2d 119, 132 (Ill. App. Ct. 1st Dist. 1989) (holding the physician-husband's greater contributions to the marriage as grounds for a disproportionate property division in his favor); *In re* Marriage of Bentivenga, 441 N.E.2d 336, 339-40 (Ill. App. Ct. 2d Dist. 1982) (concluding "that the husband deserved a greater share of the marital property because of his greater contribution toward [the property's] acquisition"). *But see Aschwanden*, 411 N.E.2d at 241-42 ("caution[ing] against placing too much emphasis on monetary contributions over non-monetary contributions"); *In re* Marriage of Gentry, 544 N.E.2d 435, 437 (Ill. App. Ct. 3d Dist. 1989) (holding that the court should not overemphasize monetary contributions).

$32,876 per year.[233] If the earner earned an average of $30,000 per year for twenty years, his contribution would be $600,000 exclusive of any services he may have performed around the house. If a full-time housekeeper earns $20,000 per year, then the homemaker's contribution would have been $400,000 over the same twenty year period. If the contributions of both spouses are counted, the net result would be that the homemaker owed the earner $100,000 after twenty years of marriage. The higher the earner's income, the greater the earner's contribution and, therefore, the greater the homemaker's debt. In addition, high income families may hire more household help, so the value of the household contributions may go down. Hence, a contribution standard that uses market rates to evaluate contributions necessarily undervalues homemaker contributions.

There are two additional flaws with the theory of offsetting contributions. First, although spouses may view themselves as contributing equally during the marriage, they will not share costs equally upon divorce. Housekeeping is a pink collar industry in which the services are almost universally performed by women[234] and paid at relatively low rates.[235] Accordingly, a pure contribution theory will pay women less both because the market pays women less and because women are more likely than men to assume the housekeeping chores in a marriage.[236] Second, the spouses never intended to charge each other for their services at market rates; they simply divided the tasks in order to maximize their future return. These spouses invested in a shared enterprise for the future. A contribution standard cuts off the chance to share in that future return.

The classic example is the spouse who supports the other during an extended professional education. Although a minority of states consider the resulting professional degree to be marital property divisible at divorce,[237] Illinois rejects this position.[238] Instead, Illinois looks, in part, to the contribution made by the supporting

233. STATISTICAL ABSTRACT, *supra* note 25, at 449, chart no. 725. This amount is for families headed by white married couples. The numbers are substantially less for families headed by a single person and for minority families. *See supra* note 168.

234. Women comprise 97.3% of all child-care workers and 95.6% of all domestic cleaning employees. STATISTICAL ABSTRACT, *supra* note 25, at 391, chart no. 645.

235. *See supra* notes 98-99, 160-62.

236. *See supra* note 15 and accompanying text.

237. *See, e.g.*, Wilson v. Wilson, 741 S.W.2d 640, 645-47 (Ark. 1987) (medical degree and earning capacity are not marital property, but goodwill from medical practice may be marital property); Daniels v. Daniels, 418 N.W.2d 924, 927 (Mich. Ct. App. 1988) (dental degree is part of marital property); O'Brien v. O'Brien, 489 N.E.2d 712, 716-17 (N.Y.

spouse. Thus, the contributing spouse may be reimbursed for the tuition paid or the amount contributed to household expenses.[239] Although few spouses would agree to perform these services if they only expected to get their money back, the end result seems less harsh because the emotional investment is likely to be limited to a few years.[240]

Just as common is the spouse who struggles through the lean years of building a career only to be discarded on the eve of success. These spouses, too, have lost their investment in the future, but may come out completely empty-handed. Consider *In re Marriage of Frus*[241] in which the couple had been married for nine years and had three children.[242] Because the couple expected the husband's income to increase after the divorce, the settlement agreement provided that if the husband's income increased, the maintenance payments also would increase at a specified rate.[243] After the divorce, Mrs. Frus went back to school to get her master's degree and found a job that paid $29,124 per year.[244] Meanwhile, Mr. Frus increased his earnings to $342,000.[245] The court held that because Mrs. Frus became self-sufficient, all maintenance should terminate.[246] Even though the couple clearly planned for future prosperity, only the husband was permitted to benefit from it. Thus, the contribution standard, like the reliance standard, fails to account for future gains.

App. Div. 1985) (medical degree is part of marital property); *cf.* Buckl v. Buckl, 542 A.2d 65, 69 (Pa. Super. Ct. 1988) (partnership interest is marital property).

Commentators have suggested redefining income as property. *See generally* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 758-64 (1988) (explaining that a number of jurisdictions do not view earning capacity as a marital asset for various reasons).

238. *See In re* Marriage of Weinstein, 470 N.E.2d 551, 559-60 (Ill. App. Ct. 1st Dist. 1984) (holding that a spouse's contribution to a professional degree may be considered only in awarding maintenance).

239. *Id.* at 558.

240. If the supporting spouse is discarded immediately, then the contributions will be limited to the length of the professional training. If the supporting spouse remains married for a longer period of time, that spouse is likely to recoup a share of the investment as the professional spouse increases earnings.

241. 560 N.E.2d 638 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

242. *Id.* at 639; *see supra* Chart No. 2.

243. *Frus*, 560 N.E.2d at 639.

244. *Id.*

245. *Id.*

246. *Id.* at 640.

V. REASONABLE NEEDS

The UMDA expressly considers "needs" in setting maintenance.[247] Thus, returning to the *Frus* decision, the court might respond that it was not trying to compensate Mrs. Frus for her marital contributions, but merely attempting to provide for the reasonable needs of the parties. Mrs. Frus earned $29,214 per year and received an additional $4,800 in child support to support one child.[248] Hence, she had $33,634 to support two people, more than enough to meet their reasonable needs.[249]

However, this characterization of the *Frus* decision illustrates the central problem of a need-based standard for maintenance. Need can be defined in many different ways: (1) subsistence,[250] (2) rehabilitation,[251] (3) standard of living,[252] or (4) equality.[253] Although most Illinois courts define reasonable needs in terms of the marital standard of living,[254] some define need in terms of rehabilitation. The *Frus* court clearly defined reasonable needs in terms

247. Section 308(a) of the UMDA conditions maintenance upon "reasonable need." Subsection (b)(1) considers the recipient's needs, while (b)(6) considers the payor's needs. UMDA § 308(a), (b)(1) & (b)(6), 9A U.L.A. 347-48 (1987). For the text of § 308(a) and (b), see *supra* notes 46-47 and accompanying text; *supra* note 49.

248. *Frus*, 560 N.E.2d at 639.

249. The median income for a family in the United States is $32,876 if the family includes a married couple. STATISTICAL ABSTRACT, *supra* note 25, at 449, chart no. 725. However, the median family income for single mothers is $14,337. *Id.*

250. *See In re* Marriage of Hensley, 569 N.E.2d 1097, 1101 (Ill. App. Ct. 4th Dist. 1991) (awarding $234 per week in maintenance and child support to cover a monthly deficit of almost $900 per month).

251. *Frus*, 560 N.E.2d at 639.

252. *In re* Marriage of Krupp, 566 N.E.2d 429, 437 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409).

253. Simmons v. Simmons, 409 N.E.2d 321, 328-29 (Ill. App. Ct. 1st Dist. 1980).

254. *In re* Marriage of Courtright, 540 N.E.2d 1027, 1029 (Ill. App. Ct. 3d Dist. 1989) ("[F]inancial independence does not mean the ability to merely meet one's minimum requirements, but entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage."); *see also In re* Marriage of Landfield, 567 N.E.2d 1061, 1075 (Ill. App. Ct. 1st Dist.) ("[T]he spouse seeking maintenance is not required to sell assets or impair her capital in order to generate income from which she can support herself in the manner enjoyed during the marriage."), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754); *In re* Marriage of Marthens, 575 N.E.2d 3, 7 (Ill. App. Ct. 3d Dist. 1991) (noting that the ability to simulate the marital standard of living is a factor when setting maintenance); *Krupp*, 566 N.E.2d at 437 ("[R]easonable needs . . . are determined in light of [the] overall circumstances which include the standard of living during the marriage."); *In re* Marriage of Courtright, 507 N.E.2d 891, 895 (Ill. App. Ct. 3d Dist. 1987) (noting that the marital standard of living, among other factors, necessitated a larger maintenance award); *Simmons*, 409 N.E.2d at 326 (refusing to approve a maintenance award because it would cause the recipient to exceed the standard of living established during the marriage). For a discussion of the problems associated with defining need in terms of the standard of living, see *infra* part VI.

of rehabilitation.[255] Mrs. Frus only needed maintenance to "rehabilitate" herself—to get enough education to be able to support herself. The court found that once she could earn a living, maintenance should terminate.[256]

Defining reasonable needs narrowly in terms of either subsistence or rehabilitation poses three problems. First, it fails to account for the reasonable expectations of the parties. In *Frus*, the couple expected the husband's earnings to increase. Indeed, one reason spouses are willing to devote their time to a marriage is that they expect to mutually share future benefits. Although they assume the risk that the benefits may not materialize, they do not expect to limit their share of those benefits to subsistence or rehabilitation.

Second, limiting Mrs. Frus to the amount necessary to "rehabilitate" herself stigmatizes her.[257] It relegates her to the status of a hired hand instead of a full partner in the marriage venture.[258] She leaves the marriage, not with her share of the profits, but with severance pay.

Finally, the spouses end up in vastly unequal positions. Mr. Frus maintains a per capita income of $337,500 while Mrs. Frus receives a per capita income of only $16,812.[259] Therefore, a narrow definition of need always will limit the recipient to subsistence

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255. *Frus*, 560 N.E.2d at 639-40.

256. *Id.*

257. *See supra* notes 136-50 and accompanying text.

258. *See In re* Marriage of Hart, 551 N.E.2d 737, 745 (Ill. App. Ct. 4th Dist. 1990) (Steigmann, J., concurring). Justice Steigmann stated:

> Marriage is a partnership, not only morally, but financially. Spouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined. Petitioner should not be penalized for having performed her assignment under the agreed-upon division of labor within the family. It is inequitable upon dissolution to saddle petitioner with the burden of her reduced earning potential and to allow respondent to continue in the advantageous position he reached through their joint efforts.

Id. (Steigmann, J., concurring). For further comparisons of marriage and partnership, see Olsen, *supra* note 12; Rutherford, *supra* note 11, at 533-59; Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195 (1987); and Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990).

259. The figure for Mrs. Frus reflects an income of $29,124 and child support of $4,800 or a total income of $33,624 for two people. The inequity could be attributed to a paltry child support award, but changing that figure would not render the parties equal in the long run. Even after the last child grows up, the ex-spouses will have enormous differences in lifestyle. Mrs. Frus will have the full $29,124 that she earns, while Mr. Frus will have the full $342,000 that he earns. *See In re* Marriage of Frus, 560 N.E.2d 638, 638-39 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

or rehabilitation, while the spouse who pays alimony is free to enjoy any accumulated profits.

VI. STANDARD OF LIVING

Most Illinois courts recognize the inequities of a narrow definition of reasonable needs and thus define the term more broadly to mean that a spouse must be able to maintain the standard of living during the marriage.[260] Unfortunately, however, few families are able to maintain their standard of living after divorce. Increased costs for housing and services without increased earnings mean that the family as a whole must reduce its standard of living. Thus, in too many cases, the court divides a loss rather than a gain at divorce.[261] Often the reductions will be substantial.[262]

For these families, the pre-divorce standard of living cannot be the benchmark. If a recipient is entitled to the full marital standard of living, the entire cost of the divorce is thrust on the payor. That burden then becomes an excuse not to pay any maintenance at all. For example, Mary Ann Glendon maintains that few families can afford to pay maintenance.[263] Obviously, however, any family that has disposable income can afford to pay something. When Glendon claims that most families cannot pay spousal support,[264] she means that they cannot afford to keep a prior spouse at the pre-divorce standard of living.[265]

For those families who do enjoy an increase in income following divorce, the marital standard of living is still inequitable. Again

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260. *See* cases cited *supra* note 254.

261. *See* Simmons v. Simmons, 409 N.E.2d 321, 328 (Ill. App. Ct. 1st Dist. 1980). The *Simmons* court stated:

> In some failed marriages, the parties are fortunate enough to have resources adequate to satisfy both of their reasonable needs in full. The spouse seeking maintenance would therefore be awarded the whole difference between her resources and her reasonable needs. But the Simmonses, like most divorced couples do not have enough to go around. Living apart costs most couples more than living together. The court is unable to provide both parties with the standard they enjoyed during marriage; one or both have to take a cut. The court must apportion the deficit.

Id.

262. One of the authors of this Article used Lenore Wietzman's figures to calculate that the average female standard of living declines about 31% after divorce. *See* Rutherford, *supra* note 11, at 573 n.215.

263. GLENDON, *supra* note 237, at 57 ("[T]he economic circumstance of most divorcing couples mean that spousal support is not and cannot be a common incident of divorce.").

264. *Id.*

265. *See Simmons*, 409 N.E.2d at 328-29 (noting that the fairest distribution of the marital property resulted in a $53.50 monthly shortfall for each party).

consider the court's holding in *In re Marriage of Frus*.[266] There, the court held that maintenance was unnecessary, not only because Mrs. Frus was self-supporting, but also because her post-divorce income of $29,124 approximated half of the marital income.[267] As evidenced by the settlement agreement, however, the Frus family had worked and planned for a future increase in income.[268] By limiting Mrs. Frus's maintenance award to the marital standard of living, the court excluded her from the return on her investment in the marriage. Therefore, using the pre-divorce standard of living as a measure for maintenance fails because it does not account for either the gains or losses that accrue from the marriage.

VII. EQUALITY

The fairest and simplest way to deal with the unknown gains and losses of marriage is to treat the divorcing couple equitably: to equalize the cost of divorce by assuring that spouses share the same post-divorce standard of living. Whether the marriage results in a gain or a loss, the result should be shared proportionately. One way to assure a common standard of living is to consider disparate income when allocating property and maintenance.

The UMDA contemplates that courts will consider disparate income when making financial allocations. Specifically, the maintenance section directs the court to consider the financial situation of both the recipient[269] and the payor[270] when setting maintenance. Similarly, "reasonable needs" must be defined in context; the relative incomes of the parties help to define which needs are reasonable.[271] Otherwise, one spouse may be deemed to "need" a sports car while the other spouse only "needs" public transportation.[272] Thus, for over a decade, some Illinois courts have been doing pre-

266. 560 N.E.2d 638 (Ill. App. Ct. 3d Dist. 1990), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134).

267. *Id.* at 639 (observing that at the time of divorce, Mr. Frus earned approximately $50,000 per year, but that his income at the time of maintenance termination had increased to over $300,000 per year).

268. *Id.*

269. UMDA § 308(b)(1), 9A U.L.A. 348 (1987); ILL. REV. STAT. ch. 40, para. 504(b)(1) (1989); *see supra* note 49.

270. UMDA § 308(b)(6); ILL. REV. STAT. ch. 40, para. 504(b)(6).

271. ILL. REV. STAT. ch. 40, para. 504(a)(3) (authorizing maintenance if the spouse seeking maintenance lacks sufficient property to provide for her reasonable needs and "is otherwise without sufficient income").

272. *See, e.g.*, *In re* Marriage of Hart, 551 N.E.2d 737 (Ill. App. Ct. 4th Dist. 1990). In *Hart*, the trial court refused to grant maintenance to a wife who earned a gross income of $14,560 even though her husband earned over $140,000 per year. *Id.* at 738-39. Consequently, the husband drove a Porsche and owned an airplane, while the wife drove a

cisely that, considering disparate income to allocate maintenance equitably.[273]

When awarding maintenance, Illinois courts use the concept of disparate income in at least three different ways: (1) to define the needs of the parties;[274] (2) to allocate the losses when the couple cannot afford to maintain the pre-divorce standard of living;[275] and (3) to predict the ability of the parties to acquire property in the future.[276] Additionally, Illinois courts use disparate income in apportioning child support,[277] attorneys' fees,[278] and property.[279]

A. Disparate Income As a Measure of Need

Although disparate income is not the sole test of whether a spouse requires maintenance, it provides an objective measure of the relative economic status of the spouses. In assessing needs, the court must decide whether a given need is reasonable. Unfortunately, making that assessment puts the court in the awkward position of second-guessing those financial decisions that the parties

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Dodge. *Id.* at 740. The maintenance award, however, was reversed on appeal. *Id.* at 744.

273. *In re* Marriage of Aschwanden, 411 N.E.2d 238, 241 (Ill. 1980) (awarding maintenance after noting that the husband's "opportunity for future acquisition of capital [was] excellent" while the wife had "little opportunity to regain and maintain the [marital] standard of living"); *In re* Marriage of Toth, No.1-90-0324, Ill. App. LEXIS 2126, at *16 (1st Dist. Dec. 20, 1991) (citing unequal earnings and ability to acquire future assets as reasons for maintenance); *In re* Marriage of Durante, 559 N.E.2d 56, 62 (Ill. App. Ct. 1st Dist. 1990) (citing the nearly equal earnings of the spouses as a reason not to award maintenance); *In re* Marriage of Jacks, 558 N.E.2d 106, 112 (Ill. App. Ct. 2d Dist.) ("The important factor . . . is the huge difference in the parties' earning capacity."), *appeal denied*, 561 N.E.2d 692 (Ill. 1990) (Table No. 70364); *In re* Marriage of Seymour, 565 N.E.2d 269, 271-72 (Ill. App. Ct. 2d Dist. 1990); Simmons v. Simmons, 409 N.E.2d 321, 327-29 (Ill. App. Ct. 1st Dist. 1980) (citing the wife's inability to match her husband's earning capacity as grounds for maintenance).

274. *Seymour*, 565 N.E.2d at 270-71; *Durante*, 559 N.E.2d at 62 (citing comparable income as evidence that the wife did not need maintenance); *Jacks*, 558 N.E.2d at 112; *In re* Marriage of Stegbauer, 404 N.E.2d 1140, 1141 (Ill. App. Ct. 4th Dist. 1980) (holding maintenance appropriate when wife's income equaled only one-third of her husband's).

275. *Simmons*, 409 N.E.2d at 328.

276. *Aschwanden*, 411 N.E.2d at 241; *Toth*, 1991 Ill. App. LEXIS at *16.

277. *In re* Marriage of Zirngibl, No. 1-89-3344, 1991 Ill. App. LEXIS 1686, at *21-*22 (1st Dist. Sept. 30, 1991); *In re* Marriage of Cornale, 556 N.E.2d 806, 808 (Ill. App. Ct. 4th Dist. 1990).

278. *In re* Marriage of Girrulat, 578 N.E.2d 1380, 1384 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Gable, 563 N.E.2d 1215, 1217-18 (Ill. App. Ct. 5th Dist. 1990). In these cases, the court considered the disparate income in order to ensure that the attorneys were paid, but refused to consider disparate income in the maintenance award. *Girrulat*, 578 N.E.2d at 1383; *Gable*, 563 N.E.2d at 1217. The result is that the system protects lawyers more effectively than spouses and children.

279. *In re* Marriage of Drone, 577 N.E.2d 926, 931-32 (Ill. App. Ct. 5th Dist. 1991).

make for themselves. For example, in *Simmons v. Simmons*,[280] the court found itself judging the reasonableness of the parties' choices in food, transportation, and vacations. Reasonable needs will vary according to the family's total financial circumstances.[281] Moreover, the parties should be able to decide how to budget their incomes. If they choose to spend more on transportation than the judge deems appropriate, that is their prerogative as long as they do not spend more than their share of the available family resources. Per capita income identifies how much money is available to satisfy the reasonable needs of the parties on an equal basis. The court then is free to determine if any special needs exist which justify an unequal division of the available income.

Several Illinois courts recognize that the amount a spouse reasonably needs is a function of joint income, rather than a measure of how destitute the spouse is.[282] For example, in *In re Marriage of Kristie*,[283] the court used unequal earnings to establish that the wife needed maintenance. The *Kristie* court refused to limit maintenance to the amount of her monthly deficit.[284] Instead, it cited her

280. 409 N.E.2d 321, 326-28 (Ill. App. Ct. 1st Dist. 1980).

281. *Id.* The *Simmons* court stated:

> The trial judge must decide what needs are reasonable on a case by case basis, taking into account the circumstances of the involved parties. Standard of living before and during the marriage, duration of the marriage and the social position of the spouse seeking maintenance can all be relevant, as would be special needs such as medical expenses.

Id. at 326.

282. *In re* Marriage of Landfield, 567 N.E.2d 1061, 1075 (Ill. App. Ct. 1st Dist.) (awarding maintenance in excess of prior budget), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754); *In re* Marriage of Krupp, 566 N.E.2d 429, 439-40 (Ill. App. Ct. 1st Dist. 1990) (holding that a spouse was entitled to enough maintenance to permit her to save for the future), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409); *In re* Marriage of Kristie, 510 N.E.2d 14, 15 (Ill. App. Ct. 1st Dist. 1987) (holding that a wife was entitled to $400 monthly maintenance, even though her monthly deficit was allegedly only $24); *see also In re* Marriage of Hart, 551 N.E.2d 737, 745 (Ill. App. Ct. 4th Dist. 1990) (Steigmann, J., concurring) ("The phrases 'lacks sufficient property . . . to provide for [her] reasonable needs' and 'is unable to support [herself],' however, cannot mean that a party must be reduced to penury before maintenance becomes appropriate." (quoting § 308(a) of the UMDA)); *In re* Marriage of Frus, 560 N.E.2d 638, 640 (Ill. App. Ct. 3d Dist. 1990) (Stouder, J., dissenting) ("I have no difficulty in affirming the trial court's decision to continue maintenance payments of $12,396 a year to the wife, when the wife's annual income is $29,124 and the husband's annual income is $342,000. . . . Rehabilitative maintenance does not mean mere survival."), *appeal denied*, 567 N.E.2d 331 (Ill. 1991) (Table No. 71134). *But see* Bellow v. Bellow, 419 N.E.2d 924, 929-31 (Ill. App. Ct. 1st Dist. 1981) (holding that maintenance in excess of expenses was inappropriate when the maintenance exceeded the family spending during the marriage).

283. 510 N.E.2d 14, 15-16 (Ill. App. Ct. 1st Dist. 1987) ("[H]e will earn $260,000 in the future in contrast to her $135,000, a difference of $125,000.").

284. *Id.*

disparate income as grounds for awarding a more equitable sum.[285] Similarly, in *In re Marriage of Landfield*,[286] where the wife was a homemaker, the court based its maintenance award on the husband's earnings rather than on the wife's deficit. Once the court focuses on the relative financial standing of the parties, it then can consider needs in excess of mere survival. For example, in *In re Marriage of Krupp*,[287] the court held that the wife was entitled to enough maintenance to enable her to save for the future. In sum, Illinois courts increasingly look to relative income in order to define reasonable needs.

Even those cases that continue to focus on the recipient's deficit tend to include disparate income in the definition of need. For example, in *In re Marriage of Emery*,[288] the court calculated the wife's monthly deficit and the husband's monthly surplus, but then noted the disparity in income. Indeed, Illinois courts typically consider disparate income when they compare the husband's income after expenses with the wife's income after expenses.[289] Although this kind of calculus tends to embroil the court in debates over whether a particular expense is reasonable, it still defines need in terms of disparate income, albeit indirectly. Similarly, those cases that establish need on other grounds often mention disparate income.[290] Thus, disparate income is a useful tool for defining reasonable needs.

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285. *Id.*

286. 567 N.E.2d 1061, 1075 (Ill. App. Ct. 1st Dist.) ("[The husband] argues that because [the wife] was able to get by on $1,500 per month, she could not have reasonable needs in excess of that amount. We do not agree."), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754).

287. 566 N.E.2d 429, 439-40 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409).

288. 534 N.E.2d 1014, 1018 (Ill. App. Ct. 4th Dist. 1989) ("[The wife's] gross earnings for 1986 were $4,696, ten times less than [the husband's] earnings.").

289. *See, e.g.*, *In re* Marriage of Kennedy, 573 N.E.2d 1357, 1363 (Ill. App. Ct. 1st Dist. 1991).

290. *See, e.g.*, *In re* Marriage of Kaplan, 500 N.E.2d 612 (Ill. App. Ct. 1st Dist. 1986). The *Kaplan* court stated:

> We note that even when she was employed full-time as a travel agent, she earned approximately $1,000 per month in gross salary during a period when respondent's reported annual income was $83,667.85. In awarding rehabilitative maintenance, the court appears to have considered not only the disparate incomes, but that petitioner was temporarily unemployed and in need of assistance to prepare for employment in the future.

Id. at 619-20.

B. Disparate Income as a Method of Allocating Gains and Losses

Often, a divorce results in a net loss for the family because increased costs are not matched by increased income. The parties cannot retain the standard of living they both enjoyed during the marriage. One way to resolve the problem is to divide the loss between the parties equally. For example, in *Simmons v. Simmons*,[291] the court reasoned that the parties should share the loss equally. The court stated:

> In this case, the length of the marriage and the age of the parties gives them equal rights to satisfy their reasonable needs out of the available income. And because the reasonable needs of the parties in this case are so nearly equal . . . we believe that the simplest "just" disposition is for them to share equally the cost of the failure of the marriage.[292]

The *Simmons* court based its decision on the unequal earning power of the spouses, noting that "[e]ven while holding a responsible position in a large bank earning a salary many would regard as munificent, this former wife cannot match the earning power of [her] former husband."[293] Thus, awarding maintenance to equalize post-divorce income will divide the losses occasioned by the divorce equally.

Sometimes family income increases after divorce because the lower earner will find a better job or the higher earner will begin to reap the benefits from earlier investments in a career. These gains also should be shared. Otherwise, the party with the increased income realizes a windfall from the divorce. Therefore, courts should look not only to current income, but also to future earnings when setting the maintenance amount. While courts should consider current income as a measure of future earning potential,[294] they should not speculate about future income that may never ma-

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291. 409 N.E.2d 321 (Ill. App. Ct. 1st Dist. 1980).

292. *Id.* at 328-29. *But see In re* Marriage of Mantei, 583 N.E.2d 1192, 1197 (Ill. App. Ct. 4th Dist. 1991) (acknowledging that there was a loss upon divorce, but refusing to allocate it equally and limiting maintenance to just $400 per month).

293. *Simmons*, 409 N.E.2d at 327.

294. *In re* Marriage of Aschwanden, 411 N.E.2d 238, 241 (Ill. 1980)("Plaintiff's occupation and his long standing employment with ADM afford him both a very high and steady income and the prospect of continued high income in the future."); *In re* Marriage of Courtright, 507 N.E.2d 891, 894 (Ill. App. Ct. 3d Dist. 1987) (affirming the trial court's receipt of "evidence of [the husband's] future projected income; income that has been based on the past performance in his practice and the likelihood that his skill, expertise, and reputation will permit him to continue in a similar fashion in the future").

terialize.[295] Often, one spouse can expect substantially less income because that spouse earns much less or entered the job market late.[296] For example, in *In re Marriage of Kristie*,[297] both spouses were employed, but the husband earned significantly more than the wife. In setting maintenance, the court noted that the husband would earn almost twice as much during his working lifetime as the wife and set maintenance accordingly.[298] Thus, by excluding one spouse from increases in future income, divorce becomes more costly for that spouse.

When a court considers disparate income in awarding maintenance, it assures that the cost of the divorce falls equally on both parties. Therefore, the courts should look to disparate income, not only to define needs, but also to equalize the impact of the divorce.

C. Disparate Income as a Measure of Ability to Acquire Assets in the Future

One way courts try to reconcile disparate income is to predict which spouse will be better able to acquire future assets. Because a higher income enables one spouse to acquire more assets in the future, that spouse should pay more in maintenance.[299] Courts currently recognize that disparate income enables the higher earning spouse to acquire more assets.[300]

When one spouse has a greater capacity to acquire more assets in the future, that spouse should pay more in maintenance to equalize this opportunity. For example, in *In re Marriage of Toth*,[301] the court held that the wife had "dismal prospects to in-

295. *See, e.g.*, *In re* Marriage of Marthens, 575 N.E.2d 3, 7 (Ill. App. Ct. 3d Dist. 1991) (holding that the court should not speculate that the wife would be able to earn much more than the $6,000 she was currently earning); *In re* Marriage of Teauseau, 540 N.E.2d 820, 821-22 (Ill. App. Ct. 3d Dist. 1989)(holding that the trial court erred in speculating that a housewife with health problems who had been unemployed for over 24 years could become self-sufficient within 4 years); *In re* Marriage of Bramson, 427 N.E.2d 285, 287 (Ill. App. Ct. 1st Dist. 1981) (holding that the court should not speculate that a housewife would be able to support herself in the future, and overturning a two-year limit on maintenance).

296. *In re* Marriage of Krupp, 566 N.E.2d 429, 439-41 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409).

297. 510 N.E.2d 14, 15-16 (Ill. App. Ct. 1st Dist. 1987).

298. *Id.* ("On the basis of present income, he will earn $260,000 in the future in contrast to her $135,000, a difference of $125,000.").

299. *See, e.g.*, *In re* Marriage of Jacks, 558 N.E.2d 106, 112 (Ill. App. Ct. 2d Dist.), *appeal denied*, 561 N.E.2d 692 (Ill. 1990) (Table No. 70364).

300. *See In re* Marriage of Aschwanden, 411 N.E.2d 238, 241 (Ill. 1980); *In re* Marriage of Toth, No. 1-90-0324, 1991 Ill. App. LEXIS 2126, at *16 (1st Dist. Dec. 20, 1991).

301. *Toth*, 1991 Ill. App. LEXIS at *16.

crease her income or acquire capital assets in the future" because of her age and income. After noting that the husband, who was younger and earned more, had much better prospects, the court affirmed the trial court's maintenance award.[302] Similarly, in *In re Marriage of Jacks*,[303] the court cited the husband's larger income and earning capacity as grounds for the maintenance award.

This viewpoint is consistent with the rule of property division. When one spouse is less likely to be able to acquire assets in the future, that spouse is entitled to a disproportionate property division.[304] Property division, however, can only compensate for disparate income in the wealthiest households. For most couples, current disparate income will translate into future assets for one spouse, but not the other. Maintenance awards that account for disparate income can help equalize prospects for the future.

Thus, a trend seems to be emerging in which Illinois courts consider disparate income in setting maintenance. Interpreting the UMDA this way seems more equitable, but the outcomes in terms of relative per capita income are mixed. The results are summarized in the following chart.[305]

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302. *Id.*

303. 558 N.E.2d at 112.

304. *Ashwanden*, 411 N.E.2d at 241; *Toth*, 1991 Ill. App. LEXIS at *18; *In re* Marriage of Kennedy, 573 N.E.2d 1357, 1362 (Ill. App. Ct. 1st Dist. 1991); *Jacks*, 558 N.E.2d at 111.

305. The information contained in Chart No. 6 may be found on the following pages of the reported cases, which are listed below in the order they appear on the chart: *In re* Marriage of Landfield, 567 N.E.2d 1061, 1073-75 (Ill. App. Ct. 1st Dist.), *appeal denied*, 575 N.E.2d 916 (Ill. 1991) (Table No. 71754); *In re* Marriage of Krupp, 566 N.E.2d 429, 431-34 (Ill. App. Ct. 1st Dist. 1990), *appeal denied*, 571 N.E.2d 149 (Ill. 1991) (Table No. 71409); *In re* Marriage of Kaplan, 500 N.E.2d 612, 615 (Ill. App. Ct. 1st Dist. 1986); *In re* Marriage of Aschwanden, 411 N.E.2d 238, 239-40 (Ill. 1980); *In re* Marriage of Seymour, 565 N.E.2d 269, 270-72 (Ill. App. Ct. 2d Dist. 1990); *In re* Marriage of Jacks, 558 N.E.2d 106, 111 (Ill. App. Ct. 2d Dist.), *appeal denied*, 561 N.E.2d 692 (Ill. 1990) (Table No. 70364); *In re* Marriage of Drone, 577 N.E.2d 926, 928 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Emery, 534 N.E.2d 1014, 1018 (Ill. App. Ct. 4th Dist. 1989); *In re* Marriage of Durante, 559 N.E.2d 56, 59-61 (Ill. App. Ct. 1st Dist. 1990); *In re* Marriage of Girrulat, 578 N.E.2d 1380, 1381-83 (Ill. App. Ct. 5th Dist. 1991); *In re* Marriage of Gable, 563 N.E.2d 1215, 1216-18 (Ill. App. Ct. 5th Dist. 1990); Simmons v. Simmons, 409 N.E.2d 321, 326-27 (Ill. App. Ct. 1st Dist. 1980); *In re* Marriage of Kristie, 510 N.E.2d 14, 15-16 (Ill. App. Ct. 1st Dist. 1987); *In re* Marriage of Kennedy, 573 N.E.2d 1357, 1360, 1361 (Ill. App. Ct. 1st Dist. 1991); *In re* Marriage of Stegbauer, 404 N.E.2d 1140, 1141-42 (Ill. App. Ct. 4th Dist. 1980).

CHART NUMBER 6

Consideration of Disparate Income in Determining Maintenance

	H's Income	W's Income	Maintenance	Child Support	H's Per Capita	W's Per Capita
Landfield	$153,000	0	$36,000	0	$117,000	$36,000
Krupp	$169,000-(avg.)	$64,000	$30,000	0	$139,000	$94,000
Kaplan	$83,800	>$12,000	$1,800**	0	$82,000	$13,800
Aschwanden	$81,300-$116,024	$6,097	$15,000	0	$66,300-$101,024	$21,097
Seymour	$64,999	$9,492	$9,000	$6,384	$50,000	$12,000
Jacks	>$60,000	$14,000	$6,000	0	>$54,000	$20,000
Drone	$46,183	$19,574	$4,080	0	$42,103	$23,654
Emery	$40,212	$3,768	$7,284	$5,160	$27,768	$8,106
Durante	$39,039	$23,744	0	0	$39,039	$23,744
Girrulat	$34,400-$41,791	$6,240-$8,320	$7,200	0	$28,600	$14,040
Gable	$24,000	0	>$3,000	?	>$21,000	>$3,000
Simmons	$22,334 (net)	$15,048 (net)	$2,982	0	$19,352	$18,030
Kristie	$18,824	$11,804 (net)	$4,800	0	$14,024	$16,604
Kennedy	$17,376 (net)	$7,812 (net)	$6,300	unallo-cated	$11,076	$7,056
Stegbauer	$18,000*	$6,000*	$4,500*	0	$13,500*	$10,500*

* Approximate
** Average of 3 different years

Three of the couples had comparable per capita incomes.[306] Of those, only one wife had a per capita income that equalled or exceeded her husband's.[307] In every other case represented on Chart Number 6, the husband had a significantly higher per capita income than the wife. Moreover, the more the husband earned, the larger the disparity in per capita income. For families in which the husband earned $24,000 per year or more, the disparities ranged from $18,000 per year to $81,000 per year. The smallest disparity was in *Simmons*, where the court expressly tried to divide the loss occasioned by the divorce equally.[308] Thus, although Chart Number 6 illustrates that the courts are moving in the right direc-

306. *Kristie*, 510 N.E.2d at 15-16; *Simmons*, 409 N.E.2d at 326-27; *Stegbauer*, 404 N.E.2d at 1141-42. The annual incomes of the three couples were within $3,000 of one another.

307. *Stegbauer*, 404 N.E.2d at 1141.

308. *Simmons*, 409 N.E.2d at 328-29.

tion, they should strive even harder to equalize the financial impact of divorce.

D. Why Courts Should Equalize the Cost of Divorce

Courts should equalize the cost of divorce by assuring comparable post-divorce per capita incomes. Doing so has three distinct advantages: (1) it sets a norm of sharing equally within a marriage that values all divisions of labor, including homemakers, unequal earners, and equal earners; (2) it empowers those who are economically trapped in destructive marriages; and (3) it fosters financial equality for women and children both within the family and within the job market.

The reasons for providing spousal support also set the normative rules about how spouses are supposed to behave during marriage. Under the old, fault-based system, alimony implemented the duty to be faithful, temperate, and kind during marriage: an unfaithful, drunk, or cruel spouse received no alimony.[309] Similarly, current spousal support rules establish the current duties in marriage.

Using maintenance to equalize the per capita income of family members after a divorce makes important normative statements. First, it says that all members of a family are equally valuable, including homemakers and children. No one is discounted. Second, it suggests that marriage is a shared economic venture. Third, it enables spouses to select any division of labor without penalty. Therefore, a spouse can decide to be a homemaker, an unequal earner, or an equal earner without worrying about the impact at divorce. Finally, it clearly states that marriage is a *serious* commitment, not to be taken lightly or discarded casually.

Assuring comparable post-divorce per capita incomes also empowers women. Currently, most women have significantly lower per capita incomes after dissolution. Consequently, women stand to lose more than men when they get divorced. The result is that some spouses may feel economically trapped in destructive relationships. For example, some abused spouses may remain in their marriages because they are unable to support themselves if they leave. One study found that a significant portion of the abused women who return to their husbands do so because they have no other place to go.[310] Moreover, equalizing the financial power between spouses helps to equalize the balance of power within the

309. *See supra* note 35.

310. *See* ANN JONES, WOMEN WHO KILL 297 (1980).

marriage.[311]

Equalizing income at divorce also fosters financial equality within the family. One of the central goals of the UMDA is to foster independence.[312] However, families are inherently interdependent because family members rely on each other for earnings and services. Once a family breaks apart, it continues to need earnings and services. Equalizing income merely assures that all family members are given equal access to the available resources. Such equal income enables all family members to exercise a different form of independence: autonomy to spend their share of the family resources.

Some fear spousal support because it seems to encourage women to be financially dependent on men. However, shared income creates no such incentive. The more money the family earns as a whole, the more there is to share after divorce. Hence, two-earner families are likely to have more income to share than one-earner families. By equalizing income at divorce, the homemaker in one-earner families will not be penalized. Indeed, equalizing per capita income automatically adjusts to the actual market situation of the couple. If both spouses earn equal amounts, no maintenance need be paid unless one spouse has exceptional needs. Any disparity, however, would be corrected; therefore, this system does not assume inequality. It will work even when the day eventually comes when both sexes have equal earning power. Until then, however, it achieves equality without stigmatizing the lower earner.

Indeed, shared income at divorce actually may encourage more equal income in the job market as well. First, if husbands can expect a share of their wives' income at divorce, they may have greater incentive to help eradicate gender discrimination in the job market. Moreover, they will have a greater incentive to contribute services at home to maximize their wives' income. Thus, equalizing income at divorce fosters equality both within the home and the job market.

VIII. CONCLUSION

As Cobbett noted, independence is a blessing available only to those who can afford it. Due to the manner in which many Illinois courts currently interpret the UMDA, however, only men achieve independence after divorce. Because women, even those with

311. *See supra* notes 42-44 and accompanying text.
312. *See supra* notes 45-57 and accompanying text.

equal incomes, usually receive disproportionately lower per capita incomes, they do not have the same independence that men do. Nor do they have the same autonomy that men have to choose how to spend their more-limited incomes. The threat of such a financial decline makes divorce a more costly alternative for women. In order to equalize the cost of divorce between men and women, Illinois courts can and should interpret the UMDA more equitably. Therefore, the courts should use maintenance to equalize the post-divorce per capita incomes between men and women. Only then will it be true that, "Marriage is that relation between man and woman in which the independence is equal, the dependence mutual, and the obligation reciprocal."[313]

313. Louis Kaufman Anspacher, *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 943 (14th ed. 1968).