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Wisconsin, Illinois, Ontario — Three Roads to Marital Property Law Reform*

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I. INTRODUCTION

In recent years there has been an increasing awareness of the property rights of married persons.¹ Most of the discussion and reform has been in the context of divorce,² although property rights upon death have also been the subject of debate and legislation.³ The question of the rights of married couples to each other's acquisitions during the continuation of the marriage relationship has received less attention, although this is changing.⁴ Community

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¹ This article has been published, in a shorter and not entirely up-to-date form, as The Low, Middle and High Road to Marital Property Law Reform in Common Law Jurisdictions, 7 COMM. PROP. J. 200 (1980).
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2. Bartke, Marital Property, supra note 1, at 65-68; Krauskopf, supra note 1; Kulzer, supra note 1.


4. Bartke, Marital Sharing, supra note 1, at 1131-51; Bartke, Marital Property, supra
property states have dealt with this question in recent years, with the result of substantial statutory amendment in those states to provide for co-equal rights of the spouses in the common property. 5

This article will undertake a discussion of the need for and goals of reform in non-community property states. We will determine the function of marital property rights during the ongoing marital relationship, and will suggest the form of statutory changes necessary to preserve those rights. First, we will give a brief historical overview of the legal, economic and social forces which are the basis for the present concerns regarding marital property rights. Next, a detailed examination of the statutory schemes of three jurisdictions will be presented. Two of these jurisdictions, Ontario and Illinois, 6 have recently amended their statutes, and the third jurisdiction, Wisconsin, is in the process of developing an integrated statutory scheme. 7 The three approaches are basically distinct, and represent different perceptions of the public policy issues involved and the goals to be achieved in marital property rights. These approaches provide the necessary context for our recommendations and conclusions.

II. BACKGROUND

(A) Common Law Background of Marital Property Rights

Under the common law of England, which forms the basis of most states' legal systems, 8 a married woman had very little indi-
individual legal personality. According to Sir William Blackstone, husbands and wives were one and the husband was the one. The legal personality of the wife during marriage was submerged and incorporated into that of the husband. In the context of property this meant that the husband was the owner of all of his wife's chattels and had the use and benefit of her real property. The wife's only interest in her husband's property was her dower, which during their joint lifetimes was a mere expectancy rather than a property right. Dower depended entirely on the wife surviving her husband.


9. See Hahlo, supra note 1, at 463-66; Johnston, supra note 1, at 1044-47 for a detailed discussion.

10. 1 W. BLACKSTONE, Commentaries* 430. This does not seem to have been the case in the middle ages. See Donahue, What Causes Fundamental Legal Ideas? Marital Property In England and France in the Thirteenth Century, 78 Mich. L. Rev. 59, 64-66 (1979).

11. 2 W. BLACKSTONE, Commentaries* 433. Feminist Susan B. Anthony recognized that such unequal and unfair treatment of women could not continue indefinitely, commenting that "[a]s young women become educated in the industries of the world, thereby earning the sweetness of independent bread, it will be . . . impossible for them to accept . . . that 'husband and wife are one, and that one the husband' . . . ." Anthony, Homes of Single Women, in The Stanton-Anthony Reader (E. DuBois ed. 1979). Anthony's observation has become a reflection of current trends. See text accompanying notes 17-31, infra.

12. 1 W. BLACKSTONE, Commentaries* 129-139. The statement must be tempered by the reflection that at least as early as the end of the seventeenth century, through the intervention of equity, a married woman could have almost complete control over her own property. See, e.g., Countess of Sutherland v. Northmore, 21 Eng. Rep. 188 (Ch. 1729); Duke of Marlborough v. Lord Godolphin, 28 Eng. Rep. 41 (Ch. 1750). This result was achieved by the so-called marriage settlement and the use of the equitable devices of trusts and powers of appointment. E.g., Hahlo, supra note 1, at 463-64; Johnston, supra note 1, at 1052-56; see note 16 infra. This was only the case to any extent, however, among the landed aristocracy of England where the marriage settlement was a part of elaborate family arrangements and was designed to ensure that land would remain in the direct family line. E.g., A. Dicey, Lectures on the Relation Between Law and Opinion in England 383 (2d ed. 1914). It was
As thus conceived, the common law recognized husbands and wives as a type of economic unit. By giving husbands the control, enjoyment and virtual ownership of their wives' assets, however, this conception of an economic unit was highly discriminatory to women. Although the law pooled the resources of the marriage ostensibly for the spouses' mutual benefit, in effect, only husbands were enriched. Nevertheless, the concept of marriage as an economic unit existed in England and was followed in the United States until the nineteenth century.

(B) Married Women's Property Acts

Legislative reforms took place in the nineteenth century which altered the common law rules. These reforms began in the United States and much later spread to England and, eventually, to Canada. The reform completely separated the spouses in the economic sphere and granted to a married woman the right to her own property. If she had property, this gave the married woman considerably greater economic independence. At that time, however, most women were working in the home or on the family farm. They received no compensation and had few expectations of gifts or inheritances. The reforms, therefore, accomplished nothing for

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never used to any great degree among the English middle classes and was virtually unknown in the colonies and in the states.

13. See Hahlo, supra note 1, at 463-66; Johnston, supra note 1, at 1057-89 for general discussions.

14. The first statute seems to have been adopted in Mississippi, Laws Miss. [1839], ch. 26. See Comment, Husband and Wife — Memorandum on the Mississippi Woman's Law of 1839, 42 Mich. L. Rev. 1110 (1944), although some of the current literature still perpetuates the myth that it was a New York invention, e.g., Comment, The Origins of Law Reform: The Social Significance of the Nineteenth Century Codification Movement and its Contribution to the Passage of the Early Women's Property Acts, 24 BUFFALO L. REV. 683 (1975).

15. For a chronology of the English and Ontario statutes, see Bartke, Marital Property, supra note 1, at 50-51.

16. The reform movement essentially enshrined as a legal rule the equitable pattern developed through the marriage settlement. The marriage settlement involved a transfer in trust for the "separate use" of a married woman or one who was about to marry. At first this involved actual trusts with third party trustees. By 1725, however, the two words "separate use" constituted a husband trustee. When this was combined with powers of appointment, a married woman could dispose of her property either on death or even during her lifetime. A marriage settlement could also involve an antenuptial agreement which, while unenforceable at law after marriage because of the unity of spouses, was fully enforceable in equity. See generally Johnston, supra note 1, at 1052-56; see also note 12 supra.

17. Generally, the source of such property would be a gift or an inheritance from her own family. Property might also have been acquired as a gift from her husband. Mister, Law of Married Women, 20 Am. L. Rev. 356, 364-65 (1886).
them and still left them propertyless. The more invidious effect of his legislation, however, was the creation of the notion that the spouses are strangers in the economic sphere with no interest in each other's acquisitions. The effect of this economic separation was compounded by the view that the childrearing and housekeeping contributions of the wife were assigned no economic value, so that division of property upon death of the spouse or dissolution of the marriage often was inequitable. Courts followed the title the-

18. Glendon, Future, supra note 1, at 319 n. 12.

The lack of recognition given to the wife's work in the home in the nineteenth century is presently reflected in the social security and tax laws. The social security laws have been challenged in the courts. See Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977). The theories behind the holdings in both these cases are rather interesting. In the former, social security benefits were paid to the deceased woman worker's children but not to her widower. In the latter, Federal Old-Age, Survivors, and Disability Insurance benefits were paid to a widow automatically, but only to a widower if he received at least one-half of his support from his wife. In both cases the court focused on the discrimination against the deceased female worker, rather than the surviving male spouse.

That both Weinberger and Goldfarb involved challenges by males to the social security system does not mean that the system does not discriminate against women who work outside or within the home. At present a woman who works must make an election between the social security benefits she has earned or those based upon her husband's earnings. Homemakers receive no benefits in their own right, no disability protection and receive no dependents' benefits if the marriage ends in divorce before ten years have passed. Cohen, Social Security: Current Myths and Reality — The Need for Its Preservation and Reform, 25 WAYNE L. REV. 1419, 1442-43 (1979); Witte, Your Social Security — Don't Leave Home Without It, Ms., October 1979, at 85.

See also Wangler v. Druggists Mut. Ins. Co., 100 S. Ct. 1540 (1980) which involved essentially the same issue in the context of Missouri worker's compensation law. The action was by the widower of a female worker killed in a work related accident. In order to be entitled to benefits he would have had to prove dependency, while a widow would be entitled to benefits without such proof. The distinction was held constitutionally invalid.

Furthermore, the federal income tax laws were "reformed" in 1969 in such a way that where both spouses work, the married couple pays more income tax than their counterparts who merely live together, or than traditional one-earner couples. Tax Reform Act of 1969, P.L. 91-172, § 803, 83 Stat. 487, 678, (added new subsection (d) to I.R.C. § 1, the separate schedule for married persons filing separate returns, as well as amending subsection (c) for unmarried individuals). The principal income tax provisions applicable to married persons are: I.R.C. §§ 1, 37, 41, 43, 44, 44A, 46, 48, 50A, 58, 63, 101, 105, 120, 151, 163, 170, 179, 213, 217, 280, 401, 408, 505, 672, 674, 677, 913, 1030, 1211, 1233, 1244, 1251, 1302, 1303, 1304, 1348, 1371, 1402.

ory of property rights, reasoning that it was the husband who earned the money used to pay for the property and since title was held in his name, the property was his. The title theory of ownership often meant that the husband received all property upon dissolution of the marriage.

(C) Economic and Social Changes Compound the Need for Further Reform

During the period of legislative reform, the role of women in society began to change. During the Civil War, many women served as nurses on the battlefields, and also worked behind the lines as part of the army of office workers in Washington, D.C. In the decades following the war, women, supported by a growing feminist movement and by their wartime experiences, expanded into new fields. In addition to the traditional job of school teaching, women were employed as factory workers, clericals, and in rarer

20. The “title theory” is based on the notion that property rights depend exclusively on the state of the title and that the only contributions worthy of legal protection are those expressed in terms of money or its equivalent. It fosters the notion that it is mine if I paid for it or if title stands in my name. It tells the homemaker that her contributions are not worthy of recognition in the eyes of the law.

21. Examples of mechanical applications of the title theory, which deprived even working wives of their rightful property interest, can be found in recent cases. Norris v. Norris, 16 Ill. App. 3d 879, 307 N.E.2d 161 (1974); Wirth v. Wirth, 38 A.D.2d 611, 326 N.Y.S.2d 308 (1971); Murdock v. Murdock, [1975] 1 S.C.R. 423, 41 D.L.R.3d 367 (1973). In Wirth, the husband suggested a crash savings program whereby his salary would be invested and the wife’s would be used to pay family expenses. All investments were in the husband’s name only. The wife’s claim to one-half of the property on the theory of constructive trust was denied by the court, which said: “A constructive trust is a vehicle for ‘fraud rectifying’. . . . There may be a moral judgment that can be made on the basis of respondent’s conduct and the imperfectly expressed intention of some possible future benefit to appellant, but that is not enough to set the court in motion.” 38 A.D.2d at 612, 326 N.Y.S.2d at 311.

Such application of the title theory has arisen in other contexts as well. In a recent New York suit by a landlord for the possession of an apartment, the trial court held that the tenant’s wife was not a necessary party. Her legal position was equated to that of the tenant’s children, servants, boarders and guests. Papacostapolos v. Pontone, [1979] 7 Housing & Dev. Rep. (BNA) 397 (Civ. Ct. N.Y., Housing Part, Aug. 22, 1979).

Some rights were accorded women by the concept of dower, which was retained even after married women’s property acts were passed. E.g., 2 R. Powell, THE LAW OF REAL PROPERTY ¶ 209-213, at 140-170.25 (2d ed. Supp. 1979). This was supplemented or superseded by the concept of forced share added to many probate codes. See, e.g., Bartke, Marital Property, supra note 1, at 69-71. These rights, however, did nothing to help the woman separated from her spouse by divorce rather than death. See generally Lake, Divorcees: The New Poor, MCCALL’s, Sept., 1976, at 18.

instances, as professionals. By 1890, 3.7 million women of working age either had a job or were looking for one and 13.9 percent of all gainfully employed women were married. The number of married women workers rose to 28.9 percent by 1930. Thus, while a married woman's place was still primarily in her home, it was not uncommon for her to be also working outside of the home.

At present, approximately 41 million women work outside of the home. It has been predicted that in the near future, women who stay at home will be in the minority. This strong, steady influx of

23. Davies, Feminization, supra note 22, at 5-6. See S. Rothman, Woman's Proper Place (1978), which gives an outline of changing ideas and practices from 1870 to the present, for an examination of society's changing policy toward women and the "proper" role of women. See also Goodman, Women's Job Status Needs a Lift, Detroit News, Oct. 18, 1979, at 23-A, col. 4, for changes in the scholastic ranking of women entering the traditional fields of teaching and nursing.


26. Id. at 13.


28. This figure represents almost half of all women between the ages of 18 and 64. It has been noted that "[j]arried women form by far the largest group of women who work. In 1971, they represented nearly 60%, followed by single women - 22%; widowed women - 8%; divorced women - 6%; and separated women - 5%" Seifer, supra note 23, at 28. Furthermore, "[w]orking wives contributed an average of a quarter to a third of the family income. In 1970, the median income for a family of four was $9,175 if the wife did not work, $11,940 if she worked part-time or part-year, and $13,960 if she worked full-time all year. More than 50 percent of wives who worked in 1972 had children under 18." Id. For the latest statistics on the increasing participation of women in the workforce, see U.S. Bureau of Census, Statistical Abstract of the United States 394, No. 647 (100th ed. 1979) [hereinafter Statistical Abstract].

There continues to be, however, a large gap between the earnings of men and women which is not closing. Statistical Abstract, supra note 28, at 420, No. 691. This is true even in the case of very highly educated women. Frank, Why Women Earn Less: The Theory and Estimation of Differential Overqualification, 68 Am. Econ. Rev. 360 (1978), advances the argument that one of the reasons why highly qualified women earn less than men is that, in most marriages, the decision of where to locate is made with respect to the husband's career. For similar conclusions see Marwell, Rosenfeld & Spilerman, Geographic Constraints on Women's Careers in Academia, 205 Science 1225 (Sept. 21, 1979); Roark, Women in Science: Unequal Pay, Unsold Ideas, and, Sometimes, Unhappy Marriages, Chronicle of Higher Education, Apr. 21, 1980, at 3. See also Sowell, Status Versus Behavior, 1979 Wash. U. L. Q. 179, 183-85, where a distinction is made between academic women who never married and those who married, as far as advancement and earnings are concerned.

women into the workforce has a profound effect upon the marital relationship, particularly upon the sources and amount of the spouses' property.

The problems of determining what constitutes marital property and how rights in that property are to be shared or divided between the couple have raised the most difficulties for the legal system. Some jurisdictions have endeavored to change their outmoded laws and to adopt new marital regimes that would reflect the evolution of marriage. We turn now to an examination of three such attempts.

III. Ontario: The Low Road

(A) Historical Background

The law of Ontario affecting married women was derived from English law. The first reforms of that law consisted of the adoption of a comprehensive Married Women's Property Act modeled after one passed two years earlier at Westminster. The reforms,


In inflationary periods, many families need a second paycheck to enable them to meet the basic necessities of life. See Detroit News, Sept. 26, 1979, at 10-G, col. 1. For other couples, the second paycheck provides an affluence that would not be otherwise available. See The Two-Paycheck Life, Money Mag., January, 1979, 34-64; Women at Work: The Rich Get Richer, Wall St. J., Sept. 8, 1978, at 1, col. 1.


31. See Money Mag., supra note 29, at 34-43.

32. Upper Canada (now Ontario) was created as a separate province in 1791. 31 Geo. 3, c. 31 (1791). The first act adopted by the new provincial legislature was The Property and Civil Rights Act, 32 Geo. 3, c. 1 (Upper Can. 1792), now codified in R.S.V. Stat. Ont. 1970, c. 367, which declared that in matters of controversy relating to property and civil rights the law of England as of Oct. 15, 1792, should govern.

33. Married Women's Property Act, 47 Vict., c. 19 (Ont. 1884). See Bartke, Marital Property, supra note 1, at 51 nn. 29-36 for a citation to the various amendments. An earlier act, Married Women's Property Act 1872, 35 Vict., c. 16 (Ont. 1872), was very limited in scope and superseded by the 1884 enactment.

34. Married Women's Property Act, 45 & 46 Vict., c. 75 (1882). Until 1897 Ontario closely followed the English lead; see Bartke, Marital Property, supra note 1, at 51.
however, perpetuated many of the disabilities of coverture.\textsuperscript{88} Even vestiges of the concept of the unity of husbands and wives were maintained.\textsuperscript{86} Married women did not have full contractual rights and the statute specifically provided that their property rights could be curtailed or eliminated by express provisions in a marriage settlement.\textsuperscript{87} As the divorce rate increased during the twentieth century, the resulting inequities became pronounced. A number of cases indicate that a woman who devoted her life to home and family was exceedingly vulnerable, because she acquired no assets in her own name and therefore received little property upon divorce.\textsuperscript{88}

\textit{(B) The Reform Efforts}

In 1974, after ten years of study, the Ontario Law Reform Commission reported that the province’s law of marital property rights was no longer responsive to the needs of society.\textsuperscript{89} The law failed to recognize the economic side of marriage and tended to penalize the stay-at-home spouse.\textsuperscript{40} The Commission recommended a deferred sharing approach,\textsuperscript{41} which envisaged that during the existence of the ongoing relationship, the parties would own their property in severalty unless they specifically put title in joint names.\textsuperscript{42} They would essentially retain full power of disposition except for certain limitations, particularly in the area of unilateral

\begin{footnotesize}
\begin{enumerate}
\item The term “coverture” was a contraction of the Norman-French term \textit{feme-covert} or covered woman, referring to the conditions of a married woman who was under the cover or protection of her lord and husband. It came to denote the state of legal disability of a married woman who was one with her husband. See 1 W. Blackstone, Commentaries\textsuperscript{*} 430.
\item These vestiges were eliminated by The Family Law Reform Act 1975, § 1(1), Stat. Ont. 1975, c. 41.
\item See Bartke, \textit{Martial Property}, supra note 1, at 52-55.
\item Ontario Report, supra note 39, at 189-95, Recommendations 3-53.
\item Id. at 189, 208, Recommendations 3, 151.
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gifts.\textsuperscript{43} Upon termination of the marriage, a monetary balance would be struck and an equalizing payment made by the more affluent spouse.\textsuperscript{44} The manner of computation, however, differed depending upon whether the marriage terminated upon the death of a spouse or by divorce. Where the death of a spouse terminated the marriage, compensating payment would be due only if the less affluent spouse was the survivor.\textsuperscript{45} Thus, the scheme suggested by the Commission would apply in full force only upon divorce.\textsuperscript{46}

Despite its faults and weaknesses,\textsuperscript{47} the proposal constituted a considerable improvement over the then-existing law of Ontario. The proposal could have been built upon and strengthened, creating a basis for a workable scheme of economic sharing. Instead, a very different bill was eventually passed,\textsuperscript{48} which went through several changes of text\textsuperscript{49} and barely survived a provincial election.\textsuperscript{50}

43. Id. at 192, Recommendations 34-38. The proposal was to prohibit “excessive gifts” which were defined as either donations other than “usual and customary gifts” or transfers found by a court to be “for a consideration . . . clearly inadequate.”
44. Id. at 189, 191, Recommendations 4, 27-29.
45. Id. at 88-90.
46. Id. at 192, Recommendations 39-40.
50. The legislation was first introduced in 1976 as Bill 140, 3d Sess., 30th Leg. Ont. 1976 [hereinafter cited as Bill 140]. This bill was criticized in Bankier, An Act to Reform the Law Respecting Property Rights and Support Obligations Between Married Persons and in Other Family Relationships: A Critique, 1 FAM. L. REV. 33 (1978); Baxter, Family Law Reform — Ontario, 55 CAN. B. REV. 187 (1977). It was reintroduced in altered form in 1977 as Bill 6, 4th Sess., 30th Leg. Ont. 1977 [hereinafter cited as Bill 6]. This bill was criticized in Bartke, Ontario Bill 6, supra note 47. The final form was introduced as Bill 59, 2d Sess. 31st Leg. Ont. 1978.
51. Bartke, Ontario Bill 6, supra note 47, at 322 n. 10.

Shortly after the submission of the report of the Law Reform Commission, a provincial election resulted in the formation of a new government. The successor attorney general introduced Bill 140, supra note 49, with the official explanation that although the recommendations of the Law Reform Commission represented certain benefits, there was no public support for them. MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) FAMILY LAW REFORM 5 (1976).

What was not disclosed was that a conference organized by the Ontario Status of Women
(C) The Statute: High Expectations and Meager Results

The Family Law Reform Act 1978 states and restates in its Preamble that it "recognizes marriage as a form of partnership." This objective, however, is never realized within the actual content of the legislation. Official comments clearly indicate that the partnership concept is applicable only in cases of divorce and not of death. Upon divorce or declaration of nullity, each spouse is entitled to an equal share of the family assets.

The section introducing the concept of family assets constitutes the cornerstone of the legislation. The label "family assets" does not refer to property acquired during the marriage as a result of the contribution of the spouses. Rather, family assets are composed of a heterogenous group of items, whether owned before marriage or acquired thereafter. The common characteristic of these items is that they are ordinarily used or enjoyed by both spouses, or by their children, while the spouses are residing together. Such a description indicates that investment and income-
producing properties are excluded, limiting family asset acquisitions to household goods and recreational equipment. The problems of construction are compounded by the requirement that the assets must ordinarily be used and enjoyed by both spouses. Therefore, any items used or enjoyed by only one spouse, should they not share the same pasttimes or interests, are excluded. This section also specifically indicates that the parties may, by a domestic contract, exclude items which otherwise would fit the category of family assets. There is, however, no express provision allowing them to expand the category to include assets excluded by statute.

The statutory provision that each spouse is entitled upon dissolution to have the family assets divided in equal shares, notwithstanding the ownership thereof, can be nullified however by another section sanctioning the exercise of virtually unlimited judicial discretion in the division of assets. On the other hand,


56. Bartke, Ontario Bill 6, supra note 47, at 330. See also Examination of Section 4, supra note 48, at 380-83. See Bregman v. Bregman, 7 R.F.L.2d 201 (Ont. Sup. Ct. 1978) (boat used by husband only not family asset, oriental rugs displayed in home family assets but those kept by husband in a trunk not family assets).

57. Domestic contract is defined in Ont. 1978 Stat., supra note 48, at § 51:

(1) Two persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or upon separation or the annulment or dissolution of the marriage or upon death, including,

(a) ownership in or division of property;
(b) support obligations;
(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
(d) any other matter in the settlement of their affairs.

(2) Any provision in a marriage contract purporting to limit the rights of a spouse under Part III in respect to a matrimonial home is void.

58. Id. § 3(b): "... but does not include property that the spouses have agreed by a domestic contract is not to be included in the family assets..." No explanation is given of the public policy reasons behind this particular provision.


60. Id. § 4(4).

"The court may make a division of family assets resulting in shares that are not equal where the court is of the opinion that a division of the family assets in equal shares would be inequitable, having regard to,

(a) any agreement other than a domestic contract;
(b) the duration of the period of cohabitation under the marriage;}
non-family assets, even though acquired during the union, can be awarded to the non-owner spouse only under very limited circumstances. When read together, these two sections may completely deprive a stay-at-home spouse of the means of support. Income-producing assets of considerable value may have been acquired by the working spouse during the marriage. Because such assets are not characterized as family assets, judicial discretion is severely limited and an award of the assets to the stay-at-home spouse is unlikely. As enacted, the statute would have been considerably better if it had simply provided for broad judicial discretion in the award of both types of assets.

Another objectionable feature of the Act is that it treats persons at different ends of the economic spectrum unequally, placing a premium on the manipulation of acquisitions. The less affluent are more likely to hold assets falling within the definition of family

(c) the duration of the period during which the spouses have lived separate and apart;
(d) the date when the property was acquired;
(e) the extent to which property was acquired by one spouse by inheritance or by gift; or
(f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement or use of property rendering it inequitable for the division of family assets to be in equal shares.”

The discretion of the judge was originally reasonably limited. See Bill 140, § 4(2); Bill 6, § 4(3). Such discretion, however, was continuously extended as the various drafts were criticized. See Bankier, supra note 49, at 34-35; Baxter, supra note 49, at 196. Section 4(4) was construed rather narrowly in Silverstein v. Silverstein, 1 R.F.L.2d 239 (Ont. Sup. Ct. 1978). See also O’Reilly v. O’Reilly, 9 R.F.L.2d 1 (Ont. Sup. Ct. 1979); Calvert v. Calvert, 9 R.F.L.2d 162 (Ont. Sup. Ct. 1979).

61. The discretion to distribute other assets is very severely limited. ONTARIO 1978 STAT., supra note 56, at § 4(6):

“The court shall make a division of any property that is not a family asset where, (a) a spouse has unreasonably impoverished [sic] the family assets; or (b) the result of a division of the family assets would be inequitable in all the circumstances, . . .”

This section has been construed very narrowly. See, e.g., Youngblut v. Youngblut, 11 R.F.L.2d 249 (Ont. Sup. Ct. 1979) (wife’s work at home and outside home, with financial contribution, not enough to give her an interest in a farm); C. v. C. (No. 1), 11 R.F.L.2d 356 (Ont. Cty. Ct. 1979); Peterson v. Peterson, 12 R.F.L.2d 319 (Ont. High Ct. 1979).

62. See Bartke, Ontario Bill 6, supra note 47, at 324-25.

63. Id. at 332-35.

64. See O’Reilly v. O’Reilly, 9 R.F.L.2d 1 (Ont. Sup. Ct. 1979) (husband opened a bank account unknown to wife in which he deposited bulk of his earnings and with which he purchased a partnership interest. Such an investment is classified as a non-family asset. Wife was partly compensated in a miserly fashion by an unequal division of family assets); Bregman v. Bregman, 7 R.F.L.2d 201 (Ont. Sup. Ct. 1978) (oriental rugs purchased by husband for investment and kept in a trunk were held to be not family assets); Sabot v. Sabot, 15 R.F.L.2d 225 (Ont. Unif. Fam. Ct. 1980) (saving certificate purchased with money from family account, not family asset, wife entitled to one-half under § 8; profit sharing plan, not family asset).
assets than are the affluent. Because the less affluent typically accumulate only negligible amounts of income-producing or investment property, all of their holdings will be governed by the Act. At the higher end of the economic spectrum, more and more surplus will be generated which will then be invested, presumably for the benefit of both spouses. These investments, however, do not qualify under the definition of family assets and will not be divisable as such. It is, therefore, possible for a business or professional person to defeat the rights of his or her spouse by the way in which he or she spends disposable income. This may be particularly offensive in those situations where one of the grounds for discord is the fact that the spouse employed outside of the home refuses to properly provide for the needs of the family, while feathering his or her nest. Thus, not only is the titleholding, employed-out-of-the-home spouse favored, but the Act, in effect, pe-

65. In many instances their surplus will be represented by a savings account which will be employed for all purposes and thus is likely to qualify as a family asset under Ont. 1978 Stat., supra note 48, at § 3(b)(i). They are also the ones least likely to appreciate the legal consequences of maintaining multiple accounts.

66. This is qualified somewhat by the very limited discretion vested in the court to divide property which is not a family asset, found in Ont. 1978 Stat., supra note 48, § 4(6)(b); See note 61 supra for the language of this section. See also remarks of Karen Weiler, of the Department of the Ontario Attorney General and one of the principal drafters of the legislation, in Toronto, on Nov. 4, 1977, at a joint meeting of the Family Law Section of the New York State Bar Ass'n and Family Law Section of the Candian Bar Ass'n (Ontario) at 23-34. The proceedings were recorded and transcribed by Prof. Mary Moers Wenig, who graciously made a copy available to us (letter dated Feb. 27, 1978, from Mary Moers Wenig to Richard W. Bartke), copies of which are on file in the library of Loyola University of Chicago Law School [hereinafter cited as Weiler Remarks]. Ms. Weiler stated:

Now debt and assets concept is obviously a limited one and it is important if we are going to have this approach that we give the court another form of discretion and that is the discretion to reach out and to order sharing, transfer, or division of non-family assets and that is in the situation where it would be inequitable again to simply divide the family assets. The court cannot only vary the proportions of sharing of family assets but can also reach out into other property and order that other property be shared where it is appropriate to do so. The considerations are the same ones as I've outlined to you and perhaps a couple of examples could illustrate. One of the situations that may come to mind is the situation where you have a house in gross value worth $250,000. The children are all grown up. That house is sold and the parties move into an apartment. The marriage breaks down shortly after the parties have moved into that apartment. At that point in time I don't think it would be unrealistic at all to expect that the judge would exercise his discretion and say, notwithstanding the fact that the house was in the husband's name, or that he has now put the entire proceeds of the sale into Bell Telephone and Telegraph stocks, this ought to be shared and to exercise his discretion to order a sharing of that other property. (Emphasis added).

67. In this connection see Ont. 1978 Stat., supra note 48, § 8, which specifically empha-
nalizes a generous spouse and rewards a selfish one.

The Ontario Act is additionally deficient in that the absence of any restrictions on the lifetime disposition by gratuitous title makes it possible for one spouse to effectively defeat the rights of the other spouse by collusive and other gifts. There is much potential for abuse, for example, in the situation of second or third marriages where children from a prior union can be given “family assets” without formal retention of any rights by the donor, in trust or otherwise.68

There are, finally, elaborate, ineffective provisions dealing with the matrimonial home.69 The only redeeming feature of these sections is that they constitute the only instance in which the unilateral right of disposition by one spouse or the other is curtailed.70

These criticisms by no means cover all of the public policy and technical imperfections of the Act, but they suffice to indicate that the Act is essentially a failure in terms of its own stated goals, and may actually leave the stay-at-home spouse worse off than she or he was before.71 The Act concentrates on the wrong assets, employing use rather than acquisition during the union as a touchstone. By excluding income-producing items from the sphere of sharing, with the pointed exception of monetary contributions, it makes a mockery of the concept of marriage as a partnership. The Act per-

sizes monetary contributions, and further minimizes the nonmonetary contributions that the legislation was ostensibly designed to recognize. See FAMILY LAW REFORM, supra note 59, at 1. O'Reilly v. O'Reilly, 9 R.F.L.2d 1 (Ont. Sup. Ct. 1979) (holding that a working wife and mother should be treated differently); Leatherdale v. Leatherdale, 14 R.F.L.2d 263 (Ont. Sup. Ct. 1980) (monetary contribution, by wife to husband's non-family assets); Badley v. Badley, 14 R.F.L.2d 345 (Ont. Crt. 1980); Sandy v. Sandy, 15 R.F.L.2d 79 (Ont. Sup. Ct. 1980) (keeping house, raising twelve children and working on farm, not enough to invoke § 8).

68. ONT. 1978 STAT., supra note 48, § 3(b)(iii) & (iv), includes property over which certain powers have been retained within the definition of family assets. See also id. § 4(b)(a).

69. A matrimonial home is included in the definition of family assets, id. § 3(b), and then expanded in Part III, §§ 38-49. Compare Calvert v. Calvert, 9 R.F.L.2d 162 (Ont. Sup. Ct. 1979) (matrimonial home partly purchased with wife's inheritance; this did not entitle her to larger share), with King v. King, 9 R.F.L.2d 294 (Ont. Sup. Ct. 1979) (a home owned by husband before marriage, which had lasted two years was unequally divided).

70. ONT. 1978 STAT., supra note 48, at § 42. This, however, should be qualified by the realization that the designation does not attach to the proceeds of the sale or other disposition of the matrimonial home. See Weiler Remarks, supra, note 66. See Devic v. Devic, 13 R.F.L.2d 243 (Ont. Unif. Fam. Ct. 1980), published after this article was written.

71. E.g., Baxter, supra note 49, at 195-96. Examination of Section 4, supra note 48, at 390, concludes that, “[a]lthough only some of the issues which may potentially be raised pursuant to this section [4] have been discussed, it is clear that this section will not be a stranger to Ontario's courts.”
mits excessive judicial discretion in the area of family assets and far too little judicial discretion elsewhere, thus glorifying title and monetary contribution at the expense of other considerations. For all of these reasons the Ontario Act cannot be recommended as a model to emulate for determining marital property rights.

IV. ILLINOIS: THE MIDDLE GROUND

(A) Pre-Amendment Law

Illinois, like Ontario, originally followed English common law. As did most common law states, it adopted a married woman’s property act in the nineteenth century. Consequently, a married couple under Illinois law had no legal interest in each other’s property, whether acquired before or during the marriage, unless the property was specifically designated as jointly owned. This concept reflected an early presumption that all goods and chattels in the marital home and in joint possession were the property of the husband. It was held much later that certain household property, which the spouses treated as common, would be classified as property held in tenancy in common.

Suits brought under the marital property act often resulted in inconsistent holdings, due to a substantial delegation of discretion to the courts. Presumptions of either several or joint ownership could be rebutted by evidence to the contrary, and it was the judge who weighed the evidence in most cases. This created a degree of uncertainty as to the rights of each spouse in property acquired by


73. See Rice v. Sayles, 23 Ill. App. 189 (1886); Hanchett v. Rice, 22 Ill. App. 442 (1886).


76. The court in In re Estate of Smith, 90 Ill. App. 2d 305, 232 N.E.2d 310 (1967), noted that the presumption of common ownership of household goods could be rebutted by evidence other than the source of funds. Id. at 308, 232 N.E.2d at 312. There was also a rebuttable presumption of a gift whenever an investment was made by one spouse in their joint names. See Baker v. Baker, 412 Ill. 511, 107 N.E.2d 711 (1952); Nickoloff v. Nickoloff, 384 Ill. 377, 51 N.E.2d 565 (1943); Harnois v. Harnois, 10 Ill. App. 3d 1062, 296 N.E.2d 511 (1973).
funds contributed by both parties. Questions of ownership could be resolved only by litigation and by looking to the couple's intent at the time that the property was acquired. Since the acquisition of property during marriage is rarely discussed in terms of who will own what in the event of dissolution, the determination of intent too often resulted in inequitable judgments.  

Inequitable property division was particularly likely in divorce proceedings.  

Under the Illinois Divorce Act, courts had broad equitable powers in the division of property. Occasionally this meant that a wife who had stayed at home and had made no financial contribution would be given her rightful share of the marital property, but more often it did not.  

Able to see value only in terms of dollars contributed and not services and support rendered, the courts frequently awarded property consistent with the title theory of ownership rather than with principles of equity in mind.

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77. This high degree of unpredictability of the outcome of a determination of ownership of marital property was criticized in Glendon, Matrimonial Property, supra note 1, at 52, 55 n.107.


81. Women rarely received credit for work in the home. The court in Everett v. Everett noted that:

It is also well established that the rights or interests that one spouse has in the property of the other by virtue of the marriage relation alone will not justify a conveyance under section 17 [citations omitted] but it must be alleged and proved by the spouse seeking a part or all of the property in the name of the other that he or she has furnished valuable consideration such as money or services other than those normally performed in the marriage relation which has directly or indirectly been used to acquire or enhance the value of the property.

25 IIl. 2d 342, 347-48, 185 N.E.2d 201, 204-05 (1962)(emphasis added).

82. See Norris v. Norris, 16 Ill. App. 3d 879, 307 N.E.2d 181 (1974) (all but the wife's personal property awarded to husband in whose name title was held, despite her substantial contributions, which were labeled "traditional"); Stotlar v. Stotlar, 50 Ill. App. 3d 790, 365 N.E.2d 1097 (1977) (reversing the trial court, securities in husband's name purchased with funds from joint checking account, did not raise special equities in wife's favor); Spalding v. Spalding, 361 Ill. 387, 198 N.E. 136 (1935); Musgrave v. Musgrave, 38 Ill. App. 3d 532, 347 N.E.2d 831 (1976); Overton v. Overton, 6 Ill. App. 3d 1086, 287 N.E.2d 47 (1972); Gerhardt v. Gerhardt, 18 Ill. App. 3d 658, 310 N.E.2d 224 (1974).

It should be noted that this narrow and unpredictable stance toward a wife's contributions was also reflected in the statutory law. The Married Women's Property Act of 1874 stated that "neither husband nor wife shall be entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise." ILL. ANN. STAT. ch. 68, § 8 (Smith-Hurd 1959) (repealed by 1977 ILL. Laws, ch.
When it became apparent that reform was necessary, Illinois legislators chose to disregard problems arising during an ongoing marriage or at its termination by the death of one of the spouses. Instead, they focused solely on the need to correct injustices in the area of divorce. Their solution was embodied in the Marriage and Dissolution of Marriage Act.\(^3\)

**(B) The Present Law and Its Effect**

The 1977 Marriage and Dissolution of Marriage Act was intended to be a comprehensive divorce reform measure.\(^4\) The Act does not affect property interests during the marriage or upon termination by death.\(^5\) Several new concepts were introduced into Illinois law by the Act, which was essentially based on the 1970 uniform act.\(^6\)

The Act defines marital property as “all property acquired by either spouse subsequent to the marriage.”\(^7\) It turns away from adherence to the title theory of ownership by expressly providing

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80-923, § 901). For a construction of this section, see Lellos v. Lellos, 25 Ill. App. 2d 201, 166 N.E.2d 639 (1960).


84. The Act retains some existing Illinois domestic relations law which does not affect marital property rights but which is worth briefly noting here. The law does not abolish fault divorce, but allows the plaintiff to merely plead one of the designated grounds without alleging underlying facts. ILL. ANN. STAT. ch. 40, § 403 (Smith-Hurd 1980). The law also allows either or both parties to initiate dissolution proceedings. Id. § 403(b). Section 602(b) directs the court not to consider the conduct of a parent that does not affect the relationship between the child and parent when awarding custody. Id. § 602(b). For a discussion of the entire Act, see Kalcheim, Marital Property, Tax Ramifications, and Maintenance: Practice Under the Illinois Marriage and Dissolution of Marriage Act — A Comparative Study, 66 ILL. B. J. 324 (1978) (Pt. 1); 66 ILL. B. J. 388 (1978) (Pt. 2); Auerbach, An Introduction to the New Illinois Marriage and Dissolution of Marriage Act, 66 ILL. B. J. 132 (1977).


Illinois is used as a comparison state in this article because its pre-reform law was particularly objectionable, while its reform efforts were similar to many others, e.g. Arkansas, Colorado, Delaware, District of Columbia, Kentucky, Maine, Minnesota, Missouri, New York, and Pennsylvania.

87. ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd 1980).
that any property qualifying as marital property will be so considered regardless of title. There are, however, six exceptions to the broad classification of marital property, and the presumption that property acquired after marriage is marital property can be overcome by a showing that it was obtained in one of the six enumerated ways.

Although divorce in Illinois is still based on fault, under the Act the division of marital property is to be made without considering marital misconduct. Marital property is to be divided in “just proportions” taking into account “all relevant factors.” These factors include ten enumerated considerations, one of which recognizes the contributions of a spouse as a homemaker. These provisions for the determination and division of marital property are to be read together with the provisions for the award of maintenance. A maintenance order can be granted only if the spouse seeking the order, among other factors, lacks sufficient property, including his or her share of the marital property, to provide for reasonable needs.

A glaring deficiency of the Act is that it attempts to resolve the issues raised by the division of property at dissolution in a legal vacuum, without co-ordinating the division with the law governing an ongoing marriage or the termination of the marriage by death of one of the spouses. The Illinois Supreme Court has noted that the

89. ILL. ANN. STAT. ch. 40, § 503(a) (Smith-Hurd 1980):
   (1) property acquired by gift, bequest, devise or descent;
   (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;
   (3) property acquired by a spouse after a judgment of legal separation;
   (4) property excluded by valid agreement of the parties;
   (5) the increase in value of property acquired before the marriage; and
   (6) property acquired before the marriage.
Assets falling within one of these six exceptions are known as “non-marital property.”
90. Id. § 503(b).
91. Id. § 503(c).
93. ILL. ANN. STAT. ch. 40, § 503(c)(1) (Smith-Hurd 1980).
Act does not regulate the respective property interests of the spouses during the existence of the marriage. Married persons continue to own separate property and are not restrained from disposing of it during marriage in whatever way they choose. This omission leaves each spouse vulnerable to actions against their interests by the other spouse as the marital relationship deteriorates. Few marriages end overnight. The disintegration is generally slow, so that ample time is available for transfers of property before dissolution proceedings commence. Some measure of protection is necessary for spouses during the ongoing legal relationship.

Thus, Illinois still insists on treating the spouses as strangers in the economic sphere during the ongoing marital relationship. Although some commentators have compared this concept to community property concepts or to a commercial partnership model, such an analogy overlooks an essential component in the law of both the community property states and of commercial partnerships: the basic equality of the partners, from the beginning of their relationship until its end. In the community property states the property rights of the parties arise from the marital relationship itself, while the common law states treat such rights as

96. Kujawinski v. Kujawinski, 71 Ill. 2d 563, 573, 376 N.E.2d 1382, 1386 (1978). In Kujawinski, the retrospective application of § 503 of the Act was upheld against a challenge of unconstitutional denial of due process and impairment of the obligation of contracts, precisely because no property interest vested in the other spouse until the dissolution proceedings. Therefore, the property-owning spouse's interests were not impaired. Id.

97. Id. Note, 1978 S. Ill. U.L. J. 598, 609, considers this to be dictum.

98. The statute includes “dissipation” as one of the criteria to be considered in the division of marital property. Ill. Ann. Stat. ch. 40, § 503(c)(1) (Smith-Hurd 1980); see Klingberg v. Klingberg, 68 Ill. App. 3d 513, 386 N.E.2d 517 (1979). Thus, under some circumstances, compensation in the form of unequal division may be made, provided there is enough property left. If, however, the transfers exhaust the marital estate, the statute as construed provides no remedy. Cf. Baker v. Baker, 201 Neb. 409, 411, 267 N.W.2d 756, 758 (1978) (spouse compensated from remaining assets for property transferred gratuitously).


101. Kalcheim, supra note 84, at 325; Auerbach, supra note 84, at 137.

102. See sources cited in notes 5 and 8 supra.

103. Recent amendments in all community property states, other than Texas, took the final step by destroying the earnings-management link. Prager, Persistence, supra note 8, at 79-80. See also Bartke, Louisiana Reform, supra note 5, at 315.
a function of title and monetary contribution. Under the Illinois Act the possibility exists for a court to order an equal distribution of marital assets, but there is no legislative directive to do so. Rather, the courts have been provided only a laundry list of factors to take into account in exercising their discretion. This has led to conflicting decisions, and will continue to do so in the future as the courts grapple with changing concepts of marriage in the context of inadequate and unresponsive legislation. Furthermore, the uncertainty of results is likely to foster litigation, rather than encourage settlement.

Finally, division of property upon divorce may vary significantly from division upon death of the spouse. Upon divorce, the spouse


105. See In re Marriage of McMahon, 82 Ill. App. 3d 1126, 403 N.E.2d 730 (1980), where a division of marital property, 60% to the husband and 40% to the wife, was affirmed as not a manifest abuse of discretion. Justice Craven dissented stating that under § 503(c) there should be a presumption of equal division. See also In re Marriage of Thornquist, 79 Ill. App. 3d 791, 399 N.E.2d 176 (1979), where a contention that § 503(c) was unconstitutionally vague was rejected.

106. In Stallings v. Stallings, 75 Ill. App. 3d 96, 393 N.E.2d 1065 (1979), the court stated: Next, with respect to the trial court's award of all marital property to Wife, Husband claims that a 50-50 split based on Illinois partnership law should have been made by the court. We summarily dismiss that proposition. Had the legislature intended marital property to be so divided at divorce, it would not have provided Section 503(c) of the Act. The legislature's intention was obviously that marital property be equitably divided, based upon the factors specified in Section 503.

Id. at 100, 393 N.E.2d at 1067. While an inflexible rule of equal division is undesirable there should be a statutory presumption of equal division.


108. E.g., Gan v. Gan, 83 Ill. App. 3d 265, 404 N.E.2d 306 (1980) (personal injury settlement marital property); Lucas v. Lucas, 83 Ill. App. 3d 606, 404 N.E.2d 545 (1980) (workers' compensation award marital property); In re Marriage of Musser, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (1979) (Military retirement pay held to be marital property to be divided. Justice Trapp dissented and had considerable problems with the concepts and the language of the statute.); In re Marriage of Glidden, 71 Ill. App. 3d 96, 389 N.E.2d 657 (1979) (Husband made improvements to wife's nonmarital property. The court held that proper construction of the statute is to take the improvements into account in the division of marital property, no interest in the res.); In re Marriage of Evans, 85 Ill. App. 3d 260, 406 N.E. 2d 916 (1980) (pension rights held to be marital property); In re Marriage of Smith, 84 Ill. App. 3d 446, 405 N.E. 2d 884 (1980) (disability pension held to be marital property); compare the construction of essentially the same statute by the Supreme Judicial Court of Maine in Tibbetts v. Tibbetts, 406 A.2d 70, 76-77 (Me. 1979), which held that the property became pro tanto marital.
may be awarded marital property109 while probate property is distributed upon death.110 The size of the probate estate depends in part on the extent to which will substitutes are used.111 The comparison is further complicated by the fact that the surviving spouse’s intestate share112 is not identical to the forced share if the will is renounced.113

The Illinois statute is far superior to the Ontario effort. It is not a model to emulate, however, because the legislative scheme is incomplete and responds to only one aspect of an area in need of integrated reform. What is designated as potential marital property for distribution upon divorce is not equivalent to probate property for distribution upon death, and there is no protection of marital property interests before dissolution. Therefore, the Illinois statute cannot be recommended as a model to be followed in other states.


110. Id. ch. 110 1/4, § 2-1 (Supp. 1980), as amended by 1979 ILL. LAWS, ch. 81-400, § 1. Intestate succession is concerned with the probate estate, which does not differentiate between “marital property” and “non-marital property”. Thus, if the bulk of the intestate’s property is subject to probate the pool available to the survivor might be considerably larger than would be the case in divorce. On the other hand, the statute of descent and distribution operates only on probate assets, which may mean that many property items will not be available to the survivor, unless survivorship or contract provisions will cause them to vest in her or him. This distinction, however, does not apply to division upon divorce.

111. While the law of Illinois with respect to the “fraud on the forced share” is more liberal than that of many other states, the question of whether property disposed of by means of a particular will substitute may be reached by the surviving spouse must be adjudicated on a case by case basis with only generalized guidelines; see, e.g., Johnson v. LaGrange State Bank, 73 Ill. 2d 342, 383 N.E.2d 185 (1978); Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); Rose v. St. Louis Union Trust Co., 43 Ill. 2d 312, 253 N.E.2d 417 (1969) (all dealing with revocable trusts). See also Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962) (joint tenancies in intangible personality).

For an exhaustive analysis of Illinois law with respect to the forced share, see Note, A Response to Johnson v. LaGrange State Bank: Restoring Forced Share Protection for the Surviving Spouse, 1980 U. ILL. L. F. 277, published after this article was written. The recommendations in the note differ markedly from the position of this article, in part because of a basic misunderstanding of community property law.

112. ILL. ANN. STAT. ch. 110 1/4, § 2-1(a). (Supp. 1980). The intestate share is one-half of the estate if there are surviving descendants, and all if there are no surviving descendants.

113. Id. ch. 110 1/4, § 2-8 (Smith-Hurd 1978). The forced share is one-third of the estate if there are surviving descendants, and one-half if there are no surviving descendants.
V. WISCONSIN: THE GO FOR BROKE APPROACH

(A) Wisconsin Law of Marital Property Rights

Wisconsin, like Illinois, is a common law state. A wife has no property interest in the earnings or acquisitions of the husband during the union. While she has a right to her own earnings, this is still circumscribed in those cases in which she is employed by her husband. In such a situation, even the wages paid to her are technically his property. Moreover, a married woman's right to engage in a business of her own is limited except in those situations where she has been deserted by her husband or where he neglects or refuses to provide for her support or the support and education of their children.

The current Wisconsin divorce statute seems to be very liberal on its face. It makes each spouse's property available for

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114. See text accompanying notes 71-81 supra. Thus, the traditional property rights of married women in Wisconsin are similar to those of Illinois discussed in the previous section. The Wisconsin Married Women's Property Act is found in Wis. Stat. Ann. ch. 246 (West 1957 & Supp. 1979-1980).

115. Melli, Legal Status, supra note 114, at 1-2.


117. Id. § 246.06 (Supp. 1979-1980). Another aspect of Wisconsin marital property rights is that until 1960 only a married woman who was admitted to the bar could have been appointed an assignee or receiver. Id. § 246.10, amended by 1959 Wis. Laws ch. 595, § 41, effective January 1, 1960.

118. Wis. Stat. Ann. § 247.255 (West Supp. 1979-1980). This statute, under which the reported cases have been decided, was amended and recodified effective July 20, 1979; id. § 767.255 (West Mar. 1980 Interim Ann. Serv.).
It also provides a number of criteria which are to guide the courts in making appropriate awards. When one analyzes the cases, however, the invidious presence of the title theory is immediately visible. Judges are still reluctant to take "the husband's property" and give it to the wife.

The 1979 amendment, however, makes a distinction between donated or inherited property and the acquisitions of marriage; as to the latter there is a presumption of equal division. Id. § 767.255 (West Mar. 1980 Interim Ann. Serv.).

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under § 767.02(1)(h), the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. A certified copy of the portion of the judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated. The court may protect and promote the best interests of the children by setting aside a portion of the property of the parties in a separate fund or trust for the support, maintenance, education and general welfare of any minor children of the parties. Any property inherited by either party prior to or during the course of the marriage shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner. The court shall presume that all other property except inherited property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering.


A recent case decided after Professor Melli's discussion is instructive. Perrenoud v. Perrenoud, 82 Wis. 2d 36, 260 N.W.2d 658 (1978), involved the dissolution of a marriage of some 22 years duration during which the husband managed to develop a very successful business and accumulate a great deal of property. The wife assumed the traditional role. One of the issues raised on appeal was the division of property. The trial court made no findings as to the value of the property and, as is usual under these circumstances, the parties' valuations differed. According to the wife's valuation the property awarded to her had the value of $170,000 and that awarded to the husband $710,391. According to the husband, the property awarded to the wife had a value of $189,312 and that awarded to him $697,684. All of the income-producing assets were awarded to the husband. Id. at 44-45, 260 N.W.2d at 662-63. Assuming the husband's valuation, the wife received 21.34 percent of the total assets, whereas if the wife's valuation were accepted, she received 19.31 percent. Thus, even under the husband's valuation, he obtained almost 79 percent of the total property including all income-producing assets, no doubt on the theory that it was his property, produced by his efforts. While the Wisconsin Supreme Court reversed, because of inadequate findings of fact, the court also stated: "[a]lthough we have commented that the award to Doris appears low, we do not hold it to be inadequate." Id. at 50, 260 N.W.2d at 665.

In a case reported after this article was written, deWitt v. deWitt, Wis. App. 296 N.W.2d 761 (1980), the court refused to recognize as property the value of a professional education, made possible by the earnings of a wife who dropped out of school to work, nor the connected value of the good-will of a professional practice. Such factors, however, are becoming increasingly important in the division of marital assets. See, e.g., Bartke, Louisiana Reform, supra note 5, at 318-19 n. 126.
Where the marriage ends in the death of either spouse, the resulting property division depends upon the sequence of death. If the stay-at-home spouse survives, she or he is protected by intestate succession or forced share provisions.\textsuperscript{122} If, however, the stay-at-home spouse pre-deceases the other spouse owning no property in her or his own right, such spouse cannot dispose of any part of the marital accumulations acquired as a result of her or his contributions.\textsuperscript{123}

\begin{enumerate}
\item \textbf{Pending Legislation: Wisconsin A.B. 1090}
\end{enumerate}

\begin{enumerate}
\item \textbf{Underlying Assumptions}
\end{enumerate}

Wisconsin A.B. 1090 represents a radically different approach from that taken by any of the American common law states or the Canadian common law provinces.\textsuperscript{124} The bill uses as its model the community property laws of the seven states which have adopted

\textsuperscript{122} See \textit{Melli, Legal Status}, supra note 114, at 9-11. The spouse's intestate share is found in Wis. Stat. Ann. \$ 852.01(1)(a)(1971); the election to take against the will is in \$ 861.05 (1971 & Supp. 1979-1980). Finally, \$ 861.17 deals with non-probate assets disposed of in fraud of the forced share. \textit{Id.} In this respect Wisconsin is ahead of many other states: see, e.g., \textit{Bonapart, Estate Planning and Women: Consciousness Raising for Estate Planners}, in U. MIAMI 8TH INST. ON EST. PLANNING 10-1, 10-2 (P. Heckerling ed. 1974); Schuyler, \textit{Revocable Trusts — Spouses, Creditors and Other Predators}, id. at 13-1, 13-2 to -17. Compare \$ 861.17 to the concept of an augmented estate in the \textit{UNIFORM PROBATE CODE} \$ 2-202, 8 U.L.A. 109-11 (Supp. 1980). Both the Wisconsin code and the Uniform Probate Code share the same shortcoming in that they do not take into account property passing to the surviving spouse outside of probate in the computation of the forced share. Thus, a spouse amply provided for by will substitutes can still claim a forced share and disrupt an estate plan. The new Michigan probate code, 1978 Mich. Pub. Act. No. 642, effective as of July 1, 1979, went to the other extreme of reducing the forced share by the total amount of all property interests passing outside of probate, \textit{MICH. COMP. LAWS ANN.} \$ 700.282(1)(b) (1980), but without any protection against a fraud on the forced share. See \textit{Rose v. Rose}, 300 Mich. 73, 74-80, 1 N.W.2d 458, 459-61 (1942).

\textsuperscript{123} See \textit{Bartke, Ontario Bill 6}, supra note 47, at 329. During the hearings on Wis. A.B. 1090, on Jan. 15, 1980, this point received considerable support.

\textsuperscript{124} The present bill is the result of untiring efforts of a small group of dedicated persons. Its primary sponsor is the Wisconsin Women's Network. The original effort was undertaken by a private committee but most of the actual drafting was done by Professor June Weisberger of the University of Wisconsin Law School.

The first working draft, not otherwise identified, is simply dated 8-78, and formed the basis of Professor Irish's article, \textit{Iriah, supra note 7}. A copy of the working draft, made available by Professor Weisberger, is on file in the library of Loyola University of Chicago School of Law. The completed draft was then worked on by the legislative reference bureau of the Wisconsin legislature, and circulated to interested parties under a covering memo of August 10, 1979. This draft is identified as LRB-0113/3 KC:tm. It then progressed due to the dedicated efforts of Representatives Mary Lou Munts, James Rutkowski and Barbara Ulichny as well as Senators William Bablitch and James Flynn.
the equal management model. Under this model, a hybrid joint
and several management scheme exists where either spouse may
manage the community property independently except in a num-
ber of enumerated circumstances where the concurrence of both is
required. In certain circumstances, e.g., business, only the actively
engaged spouse has management powers in the day-to-day
operation.

The outline of the proposed reform prepared by Professor Weis-
berger in April, 1979 clearly reflects this model. The outline sets
out the inequities and inadequacies of the existing law, and fo-
cuses on three problem areas: (1) the inability of the stay-at-home
spouse to obtain credit in her or his own right; (2) the inability to
make lifetime gifts; and (3) the inability to direct how the accumu-
lations of the marriage are to be disposed of upon death if she or
he is the first to die.

The legislative findings in the bill also articulate the need for
reform, and indicate the legislature's intent to establish a form
of community property. The bill codifies the general community
property premise that in managing the common estate, the spouses
owe to each other the highest degree of fair dealings and disclo-

126. See, e.g., Bartke, Marital Sharing, supra note 1, at 1170-72, for elaboration.
A.B. 1090 uses the term “marital partnership property” rather than “community prop-
erty.” This term was apparently chosen by the drafters because of the almost automatic
hostility to the concept of community property in common law states.
127. Marital Property Reform in Wisconsin, an outline prepared by Professor June
Weisberger and circulated together with the August 10, 1979, memorandum and draft.
[Hereinafter cited as Weisberger Outline].
128. Weisberger Outline, supra note 127 at 1: “A non-wage earning, non-asset owning
spouse will probably be in a better position, from a legal and economic point of view, follow-
ing divorce or legal separation, than during an ongoing marriage.”
129. Id. at 1. Compare Bingaman, Equal Management of Community Property and
Equal Credit Opportunity, 13 Idaho L. Rev. 161 (1977). These problems are not addressed
by the Illinois and Ontario statutes.
130. Section 37 of Wis. A.B. 1090 would repeal chapter 766 of the Wisconsin statutes
and substitute a new chapter 766, which is the backbone of the proposed legislation. The
new chapter is then divided into section numbers parallel to the existing Wisconsin statutes.
Since most of the discussion in this article will be centered around the provisions of chapter
766, all citations to this chapter hereinafter will be to A.B. 1090 and the appropriate section
to the proposed provisions to the statutes, unless specifically indicated otherwise. The legis-
slative findings of intent are in § 766.001.
131. A.B. 1090 § 766.001(3).
sure.\textsuperscript{132} Since the bill is designed to introduce new concepts and restructure an existing institution, it is quite detailed. It includes, for instance, an innovative choice of law rule, that where the spouses maintain two \textit{bona fide} principal residences, one of which is within and one without the state, they are free to designate the law of the jurisdiction which shall govern their property rights.\textsuperscript{133} This provision recognizes that with changing perceptions of marriage and the career advancement of working women, there increasingly will be instances where a happily married couple will not necessarily reside under the same roof.\textsuperscript{134}

(2) The Contractual Rights of the Spouses

The law concerning antenuptial and postnuptial contracts between spouses or prospective spouses is currently in a state of flux.\textsuperscript{135} Historically, courts have approached the validity of such agreements differently depending upon whether they dealt with rights upon death or rights upon divorce. In the latter case, such agreements were held to be void as against public policy.\textsuperscript{136} Although recently some jurisdictions have begun to reconsider their position,\textsuperscript{137} the development of the law is very uneven. Because of this, the drafters of the Wisconsin bill have included elaborate provisions dealing with such agreements.\textsuperscript{138}

Any vestiges of contractual incapacity have been removed, and antenuptial or postnuptial agreements may be executed either before or after solemnization.\textsuperscript{139} Following the trend of modern authority, the bill stresses fairness, full disclosure and understanding as the touchstones of enforceability, thereby excluding \textit{a priori} assumptions of invalidity on the basis of public policy.\textsuperscript{140}

132. \textit{Id.} \S 766.13(3).
133. \textit{Id.} \S 766.20.
135. \textit{See generally} Bartke, \textit{Marital Sharing, supra note} 1,
1147-51.
136. \textit{Id.} at 1149 n. 116. For a recent expression of this approach see, \textit{e.g.}, Connolly v. Connolly, 270 N.W.2d 44, 46-48 (S.D. 1978).
138. A.B. 1090 \S\S 766.63-.69.
139. \textit{Id.} \S 766.63(2).
140. \textit{Id.} \S 766.63(10)(a) provides:

\begin{itemize}
  \item If a spouse petitions a court to enforce the provisions of an individual marriage
(3) Property Provisions of the Bill

The substantive provisions of the bill dealing with property rights of marriage are quite voluminous. The length and detail, however, are necessary in that a basic change in approach is being undertaken. Since Wisconsin courts are not familiar with community property concepts, it is desirable and prudent for the legislature to define the concepts clearly and provide statutory answers to most of the questions that are likely to arise.\textsuperscript{141}

\textit{(a) Types of Property}

The bill provides for three types of spousal property interests: (1) quasi-marital partnership property,\textsuperscript{142} (2) separate property\textsuperscript{143} and (3) marital partnership property.\textsuperscript{144} The first type of property is included both because of transitional problems, and prospectively to avoid some of the injustices which have occurred in the traditional community property states.\textsuperscript{145} The second and third types of property generally follow the definitions and rules developed in community property states, but with significant refinements and modifications.

Quasi-marital partnership property, a concept borrowed from California,\textsuperscript{146} consists of separate property which is either owned

\begin{itemize}
\item[1.] That he or she made a full and fair disclosure of assets and liabilities at the time the agreement was made; and
\item[2.] That the other spouse signed the agreement freely and voluntarily with full knowledge of his or her legal rights and responsibilities under this chapter or, in the case of an agreement executed under sub. (9), his or her legal rights under the laws of that jurisdiction.
\end{itemize}


\textsuperscript{142} A.B. 1090 § 766.31(3).

\textsuperscript{143} Id. § 766.31(1).

\textsuperscript{144} Id. § 766.31(2).

\textsuperscript{145} E.g., \textit{In re Thornton's Estate}, 1 Cal. 2d 1, 33 P.2d 1 (1934); \textit{In re Gulstine's Estate}, 166 Wash. 325, 6 P.2d 628 (1932).

\textsuperscript{146} See Cal. \\\textsc{Civ. Code} §§ 4804 & 4810 (West 1970), id. §§ 1237.5, 1238, 1265, 4903, 4905, 4806 & 5132 (West Supp. 1979), Cal. \\\textsc{Prob. Code} §§ 201.5-8, 661 & 663 (West Supp. 1979). These statutes were adopted as a legislative response to \textit{In re Thornton's Estate}, 1
by a spouse at the date at which the bill becomes operative, or brought by the spouse from another common law state, but which would have been characterized as marital partnership property under the provisions of the bill. The purpose of this classification is to give immediate and tangible relief to parties who are already married. The provision builds upon the experiences of California and Washington,147 and prospectively provides for couples moving to Wisconsin from common law jurisdictions.

Separate property is that property which either party to the marriage owned before the solemnization or which is acquired thereafter by lucrative title, i.e., by gift, devise or inheritance.148 Numerous additional subsections clarify the concept and facilitate interpretation by the courts. The only questionable provision is one which classifies as separate property “distributions to a spouse from a trust, including either trust income or principal.”149 While the obvious purpose is to eliminate any questions as to the character of distributions to a spouse from a trust created for her or his benefit by a third party, the overbroad language may create problems where a trust is created by the spouse and funded by marital partnership property.150 By creating a trust with marital partnership personalty, a spouse might try to convert the income or corpus into separate property.151

148. A.B. 1090 § 766.31(1).
149. Id. § 766.31(1)(b).
150. While neither spouse could create a trust of marital partnership realty unilaterally because of the provisions of id. § 766.51(5), there does not seem to be any reason why a trust funded with personalty should not be upheld, id. § 766.51(1). See text accompanying notes 163-76 infra for discussion of management powers.
151. The provision would be clarified if it were changed to read: “distributions to a spouse from a trust, including either trust income or principal, created for the benefit of such spouse by a third party, including the other spouse, or by the spouse him or herself with separate or quasi-marital partnership property.”

Although the Wisconsin bill does not address the issue, revocable trusts of community property created by only one spouse have caused problems. For a thorough but dated discussion of revocable trusts of community property, see Johanson, Revocable Trusts and Community Property: The Substantive Problems, 47 TEx. L. Rev. 537 (1969); Johanson, Revocable Trusts, Widow’s Election Wills, and Community Property: The Tax Problems, 47 TEx. L. Rev. 1247 (1969). For a more current discussion and criticism of the few statutory models available (CAL. CIV. CODE § 5113.5 (West Supp. 1980); IDAHO CODE § 32-906A (Supp. 1978)) see Bartke, Community Property, Management Powers and Trusts: You Can
Following the pattern set by the traditional community property states, marital partnership property is defined generally as all property which is not separate property or quasi-marital partnership property. This definition is important because it underscores the preference for marital partnership property, it permits adjustment of the new system without requiring amendment. In addition to the general and all-inclusive categorization, the section lists many items specifically. This listing is of tremendous practical benefit and will assist the Wisconsin bench and bar in familiarizing themselves with the new property concepts.

The drafters have classified income of separate property as marital partnership property. The provisions of A.B. 1090 have modified the classification along the lines of the new Louisiana statute, whereby either one of the marital partners may unilaterally withdraw the income of separate property from the marital partnership. The Louisiana statute makes it possible for one spouse to withdraw the fruits of his or her separate property from the community fund, without notifying the other spouse, in order to induce the former to continue to contribute the income of separate property to the common pot. The proposed Wisconsin provision, however, is superior to that of Louisiana, because it requires that notice of the withdrawal be given to the other spouse.

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152. A.B. 1090 § 766.31.
153. See, e.g., Bartke, Marital Sharing, supra note 1, at 1158-64, 1182-84.
154. A.B. 1090 § 766.31(2) subsection (a) through (e).
155. A.B. 1090 § 766.31(2)(c)2. This classification is in accord with Spanish law; see, e.g., Pugh, supra note 8, at 8.
156. LA. CIV. CODE ANN. art. 2339 (West Supp. 1980).
157. A.B. 1090 § 766.68(2).
The Wisconsin bill also contains classification provisions that deal with specific situations. An express provision makes it clear that record title is not determinative of the character of property. The bill includes the usual presumption that property is marital partnership property, as well as rules dealing with commingling, and provisions for the resolution of conflicts where one type of property is used for the improvement of another type. While the provisions are quite adequate, a more specific language dealing with marital partnership property used to improve or discharge obligations on separate property would be desirable. The bill also contains elaborate provisions dealing with the interaction of marital partnership property and existing common law concurrent ownerships, such as tenancies in common and particularly joint tenancies. Finally, there is an excellent provision dealing with recovery for personal injuries. Such recovery is made marital partnership property except for the portion attributable to pain and suffering and for recovery in the case of interspousal torts.

(b) Management and Control

The bill specifically indicates that both spouses own equal, undivided, present and vested interests in the marital partnership property. This represents a codification of community property

158. Id. § 766.33(2).
161. A.B. 1090 § 766.33(1)(b) (use of separate funds to increase the value of marital partnership property); id. § 766.31(2)(c).1. (increases in value of separate property attributable to the labor, employment, efforts, industry or skill of either spouse).
163. A.B. 1090 § 766.325.
164. Id. § 766.31(2)(d). See also Bartke, Marital Sharing, supra note 1, at 1169-70. For an extensive discussion of the law in the various community property states see Akers, Blood and Money—Separate or Community Character of Personal Injury Recovery, 9 TEX. TECH. L. REV. 1 (1977).
165. A.B. 1090 § 766.31(1)(k).
166. Id.
167. Id. § 766.35.
Adopting such concepts, however, necessitates the fashioning of appropriate rules for the management of the common property. Indeed, the workability, fairness and desirability of the scheme depend to a large extent on management powers. The bill follows the best examples from the seven community property states which have adopted a joint and several management scheme. Each party is free to manage his or her separate property or quasi-marital partnership property without interference by the other, except in certain very limited circumstances. As far as marital partnership property is concerned, either party may manage it except for enumerated instances in which both must participate. The bill requires joint action in the acquisition, encumbrance, sale, conveyance or lease for more than one year of marital partnership realty. Also included is a requirement of joint action in undertakings of guaranty or suretyship, and detailed guidelines in the case of marital partnership businesses.

When a marital partnership business is undertaken, the Wisconsin bill does not require concurrence in daily operations, and third parties are protected who encumber or purchase property from one spouse in the regular course of business. Disposition of all or substantially all of the assets, however, requires the concurrence of

168. Such was the law even before adoption of the present equal management statutes. See, e.g., W. De Funia & M. Vaughn supra note 8, at 234-45.
169. See generally Bartke, Marital Sharing, supra note 1, at 1170-75.
170. See citations note 125 supra.
171. A.B. 1090 § 766.51(2) (separate property), id. (3) (quasi-marital partnership property).
172. Id. § 766.51(2) "... Prior to any realization or partition, each spouse may also exclusively manage and control any increase in value of his or her separate property ... subject to the good faith responsibility to the other spouse ..." Id. (3) "... except that selection of a settlement of payment option respecting the benefits payable under contract, account or plan upon retirement, termination of the plan or termination of participation in the plan shall require the written consent of both spouses."
173. Id. § 766.51(1).
174. Id. § 766.51(5). The provision goes beyond the language of the community property statutes and includes a mobile home used as a family residence within the definition, which in this day and age seems highly desirable. While all seven states which embrace the equal management principles require joinder in the encumbrance, sale, conveyance, or lease of community realty, only three require joinder in the acquisition: Ariz. Rev. Stat. Ann. § 25-214C.1 (1976); Nev. Rev. Stat. § 123.230(4) (1977); Wash. Rev. Code Ann. § 26.16.030(4) (Supp. 1980). This addition is highly desirable.
176. A.B. 1090 § 766.61.
177. Id. § 766.61(1)(c).
both spouses.\textsuperscript{178} In this area, the bill follows the best examples of other states and improves markedly on the language used elsewhere.\textsuperscript{179} Even where joint action is required, there are three situations in which one spouse may act alone. First, the spouses may so provide in their marriage agreement.\textsuperscript{180} Second, either spouse may grant to the other a power of attorney.\textsuperscript{181} Finally, for good cause shown, on grounds specified in the bill, a court may grant exclusive management powers to one or the other spouse.\textsuperscript{182} Where joint action is required and one of the spouses is of legal age and the other one is a minor, the minor may validly join in any necessary instrument.\textsuperscript{183}

As originally introduced, A.B. 1090 would have prohibited all unilateral gifts of marital partnership property,\textsuperscript{184} following the California-Nevada-Washington model.\textsuperscript{185} There seems to have been some opposition to this and the current version\textsuperscript{186} is apparently

\begin{itemize}
\item \textsuperscript{178} Id. § 766.61(1)(a).
\item \textsuperscript{179} See Macdonald, The Impact of Equal Management Upon Community Property Businesses, 13 Idaho L. Rev. 191 (1977), for a discussion of the statutes in the community property states, although we disagree strongly with some of the conclusions. See also, Bilbe, "Management of Community Assets Under Act 627, 39 La. L. Rev. 409, 424-26 (1979), which discusses the provisions under the 1978 Louisiana Act which was repealed in 1979. The provisions which are now in force, however, are substantially identical, see La. Civ. Code Ann. arts. 2347, 2350 & 2352 (West. Supp. 1980).
\item \textsuperscript{180} A.B. 1090 § 766.63(1). The bill is not without safeguards, however, since the one granting the right of exclusive control to the other may at any time withdraw it unilaterally. Such provision may prevent overreaching. Thus, the Wisconsin provision by itself might cause a spouse not to seek such an agreement, for ulterior motives, because of the right of revocation. Id. § 766.63(3). In contrast, the Louisiana Code, La. Civ. Code Ann. art. 2348 (West Supp. 1980), specifically provides for irrevocability during the period stated in the agreement and may present such a temptation.
\item \textsuperscript{181} A.B. 1090 § 766.63(1)(a). This provision gives spouses necessary flexibility.
\item \textsuperscript{182} Id. § 766.53(1)(b). The grounds are as follows:
\begin{quote}
\ldots the consent of the other spouse cannot be obtained due to the physical incapacity, mental incompetence, imprisonment or absence of that spouse or when a spouse is substantially injured because of the other spouse's long-term financial irresponsibility. . . .
\end{quote}

This is analogous to a new and less well reasoned provision of the Civil Code of Louisiana. La. Civ. Ann. art. 2355 (West Supp. 1980) provides:

A spouse, in a summary proceeding, may be authorized by the court to act without the concurrence of the other spouse upon showing that such action is in the best interest of the family and that the other spouse arbitrarily refuses to concur or that concurrence may not be obtained due to the physical incapacity, mental incompetence, commitment, imprisonment, or absence of the other spouse.
\item \textsuperscript{183} A.B. 1090 § 766.53(2).
\item \textsuperscript{184} LRB-0113/6 KC:mm § 766.55.
\item \textsuperscript{186} A.B. 1090 § 766.932(1): “Whenever a spouse transfers marital partnership property
modeled after Louisiana. The change may have been necessary to ensure passage, but the original version was preferable from a public policy point of view.

The bill is especially effective where the title of record is in the name of one spouse only. It specifically indicates the existence of management rights and provides meaningful remedies to the spouse whose name does not appear of record, while protecting the interests of bona fide purchases.

As a corollary to the coequal management rights, the bill specifically provides that either spouse may bring an action affecting marital partnership property. This provision is entirely in keeping with the tenor of the proposed legislation. It is also wise from a practical point of view, since it empowers either spouse to act in a case of an emergency, where the participation of the other spouse may be difficult or impossible to obtain.

with donative intent to a third party without obtaining the consent of the other spouse and the transfer was not reasonable or moderate, the injured spouse may petition the court for recovery from the donee of the property or property directly traceable to the transferred marital partnership property.

187. LA. CIV. CODE ANN. art. 2349 (West Supp. 1980) provides: “The donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation.”

188. See, e.g., Bartke, Marital Sharing, supra note 1, at 1173-74; Bartke, Trusts, supra note 150, at 143-45 for elaboration.

189. A.B. 1090 § 766.51.

190. Id. “Record title to property by one spouse alone does not defeat the other’s rights to manage and control the property if it is marital partnership property.”

191. Id. § 766.93(1): “A spouse who is improperly denied access to marital partnership assets may bring an action which may include a summary proceeding to add that spouse’s name to the title, title transfer or any other appropriate remedy, or an equitable proceeding to order the other spouse to change the record title of property located outside this state by registering the property in both names.” The last clause is particularly significant since it would grant to Wisconsin courts equitable powers to compel registration in those cases where one spouse used marital partnership property to acquire realty in another state registered in his or her name only. See also, Bingaman, supra note 129, at 161-62.

192. A.B. 1090 § 766.51(4). The Wisconsin approach is opposite to that of Louisiana, which grants exclusive management powers to the spouse in whose name the chattel is registered: “A spouse has the exclusive right to manage, alienate, encumber, or lease moveables issued or registered in his name as provided by law.” LA. CIV. CODE ANN. art. 2351 (West Supp. 1980). Such an approach creates an open invitation to attempt to circumvent the statute. See Bartke, Louisiana Reform, supra note 5, at 332-33. But see Cross, Community Property: A Comparison of the Systems in Washington and Louisiana, 39 LA. L. REV. 479, 487 (1979).

193. A.B. 1090 § 766.57: “Any cause of action affecting the marital partnership property may be brought by either spouse.” See Cross, Washington Community, supra note 8, at 796, for a discussion of Washington law after the adoption of the equal management concept.

194. While in the case of an emergency it would be possible to petition the court under
Dealings with third parties involve the question of how liabilities incurred by one or the other spouse, or by both spouses jointly, are to be discharged. While all of the community property states recognize a distinction between community and separate debts, the difference is primarily in whether the distinction is recognized only between the spouses or whether it applies to third persons dealing with them as well.

When drafting legislation concerning the spouse's liabilities to third parties, there are essentially three models to choose from. The first, following Spanish law, provides that the husband's creditors can satisfy their claims from community property. As a result of the introduction of equal management schemes in several states, however, this rule now applies equally to both husbands and wives, so that as to third parties, the distinction between separate and community obligations does not exist. At the other end of the scale there is the Washington model, also adopted by Arizona, which applies the distinction not only between spouses but to the creditors as well. Finally, New Mexico, when modifying its statute, adopted an intermediate position, whereby the creditors of either spouse, if they cannot obtain satisfaction from the separate estate of the debtor spouse, may invoke marshalling rules and reach the debtor spouse's one-half interest in the common assets, thereby breaching the principle of indivisibility.

The original draft of A.B. 1090 essentially followed the New Mexico model. After publication and the receipt of comments, the approach was modified, and A.B. 1090 as introduced and
amended fundamentally adopts the Washington-Arizona approach. The statute has elaborate provisions defining separate and marital partnership obligations. As far as separate obligations are concerned, the bill distinguishes between those debts which were incurred prior to marriage or prior to the effective date of the bill, and those incurred after marriage or after the effective date of the bill. As to preexisting separate debts, the bill provides for utilization of some, but by no means all, of the marital partnership property for the purpose of satisfaction. There is, however, a corresponding contemporaneous division for the benefit of the non-debtor spouse. Such a scheme seems to be the best solution to spousal debts since it is designed to prevent the existence of the so-called marital bankruptcy.

(d) Rules upon Dissolution

The bill presents a fully integrated scheme which sets forth rules upon dissolution both by death and divorce. It recognizes the vested nature of the property interests of both spouses in the marital partnership property and generally follows the rules of commu-

204. A.B. 1090 § 766.71(4) & (5).
205. Id. § 766.71(2) (separate debts) and (3) (marital partnership debts). Debts are defined broadly in subsection (1). They include not only contractual debts but also tortious obligations (id. § 766.71(2)(g)) which, depending on their character, may be dischargeable either from separate or marital property assets.
206. Id. § 766.71(4) (pre-existing separate debts) and (5) (separate debts incurred after marriage or after effective date of bill).
207. Id. § 766.71(4) (the marital partnership property which is attributable to the earnings or efforts of the nondebtor spouse or to the income of the nondebtor spouse's separate property is not available for the satisfaction purpose).
208. Id. § 766.75 (when marital partnership property is levied upon for the satisfaction of separate debts the nondebtor spouse has one year within which to petition a court to have marital partnership property, equal in value to that seized, set aside to him or her as his or her separate property). Additional remedies would be provided by id. § 766.71(7) & (8).
209. The term marital bankruptcy was used extensively in the State of Washington to describe the situation of an indebted party marrying and thereby precluding creditors from satisfying their obligations. Such a state of affairs was terminated by the legislature in 1969 when it adopted WASH. REV. CODE ANN. § 26.16.200 (Supp. 1980), discussed in Note, 45 WASH. L. REV. 191 (1970). See also Cross, Washington Community, supra note 8, at 829-34.
210. A.B. 1090 §§ 54-71 would amend various provisions of the probate code to correspond to the changes in the property rights of the spouses.
211. Id. §§ 50 & 51. Section 50 would add provisions, to WIS. STAT. ANN. § 767.255, designed to facilitate compensating transfers from one spouse to the other in order to balance the books on marital partnership property. Section 51 would make it clear that upon divorce, quasi-marital partnership property is to be treated as marital partnership property.
nity property states. Each spouse is given full testamentary powers over his or her share of the common assets. A.B. 1090 also incorporates the Washington community property agreement, which might make it possible for the spouses in many instances to avoid probate.

For transitional reasons, and undoubtedly because of familiarity with the concept, the forced share in the separate property of the other spouse is retained. The quasi-marital partnership property is subject to the rules applicable to marital partnership property upon death. The survivor, however, must affirmatively elect to have it so treated. This gives full protection to the surviving spouse without interfering with estate planning schemes or causing additional tax liability.

(C) Recapitulation

The drafters of Wisconsin A.B. 1090 have examined various marital property models and have carefully selected the best available examples for use as the foundation of their bill. In many instances, the Wisconsin bill is superior to the models examined. This effort is particularly significant since it represents the first serious attempt to introduce the concept of sharing the economic fruits of marriage in one of the common law states. The bill focuses upon

212. Id. § 59, which would add § 861.01 to the Wisconsin statutes. This section would also make it clear that the decedent has full testamentary power over his or her quasi-marital partnership property unless the other spouse exercises the election granted by the bill.

213. Id. § 62, which would repeal and recreate § 861.05 of the statutes.


215. See Cross, Washington Community, supra note 8, at 798-802, for a discussion of the Washington community property agreement. See also Bartke, Marital Sharing, supra note 1, at 1141-42.

216. A.B. 1090 § 61, which would amend § 861.03 of the statutes. This forced share has to be affirmatively elected pursuant to the provisions of id. § 62, which would amend § 861.05 of the statutes.

217. Id. § 60, which would add new section 861.015 to the statutes. Such election must be made within six months of the date of death unless extended by an order of a court on the grounds stated in the bill under subsection (2)(c).

218. This may permit a surviving spouse and her or his legal advisors to fine tune the marital deduction after death, by deciding whether to make the election and thus increase the marital deduction, or waive the election and lower the survivor's gross estate. Sec. Tres. Regs. § 20.2056(e)(1)(a)(3) (1958).

219. The enactment in the 1940's of so-called community property statutes in several of the common law states represented tax gimmicks rather than considered attempts at improving the economic side of marriage. See, e.g., W. Dr Funiak & M. Vaughn, supra note 8, at 89-91.
actual problems rather than symptoms, and would provide married persons in the state with an integrated scheme governing their property rights during the marital relationship as well as upon termination of the relationship by death or divorce. It would formalize their rights and obligations not only as to each other but also with respect to third parties.

(D) Alternate Proposals

Some members of the Committee on Marital Property Reform of the Wisconsin bar recently have circulated an alternative proposal to A.B. 1090.\textsuperscript{220} This proposal clearly indicates the danger facing those who advocate reform.\textsuperscript{221} The proposal retains many of the findings of fact and statements of purpose contained in A.B. 1090, but with critical changes.\textsuperscript{222} The result is to combine a statement of purpose that supports equality with a substantive framework that fails to effect that equality. The proposal eliminates the concept of marriage as a partnership; it claims, instead, to recognize and protect the economic interests of the spouses without changing the economic conception of the marriage relationship.\textsuperscript{223} The concept of co-ownership and contemporaneous sharing of the eco-

\textsuperscript{220} The draft of the alternate proposal was sent to the authors by Prof. Weisberger. It is dated 8/29/80 and only identified as “Proposed State Bar Alternative to Marital Partnership Property Bill.” [Hereinafter cited as Bar Proposal with the appropriate section number]. It consists of proposed changes or additions to the Wisconsin statutes, using the numbering of the statutes themselves. Copies are on file in the Loyola University of Chicago Law Library.

\textsuperscript{221} The path of reform is always difficult and objections by those trying to preserve the status quo are generally couched in terms of the existing institutions being either ordained by supernatural powers or somehow created by impersonal forces of nature. See, e.g., Prager, Persistence, supra note 8, at 11-21, for this kind of attitude toward either retention or amendment of community property during the constitutional convention of 1849 and during the legislative hearings on the amendments in 1971-72. Similarly, for outraged objections to the final amendment of the Louisiana system from those who predict that the very foundations of organized society will crumble, see Pascal, Louisiana’s 1978 Matrimonial Regimes Legislation, 53 Tul. L. Rev. 105 (1978); Tete, A Critique of the Equal Management Act of 1978, 39 La. L. Rev. 491 (1979). See also concurring opinion of Mr. Justice Bradley in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140-42 (1873).

\textsuperscript{222} Bar Proposal, supra note 220 § 766.001.

\textsuperscript{223} Id. § 766.001(1). All references to property rights are eliminated and the recital that “marriage is a partnership of equals” is changed to read that “marriage is a community of equals.” The word “community” in this context is vague and less descriptive than “partnership.” Perhaps the drafters wish to insure that equality of property rights will not be a consequence of their pretension of reform.

Similarly in § 766.001(2) the references to property system and partnership system are eliminated and are substituted by the words “laws of this state” and “changes contained in this Chapter.”
nomic gains of the union is not recognized.

In regard to marital property and death of a spouse, the proposal makes no provision for the propertyless spouse who dies first. She or he still has no capacity to direct the disposal of a part of the accumulations of the marriage. The proposal also suggests minor amendments to the forced share provision, increasing the share from one-third to one-half of the net probate estate. This, however, still applies only to probate assets and has only partial safeguards in those situations where will substitutes are used to defeat the rights of the survivor.

One section of the proposal indicates that either spouse has an equal obligation to support the other in accordance with his or her ability to contribute money or services. There is no prescribed mechanism, however, for adjusting this obligation and the obligation stated in another provision that the parties are jointly and severally liable for any debts contracted or incurred by either for the reasonable and necessary expenses of either spouse or their minor children. There is also a quaint provision whereby the propertyless spouse may incur debts which must be paid by the other spouse, not to exceed $5,000. How this particular maximum figure was arrived at is not disclosed. There is no relationship be-

224. See text to notes 139-43 supra and the references to the outline prepared by Professor Weisberger.

225. Bar Proposal, supra note 220 § 861.05(1).

226. Id. “The elective share consists of one-half of the net probate estate, reduced by any property given outright to the spouse under the decedent’s will . . . .” See note 135 supra for elaboration.

227. Id. § 766.13(2): “Husband and wife owe to each other mutual support. Each spouse has an equal obligation to support the other spouse in accordance with his or her ability to contribute money or services which are necessary for the adequate support of the other spouse. Each parent spouse has an equal obligation to support his or her minor children.”

228. Id. § 766.51(2). Besides the general provision, eight subsections ((a) through (h)) give specific examples of such necessaries.

229. Id. § 766.51(3)(a): “In addition to sub. (2), and regardless of § 422.305, if a creditor has filed and mailed a credit statement provided in para. (c) and (d), a spouse shall be jointly and severally liable for the payment of debts contracted or incurred by the other spouse in consumer transactions as defined in § 421.301(13), whether or not for necessaries, provided in this section. The aggregate liability of the non-contracting spouse under this subsection shall not exceed $5,000 . . . .”

This proposal is somewhat reminiscent of, although less generous than, that made several years ago by Professor Pascal in his attempt to forestall the reforms of the community property system of Louisiana. His proposal was that if one spouse had less than perhaps 20 percent of the combined incomes of both, she or he should be entitled to demand enough from the other to raise this total to that particular percentage. Pascal, Updating Louisiana’s Community of Gains, 49 Tul. L. Rev. 555, 570 (1975); for a criticism of this proposal see Bartke, Community Reform, supra note 5, at 235 n.126.
tween this figure and the economic conditions of the spouses. Furthermore, this figure is presumably cumulative, and once exhausted during the marriage, the provision becomes inoperative.

There is also a provision granting to spouses during marriage the right to a division of assets similar to the divorce provisions. Why such a potentially disruptive action is superior to contemporaneous sharing is not explained. It may be based on an assumption that it will either not be enacted, or else it will be seldom used. Finally, the section provides that property once divided in this fashion shall not be subject to another division under the section. There is, however, no cross-reference of this section to the forced share provisions, so that the less affluent spouse could engineer a division shortly before the death of the other spouse, and then claim a forced share also.

The whole proposal is clearly ill-judged and a blatant attempt to try to avoid coming to grips with the economic side of marriage. It is clearly intended to confuse the issues and blunt the attempts of those who are trying to rationalize the law of Wisconsin and bring a measure of justice to the marriage relationship.

VI. Conclusion

The preambles to the Wisconsin bill and to the Ontario statute are not very different in their recited legislative intent. The Wisconsin bill, however, goes on to achieve its stated intent while the
Ontario statute does not. The rhetoric of partnership in the Ontario statute is empty and almost dishonest when the substantive content of the statute is analyzed. The act applies only to dissolution by divorce and has no effect whatsoever during the existence of the marriage or upon death of the spouse. Furthermore, even in the context of divorce it does not approximate a partnership of equals.

The Illinois approach, following the Uniform Act, is considerably better than the Ontario statute but is still preoccupied with symptoms rather than causes. Since it applies to divorce only, it does nothing for the stay-at-home spouse during the continuation of the marriage. There is no integration with statutes applicable upon death, and under certain circumstances the stay-at-home spouse may be treated more generously upon divorce than as a widow or widower. Finally, the statutory provision for the survivor can be defeated by lifetime transfers which do not deprive the transferor spouse of the economic benefits and use of the property. Because of all of these shortcomings the Illinois approach, which is similar to that of many other states, is only a temporary rather than a long range solution.

The Wisconsin bill follows its well-intentioned preamble with a carefully thought out, well-drafted and comprehensive statutory scheme that addresses the underlying causes of the present inequities. It discards the nonsystem of the Married Women’s Property Acts and instead creates a true system of community property that is superior to any of the eight models now in existence. It has the necessary flexibility to permit the spouses to agree upon and divide their tasks and roles in and outside the home without the fear of a denial of property rights because of the choices made. The present law does not do this.

Wisconsin A.B. 1090 hopefully will be enacted into law in the forthcoming session of the legislature. It represents an excellent model for other common law states. Some of the community property jurisdictions also may profitably peruse its provisions and improve their own statutory schemes. The commissioners on uniform state laws have appointed a committee of distinguished legal scholars and practitioners and entrusted them with the task of drafting a uniform or model marital property regime statute. In the Wis-

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235. See Bartke, Marital Sharing, supra note 1, at 1132-34; Bartke, Marital Property, supra note 1, at 80-81, for elaboration.

236. The term regime in this context is borrowed from the civil law and denotes the
consin bill the members of the committee have a model worthy of emulation which they would be wise to consider in their deliberations.

A good definition is contained in the Louisiana Code, LA. CIV. CODE ANN. art. 2325 (West Supp. 1980): "A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons."