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DEFINING “PROPERTY”: A DEBATE DIVIDING MORE THAN MARITAL ASSETS

JULIE A. JUHASZ

Divorce law reforms are necessary to prevent unfair and arbitrary outcomes. Child support awards and property divisions both illustrate the sometimes capricious nature of divorce awards. A clearer definition of marital property is necessary to ensure justice and consistency.

Previous to no-fault divorce law reforms, marital misconduct determined child custody, property division, and child support payments.¹ Eliminating fault has largely been hailed as a step toward fairer, more objective judgments; its absence, however, and subsequent lack of foundational principles has led to seemingly arbitrary outcomes in other ways. Two divorce issues demonstrate the inconsistencies created by the no-fault system: child support awards and property division, especially human capital division.

Recent reforms have curbed inconsistency in the area of child support awards, including judicial guidelines for determining award amounts. These guidelines establish objective factors judges should consider in determining support amounts. Establishing guidelines in defining and dividing marital property similar to those provided for child support would alleviate the uncertainties and injustices present in current application of human capital division.

Eliminating Fault

No-fault divorce reforms sought to eliminate the subjective judgments that resulted under the fault system.² Fault considerations may not have provided the ideal impartial foundation for divorce decisions, but they did provide a foundation nonetheless. Jana Singer, though hardly a fault enthusiast, admits that the field of family law has been

searching for justifying principles since its rejection of marital fault.³ To increase the objectivity of decisions, consistency and clarity need to be reestablished in divorce law. The controversial issue of human capital division emphasizes this need.

The question of whether education, degrees, job training, or professional licenses can be defined and divided as marital property has forced many scholars to reflect upon the legal meaning of property in light of a changing world economy.⁴ The current world economy generally emphasizes knowledge, and values analytical and managerial skills above unskilled physical labor. Thus, the human capital acquired during marriage may be far more valuable than assets such as cars or savings accounts, making its inclusion or exclusion of major significance.⁵ Yet most lawmakers and courtrooms have been reluctant to define human capital as divisible property. Defining the term *marital property* is a debate that has divided scholars and legal experts as often as it has divided assets. In the search for consistency and clarity, an analysis of marital property and comparison to the child support reforms may reveal solutions to the ongoing human capital debate.

Child Support Reforms

As mentioned, no-fault divorce theory yielded a system lacking consistent principles that dictate and justify divorce decisions, particularly in child support awards. Child support amounts were arbitrarily determined previous to the 1984 Child Support Enforcement Amendments. These statutes required states to specify guidelines for support awards.⁶ This new uniformity was part of a number of measures intended to produce more consistent procedure, amounts and enforcement of child support payments. These reform measures were driven by several studies that unveiled the devastating effects such capricious award determinations were having on children. One Denver study reported awards ranging from six percent to twenty-six percent of the noncustodial parent's income.⁷ This wide variation did not seem to correspond with any objective variables such as number of children, income level of the custodial parent, or the supporting parent's income in absolute terms.⁸ The study also revealed that a shocking sixty-six percent of the fathers in the study made higher monthly car loan payments than child support payments.⁹

Child support is important because women and children are the parties most likely to be economically devastated by divorce.¹⁰ Child poverty can be devastating in others ways, such as limited educational opportunities, higher rates of delinquency, increased teen pregnancy, and less access to healthcare.¹¹ Child poverty has grown over the last several decades, and many experts concur that "the case-by-case method for setting child support awards has contributed to this decline in children's standards of living."¹²

In 1984, Congress intervened on behalf of children to remedy the lack of statutory direction that arguably exacerbated the problems of child poverty. The Child Support Enforcement Amendments, effective October 1, 1987, set forth that

each state . . . must establish guidelines for child support award amounts within the state . . . by law or by judicial or administrative action, and shall be reviewed . . . to ensure that their application results in the determination of appropriate child support award amounts.¹³

The Denver study concluded that the greatest determining variables in award amounts were seasonal variations, the representation of the respondent, and the attitude of the district attorney.¹⁴ These subjective factors seem irrelevant to the best interest of the child or the family. The Child Support Enforcement Amendments required systematic methods to be developed, applied, and evaluated based upon objective standards without dictating to the states exactly what the methods should be. The tide is turning against growing child poverty and noncompliance of child support orders. Other measures aimed to reform child support and enforce compliance have been implemented. Many of these policies have been shown to be effective.¹⁵ Uniformity in child support awards has been successful in improving court efficiency and enhancing the satisfaction for the parties involved.¹⁶ Such judicial guidance could be equally helpful in establishing uniformity in human capital division and generally eliminating inconsistent and arbitrary outcomes.

Dividing Property—Arbitrary Decisions

Similar arbitrary application of no-fault divorce law persists in human capital division as marital property. Courts have implemented

three different methods for dividing marital property: strict title theory, equitable distribution, and community property theory.¹⁷ Only Mississippi, South Carolina, and West Virginia continue to use a strict title division.¹⁸ The other forty-seven states' laws have evolved to consider all property acquired during the marriage to be marital property, regardless of the name on the title. Yet even this more expansive definition of marital property does not explicitly allow for human capital division. The result is a great deal of legal chaos.

Some courts have allowed for human capital to be attributed as an investment of the marriage, rather than the sole efforts of one spouse. Other cases have refused to recognize human capital as shared property. In the 1983 case of *Woodworth v. Woodworth*, one spouse's juris doctorate was determined to be part of the couple's marital assets.¹⁹ One year later, in a case involving a woman seeking similar compensation for her investments in her husband's Master's degree, the judge denied that the degree was divisible property.²⁰ The justification for dividing the law degree apparently seemed unjust to the judge who denied the latter woman compensation, even though she may have had reasonable expectation to be granted compensation based upon *Woodworth v. Woodworth*. This article does not seek to argue that one decision was right and the other wrong, but rather that each case seems unfair in light of the other. Human capital division is an area of divorce settlement that needs more uniformity and clarity.

At least three solutions would provide greater uniformity. The first is to maintain a traditional definition of property, considering human capital as an individual rather than a marital asset. This seems to remain the general preference of courts. Dividing human capital requires rough estimations of the value of the degree and difficult estimations of the supporting spouses' investments, including financial contributions, childcare responsibilities, and any foregone professional opportunities. Most judges have avoided this complicated type of estimation and division. A traditional definition of marital property does not allow for assets that are inseparable from the individual.²¹ Human capital does not have all the traditional properties of assets recognized historically by the law. It cannot be inherited, sold, or in any other way transferred from one person to another. However, while human capital is not included in the current laws, neither is it explicitly excluded.²² Maintaining

a traditional view of marital property would provide a solution to disparate rulings only if human capital were addressed directly and were clearly defined as nondivisible property.

A second viable solution would be to modify the law to clearly include human capital as property and specify procedures for dividing it. Many assert that traditional notions of property are inappropriate in today's economy.²³ The economy has undergone a significant change and "family law has not successfully acclimated itself to this change, and as a result, substantial injustices are being created in property settlements."²⁴ Klebanoff observed that the courts are more likely to classify the enhanced earning power of a spouse as marital property than the degree itself.²⁵ In both *Woodworth v. Woodworth* and *In re Marriage of Hortsman*, the courts accepted division of future earnings.²⁶ Notably, the amounts were calculated differently in each case.²⁷ Thus, this definition permitted the consideration of spousal contributions while leaving the details of division to the discretion of the courts. Clarifying the definition of marital property to include human capital appears to be a more flexible alternative than excluding human capital entirely. Even so, the current law requires amending to provide courts with justification for dividing human capital fairly.

Jana Singer provides a third possibility she calls "income sharing."²⁸ This alternative would pool both spouses' incomes for some time following divorce. If expanded upon and accompanied with specific guidelines for implementation, this may also eliminate the current arbitrary outcomes in divorce decisions. Any of these three solutions would create a uniformity which would seem more equitable than the disarray observable in comparing cases such as *Woodworth v. Woodworth* with *Grosskopf v. Grosskopf*.

Conclusion

In the absence of fault from recent divorce proceedings, there is an observable lack of theoretical foundation. This has led to a greater need for judicial guidance in certain areas of divorce decisions. Establishing uniform methods for determining child support awards has focused the decision on objective and relevant considerations such as the child's needs and the parent's ability to pay. Similarly, greater statutory direction in defining marital property would establish greater consistency

and fairness for parties disputing human capital division. Contemporary scholars have expanded the term “property” in light of a changing world economy that values education and human capital. The law may accept or reject this new meaning, but certainly the change has necessitated clarification.

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Notes

¹ *Uniform Marriage and Divorce Act. Uniform Laws Annotated 9A*, 1998.

² Jana B. Singer, “Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit,” *Family Law Quarterly* 31 (spring 1997): 120.

³ Singer, “Husbands, Wives, and Human Capital,” 121.

⁴ Allen M. Parkman, “The Recognition of Human Capital as Property in Divorce Settlements,” *Arkansas Law Review* 40 (winter 1987): 439.

⁵ Parkman, “The Recognition of Human Capital,” 466.

⁶ *Child Support Enforcement Amendments. U. S. Code*, vol. 42, sec. 667 (1984).

⁷ Lucy M. Yee, “What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court,” *Denver Law Journal* 57 (spring 1979): 21.

⁸ Yee, “What Really Happens in Child Support Cases,” 37.

⁹ Yee, “What Really Happens in Child Support Cases,” 37.

¹⁰ Judith Mitchell Billings, “From Guesswork to Guidelines: The Adoption of Uniform Child Support Guidelines in Utah,” *Utah Law Review* (winter 1989): 863.

¹¹ Ross A. Thompson and Jennifer M. Wyatt, “Values, Policy, and Research on Divorce: Seeking Fairness for Children,” in *The Postdivorce Family*, edited by Ross A. Thompson and Paul R. Amato (Thousand Oaks, CA: Sage Publications, 1999), 196.

¹² Billings, “From Guesswork to Guidelines,” 865.

¹³ *Child Support Enforcement Amendments. U.S. Code*, vol. 42, sec. 667 (1984).

¹⁴ Yee, “What Really Happens in Child Support Cases,” 37–38.

¹⁵ Daniel R. Meyer, “Compliance with Child Support Orders in Paternity and Divorce Cases,” in *The Postdivorce Family*, edited by Ross A. Thompson and Paul R. Amato (Thousand Oaks, CA: Sage Publications, 1999), 131.

¹⁶ Billings, “From Guesswork to Guidelines,” 871–72.

¹⁷ Susan Klebanoff, “To Love and Obey ’Til Graduation Day: The Professional Degree in Light of the Uniform Marital Property Act,” *American University Law Review* 34 (spring 1985): 841.

¹⁸Klebanoff, "To Love and Obey," 842fn.

¹⁹Allan Ashman, "Law Degree Is Valuable: \$20,000 Property in Divorce," *American Bar Association Journal* 69 (October 1983): 155.

²⁰*Grosskopf v. Grosskopf*, 677 P. 2d. 814 (Wyoming 1984), 822.

²¹Singer, "Husbands, Wives, and Human Capital," 131.

²²*Uniform Marriage and Divorce Act: Uniform Laws Annotated 9A*, 1998.

²³Parkman, "The Recognition of Human Capital," 439.

²⁴Parkman, "The Recognition of Human Capital," 440.

²⁵Klebanoff, "To Love and Obey," 851.

²⁶Klebanoff, "To Love and Obey," 852.

²⁷Klebanoff, "To Love and Obey," 853.

²⁸Singer, "Husbands, Wives, and Human Capital," 131.