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No-fault divorce does not properly compensate women for their efforts to raise children. Only by incorporating human capital in the divorce settlement can women be properly compensated for their investments.

In recent years courts have used the clean break philosophy to settle divorce, attempting to equally divide property accumulated during marriage. This approach allows both husbands and wives to walk away from divorce relatively free from long-term financial interdependence. However, many legal scholars claim that a clean financial break undercompensates women relative to men. This leads to the argument that a clean financial break is incompatible with equitable divorce settlements, causing some legal scholars to reject the clean financial break as the optimal method of adjudicating divorce. In an attempt to both maintain the clean financial break and provide more equitable settlements, some legal scholars suggest expanding the scope of property by viewing human capital acquired during marriage as an asset to be split between spouses upon divorce. The inclusion of human capital as property creates greater equality in divorce settlements while maintaining the benefits of a clean financial break.

The notion of a clean financial break first began when fault-based divorce was replaced by no-fault divorce. Prior to the 1970s, divorce was granted "only upon proof that one of the parties was at fault for having breached spousal duties."[1] Through this system, alimony was awarded more or less to the party that was at fault. Because of this system, fault-based settlements usually created a web of financial entanglements, prohibiting the couple from doing exactly what divorce intended them to do—break all ties emotionally, physically, and financially. Milton C. Regan Jr., in his article "Spouses and Strangers: Divorce Obligations and Property Rhetoric," concludes that fault-based divorce "formally treated ex-spouses as ongoing family members whose claims against one another continued to reflect the fact of their marriage."[2] In 1970, California initialized no-fault divorce, completely eliminating fault as a consideration for determining alimony. According to Jana B. Singer, "facilitating a clean financial break replaced punishing a guilty spouse (or protecting an innocent one) as the overriding objective of divorce-related financial adjustments."[3] This change rid couples of life-long financial connections and enabled them to move on with their lives.[4] The transition from fault-based divorce to no-fault divorce established the clean financial break in divorce settlements, necessitating the courts to reexamine the definition of marital property.

While administering a clean financial break, courts must separate each spouse's personal property from jointly owned marital property. Once courts determine what constitutes marital property (usually defined as property acquired during marriage), they simply divide it between both spouses equally.[5] However, even this simple definition does not prevent disputes between spouses about whether certain assets are personal or marital property. Legal scholars have suggested that the boundaries of marital property become clearer when marriage is viewed in economic terms, with the market being the motivating force behind all marital interaction. Joan M. Krauskopf, a law professor at the University of Missouri at Columbia, writes:

> In economic analysis, the family is a decision making unit that operates to maximize the unit's utility in consumption and also in the allocation of human time and production activities. This view of the family is an application of the traditional economic theory of the firm.[6]

Krauskopf continues by suggesting that the traditional family unit is extremely efficient in allocating the family's resources—both time and money—in order to maximize returns. Although economic principles do not completely explain marital behavior, viewing marriage in economic terms can be helpful in deciphering marital property boundaries.

Currently, courts do not view educational degrees acquired by either spouse during marriage as marital property. Because of this, a clean financial break will undercompensate domestic spouses. The following scenario illustrates this inequity. Suppose a young couple, Tom and Sue, get married while both are still in college. Because of their limited budget, Sue quits school in order to support the completion of Tom's legal education. She financially provides for him during these years, driven by the hope of someday reaping the financial rewards of her husband's increased future income. However, shortly after Tom graduates from law school they divorce. At this point, Tom's future earning potential far exceeds his wife's. In addition, the couple's traditional property (cars, real estate, housing, and so forth) is extremely limited. If a clean financial break were to occur, dividing only their traditional property, Sue would be undercompensated relative to Tom. This simple example illustrates that, although a clean financial break is ideal, divorce settlements need adjustment in order to accommodate nontraditional forms of property. Krauskopf and other scholars have presented the human capital theory as the solution.

Human capital theory explains the wages of laborers as a function of the training they receive.[7] The origin of this theory dates back to the early 1960s when some economists realized "that a substantial growth in income in the United States remains [unexplained] after the growth in physical capital and labor has been accounted for."[8] In an effort to explain this rise in income, Gary S. Becker, one of the pioneering scholars of the human capital theory, pointed to the investments human beings make in themselves by receiving "schooling, on-the-job training, medical care," and so forth.[9] Becker called these types of investments "human capital investments." By including the growth in human capital with the growth in physical capital and labor, Becker successfully captured more of the rise in income experienced in the United States. As a result of this success, human capital theory has become very influential in explaining labor wages.

Additionally, some economists claim that human capital theory will continue to explain more and more of labor wages as our economy evolves. For example, Allen M. Parkman, Professor of Management at the University of New Mexico, claims that the primary sources of income "in a manufacturing and agricultural [economy]" are "physical assets, such as houses and land, and financial assets, such as stocks and bonds."[10] Whereas in an economy dominated by a large service sector, "the primary income producing assets become the individuals themselves."[11] Thus, as our economy continues to become more and more service oriented, we should expect to see a decrease of investments in traditional types of capital and an increase of investments in human capital. This will make it even more important for the courts to recognize human capital as marital property.

Due to the work of human capital theorists, economists have broadened their definition of property to include human capital. For example, economists define investment as "anything that accumulates capital" and capital as "a stock of assets that yields a stream of income or utility over time."[12] If these definitions are used as the determinants of capital (property), then no distinction can be made between a person's investments in schooling and his or her investments in physical capital, such as real estate. The inability to draw an economic distinction between these two types of investments leads to the argument that courts should treat both types of investments equally when adjudicating divorces. Thus, in order for clean break settlements to be just, courts must broaden the legal definition of property to include human capital.[13] The example of Tom and Sue illustrates this point. A clean break settlement that does not grant Sue part-ownership of the human capital her husband acquired during their marriage will greatly undercompensate her for her investments in the marriage. However, courts have almost uniformly rejected the inclusion of human capital as marital property.

Regan suggests four main reasons why courts have not viewed human capital as marital property. First, the most common justification used by the courts is that, in their eyes, a degree such as a law or medical degree does not fall under the traditional definition of property because "it has no exchange value or any objective value on an open market."[14] For instance, it is impossible to buy, sell, or trade an educational degree for money or anything else. Regan explains it well when he states that a degree "cannot be assigned, sold, transferred, conveyed, or pledged."[15]

A classic example of this understanding is found in *Graham v. Graham*.[16] In this 1978 case, the Colorado Supreme Court held that the husband's M.B.A. was not considered property because it did not have any open market exchange value.[17] Here the court correctly identifies the impossibility of separating human capital assets from their owners. However, even if human capital "cannot be assigned, sold, transferred, conveyed, or pledged,"[18] it can be rented. Fundamental to human capital theory is the concept that individuals who embody a set of skills can rent those skills to employers. If individuals could not rent their skills, there would be no justification for employers to pay higher wages to degree holders than to non-degree holders. In *Graham v. Graham*, the court argued that if something is not marketable, then it is not property. However, by failing to recognize that human capital can be rented to employers, the court mistakenly identifies human capital as not marketable. Thus, in this argument, the court fails to demonstrate that human capital is not property.

Secondly, Regan states that the courts are hesitant to identify human capital as property in divorce settlements because the "valuation of future earning capacity is highly speculative."[19] Although economists are fairly successful at valuing human capital assets across large samples of people, they are unable to pinpoint the exact future income a specific individual's human capital will produce. This is because future income is contingent upon many variables, such as luck or enthusiasm, which tend to balance out in large samples of people but greatly affect the income of specific individuals. Courts have argued that the speculation required to divide human capital assets provides justification for not dividing the assets at all. However, the courts have been willing to speculate the value of future incomes in tort cases for years.[20] Therefore, if courts wish to be consistent, they must not use this reason for not including human capital as marital property.

Part of the reason courts hesitate to speculate on future income is that, in a clean financial break, property settlements at divorce are not modifiable.[21] This inability to modify divorce settlements also leads to a third reason courts hesitate to classify human capital as property. Courts fear that ex-spouses, especially professionals, could be trapped in their careers due to heavy financial obligations, "and thus [be] severely restricted in the liberty to choose a more satisfying way of life."[22] Referring again to Tom and Sue, suppose Tom was required to provide a large payment to Sue in compensation for her investments in his education. After being divorced for a year, Tom decides that he is unhappy as a lawyer and wishes to be a high school teacher. Because the earning capacity of a lawyer far exceeds the earning capacity of a teacher, Tom decides he is unable to both make the career change and fulfill his financial obligation toward his ex-wife. Some may argue that incorporating human capital as property threatens the freedom of people like Tom to choose their careers. However, trying to protect Tom's freedom to change careers jeopardizes Sue's investments. If courts agree that Sue has invested in Tom's human capital, they must agree that Tom has borrowed from Sue. Thus, Tom should be free to choose whatever career he wishes, so long as he reimburses Sue for her investment. Because Sue invested in Tom's human capital during the marriage—when the marital contract was in force—the need to protect Sue's prior investment outweighs the loss of Tom's ability to change occupations. Consequently, courts should not use this justification in attempting to separate human capital from marital property.

Lastly, some judges purport that even if human capital is property, it should not be considered marital property.[23] In the 1984 case *Sullivan v. Sullivan*,[24] Judge Kaufman stated that the future value of an educational degree "is entirely dependent upon the future efforts of the educated spouse."[25] Here, Judge Kaufman seems to imply that owning capital necessitates control over how that capital is used. However, the purchasing of stocks presents a case where individuals own capital but have no control over how that capital is deployed.[26] For example, an ordinary purchaser of Microsoft stock does not gain control over how that capital is used. Nevertheless, while Microsoft maintains the right to deploy their capital as they choose, individual stock purchasers are entitled to the returns on their investment. Thus, spouses' lack of control over their partners' human capital does not exclude them from owning the returns on their investments. Because courts assert that human capital is separate property, many women are not being justly compensated for their investments.

The clean financial break has advantages over other divorce philosophies because it bestows ex-spouses freedom from long-term financial entanglements. If a clean financial break is to provide equitable divorce settlements, human capital acquired during marriage must be viewed as marital property.[27] This inclusion promises to reward domestic spouses more justly for their contributions to the marriage. Defining human capital as property promises fairness in divorce settlements much more than the current no-fault system.

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Notes

[1]Milton C. Regan, Jr., "Spouses and Strangers: Divorce Obligations and Property Rhetoric," *Georgetown Law Journal* 82 (1994): 2310.

[2]Regan, "Spouses and Strangers," 2312.

[3]Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31(spring 1997): 120.

[4]Regan, "Spouses and Strangers," 2314.

[5]Allen M. Parkman, "The Recognition of Human Capital as Property in Divorce Settlements," *Arkansas Law Review* 40 (1987): 446

[6]Joan M. Krauskopf, "Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital," *University of Kansas Law Review* 28 (1980): 386.

[7]Jacob Mincer, "The Distribution of Labor Incomes: A Survey, with Special Reference to the Human Capital Approach," *Journal of Economic Literature* 8 (1970): 1.

[8]Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*, vol. 15 (New York: National Bureau of Economic Research, 1964).

[9]Gary S. Becker, *Human Capital*, 1.

[10]Parkman, "Recognition of Human Capital as Property," 439–40. Allen M. Parkman received his A.B. in 1962 from Brown University, his Ph.D. in economics in 1973 from the University of California at Los Angeles, and his J.D. in 1979 from the University of New Mexico.

[11]Parkman, "Recognition of Human Capital as Property," 440.

[12]J. Ronnie Davis and John F. Morrall III, *Evaluating Educational Investment*, (Washington, D.C.: Lexington Books,1974), 1.

[13]Achieving an equitable settlement is not the only reason courts should treat human capital as property. This conclusion can also be reached through an efficiency argument. In order to maintain a spouse's incentive to invest in the human capital of

his or her partner, governments must protect the spouse's right to the returns of the investment. Without this incentive, families will underinvest in human capital. Thus, families will lower the overall well-being of society by inefficiently investing their resources.

[14]Regan, "Spouses and Strangers," 2362.

[15]Regan, "Spouses and Strangers," 2362.

[16]*Graham v. Graham*, 574 P.2d 75 (1978).

[17]*Graham v. Graham*, 75.

[18]Regan, "Spouses and Strangers," 2362.

[19]Regan, "Spouses and Strangers," 2362. Here Regan references the Colorado Supreme Court's reaffirmation of Graham as cited in *In re Marriage of Olar*, 747 P.2d 676, 679–80.

[20]Regan, "Spouses and Strangers," 2363.

[21]Regan, "Spouses and Strangers," 2363.

[22]Regan, "Spouses and Strangers," 2363.

[23]Regan, "Spouses and Strangers," 2364.

[24]*Sullivan v. Sullivan*, 184 Cal. Rptr. 796–825 (1984).

[25]*Sullivan v. Sullivan*, 802.

[26]This assumes that there is another stockholder who owns at least fifty-one percent of the company's shares.

[27]Some may claim that the inclusion of human capital in divorce settlements does not go far enough to ensure that ex-spouses have equal standards of living after divorce. These critics might point to gender biases, such as the gender–wage differential, as a reason why gaps will likely occur in the ex-spouses' standards of living. Moreover, these people may call upon courts to offset this injustice while dividing property among divorcing spouses. However, expecting divorce settlements to counteract gender biases unduly places the responsibility of solving these injustices upon divorce officiators. Divorce courts should be expected to divide marital property only in a way that fairly compensates both spouses for their contributions to the marriage.