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ALIMONY REFORM

H.L. ROGERS

While Singer trenchantly attacks the faults in no-fault divorce, the alimony system she proposes falls short. Alimony is indeed necessary but must be based on something other than the traditional economic rationale, which disenfranchises women and children.

In the article “Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit,” Jana Singer discusses the problems in the evolving no-fault divorce laws and argues the need for alimony. However, both no-fault divorce and the alimony system she proposes (based on an economic rationale) are inadequate. First, I intend to show the problems with no-fault divorce as chronicled by Singer and others. Second, I will discuss how Margaret Brinig and other feminist scholars have found that the economic justification Singer proposes for alimony, partly in this article and more extensively in the article “Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony,” is not capable of equitably awarding alimony to the noneducated or nonprofessional spouse.

Economic justification is not capable of equity in all cases because it falsely assumes that family specialization is always desirable. Because economic rationale often disenfranchises women and children, many of those adversely affected do not have marketable commodities. As a result, they often receive less through alimony than they should. Not only does this demonstrate why the notion of a clean financial break is impossible, but it also provides evidence to show that alimony should

not be seen as a hurdle to overcome in divorce, but as an equitable means of compensating for capital lost through divorce.

No-Fault Divorce

No-fault divorce has two main purposes. The first is to exclude fault from divorce proceedings, while the second is to enable a financial and emotional clean break between the couple. Although the first purpose has made divorce proceedings simpler and cleaner, the second has been shown to be nearly or completely impossible.

When no-fault divorce took effect in California in 1970, it implied the dissolution of alimony payments. However, as both Singer and Herma Hill Kay have discussed, the primary reason for moving to no-fault divorce was to dissolve the prerequisite of fault in a divorce and to enable a clean break in the marriage.¹ Finding fault in a marriage could be used for two purposes only: to show a no-fault basis for divorce by establishing “irreconcilable differences” or to determine the custody of a child produced from the marriage.² The impact of no-fault divorce on alimony came from its second purpose—to enable a clean break financially and emotionally. Because of the idea of “the clean financial break,” “divorce proceedings were to sever not only the couple’s legal union, but their economic relationship as well.”³

Eliminating fault from divorce has helped create divorce procedures that limit adversarial procedure, thus diminishing the emotional damages that stem from sometimes lengthy and harsh litigation. The clean break theory, however, has proved impractical in marriages that include children.

Clean Break

Margaret Brinig has shown that the goal of achieving a clean break through divorce in a marriage with children is impossible:

Most of the time divorce involves minor children. Whether or not we characterize them as unwilling victims of their parents’ decision to separate, they are affected. These effects may be temporary, as with the emotional or relocation costs of divorce, the probable lowered standard of living, or the immediate loss of a continued parental contact. Children also lose over the very long-term according to a

number of studies. Thus arguably there can be no clean break when children are involved.⁴

Children need a relationship of some type even after the marriage is over. One spouse cannot simply disappear without adverse effects. And usually neither spouse wants to disappear.

Because a clean break is not possible in all circumstances, the dissolution of alimony is also not possible in all circumstances. In cases where there are children, contact between ex-spouses must continue, and alimony is no longer a hurdle. Since the idea of a clean financial break, alimony was seen as a hurdle to overcome. If a spouse had to continue to pay alimony, the break could not be achieved. Thus, “alimony, if awarded at all, was to be awarded sparingly, and only for the short-term.”⁵

Alimony

In an earlier article, Singer expands on the rationale that dissolved alimony:

The advent of no-fault divorce and the demise of the state-imposed marriage contract significantly undermined these traditional rationales for alimony. Because divorce no longer required a showing of fault or breach, a damage remedy seemed inappropriate. Similarly, because marital obligations were no longer officially gender-based, an alimony remedy premised on the husband’s support obligation and available only to the wife seemed both anachronistic and discriminatory.⁶

The reasoning behind no-fault divorce led to the dissolution of alimony. As shown above, however, such reasoning was faulty in marriages with children. But alimony also has other intrinsic problems that Singer discusses. For instance, traditional husband-to-wife alimony seems discriminatory in an era when both male and female are shown to be equally capable in the work force. Therefore, alimony is necessary in certain divorces, but any alimony stipulated must be reformed.

Under current theory, and according to Singer’s argument, the alimony that would be enforced now is based on an economic rationale. In her view, economic rationale for alimony assumes that couples will attempt to maximize their commodities in their marriage relationship.

These commodities include not only traditional aspects such as income and material wealth, but also things such as home-cooked meals, children, and family time. Economic rationale also theorizes that couples will specialize in order to gain more commodities more efficiently. Marital specialization theory holds that the spouse that is more productive in a certain sector will specialize in that sector. For example, if the female spouse is better suited to raise and care for children, she will stay home and care for them while the male spouse enters the work force.⁷ Thus, following economic rationale, alimony would be based on the commodities lost by the dissolution of the marriage and its specialization.

Economic Rationale

Two main problems exist with approaching divorce using an economic rationale. First, this approach incorrectly assumes that marital specialization is the most efficient means of a couple increasing their “commodities,” meaning the overall well-being of the couple. Second, the rationale often disenfranchises women and children because it is difficult to gauge a commodity that has no value in an economic market such as material compensation for time spent raising children instead of earning a degree and entering the work force.

Specialization is not always the most efficient way to sustain the well-being of the marriage and family. As Brinig points out, specialization is only most efficient in a marriage “that ends in due course.”⁸ If the marriage ends prematurely in divorce or death, the specialized spouse that remains with the children must learn to fill roles that he or she knows little or nothing about. For example, if the male was the sole economic provider and he is left to care for the children, he will have to learn quickly about household production and child-rearing.

Conversely, if the female that raised the children and carried out the household production is left without the sole economic provider, she will have to quickly enter a work force for which she is not prepared. In these circumstances, it would be far more efficient for the male to participate in some of the child-rearing and household production and for the female to participate moderately in the work force. Thus, economic rationale is not the best model for alimony decisions, because if the roles are shared, this model is not suited to discern where commodities were earned in the more complex setup. Also, economic

rational theory fails to consider the psychological effects of a divorce on a spouse in a relationship where the roles are completely specialized.

Another problem with economic rationale is that it often disenfranchises women and children. Joan C. Williams notes that this rationale “not only impoverishes women, but also results in systematic disinvestment in children.”⁹ Although many would like to think differently, gender roles still influence economy. As Singer states, “despite recent attempts by some economic theorists to delink marital specialization from gender roles, the two remain closely, perhaps inextricably, connected.”¹⁰ When specialization occurs in a marriage, the male almost always goes into the work force while the female stays at home to raise the children and maintain the household. Because of the dominance of these gender roles, women and children almost never have marketable commodities. Thus, alimony is still almost always paid from male to female. And while it is arguably easier to calculate how much a male in the work force is worth and will be worth, it is difficult to calculate how much the female has earned and will earn in the household. This makes it difficult to determine how much the male owes the female.

Because of these two problems, the economic rationale that Singer proposes for deciding alimony needs reform. Alimony is necessary, especially because gender roles often leave the female spouse with few or no marketable skills. As Joan Krauskopf shows,

Every court reacted sympathetically to the inequity of one spouse receiving no compensation for sacrifice of standard of living and personal funds in order to enable the other spouse to obtain the personal benefit of advanced education, which significantly increased earning capacity. A fundamental sense of fairness was repelled by the enrichment of one at the expense of the other ex-spouse when, contrary to expectations, divorce precluded sharing the personal benefit reaped by the educated spouse.¹¹

Currently, courts want to award spouses that have supported the other spouse through school and into the work place, especially if the divorce takes place before the noneducated spouse can enjoy the higher income that comes from additional education. Alimony is necessary to ensure the well-being of the noneducated spouse and the

children after the divorce. As the current attitude of the courts demonstrate, it is unfair that one spouse sacrifice his or her market value to send the other spouse through school without receiving some type of compensation should divorce occur.

Conclusion

Thus, alimony is necessary but difficult to award. The easiest way to award alimony is by using the economic justification. However, this method has been shown to be unfair. Often the most prized commodity in the marriage is not the money earned by the working spouse. And often it is not even the care of the household by the other spouse. As Singer states, "The most important career asset associated with marriage is not the career enhancement itself; it is instead, the ability to advance a career while at the same time experiencing the benefits of parenthood."¹² Singer concludes, "This analysis implies that, for purposes of apportioning career assets, it may be appropriate to distinguish between marriages that have and have not produced children."¹³ It is important to determine the type of marriage relationship in order to adequately award the alimony. Differences in the law should be maintained for specialized marriages, marriages where specialization is not total, and marriages with and without children, among others. Alimony based on laws that differentiate between families would be more equitable. However, although alimony remains a necessity, the law will have to find and implement better ways of awarding it.

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Notes

¹Jana B. Singer, "Husbands, Wives, and Human Capital: Why the Shoe Won't Fit," *Family Law Quarterly* 31 (spring 1997): 120.

²Herma Hill Kay, "An Appraisal of California's No-fault Divorce Law," *California Law Review* 75 (1987): 293.

³Singer, "Husbands, Wives, and Human Capital," 120.

⁴Margaret F. Brinig, "Property Distribution Physics: The Talisman of Time and Middle Class Law," *Family Law Quarterly* 31 (spring 1997): 108.

⁵Singer, "Husbands, Wives, and Human Capital," 120.

⁶Jana B. Singer, "Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony," *Georgetown Law Journal* 82 (1994): 2424.

⁷Singer, "Alimony and Efficiency," 2429–30.

⁸Margaret F. Brinig, "Comment on Jana Singer's 'Alimony and Efficiency,'" *Georgetown Law Journal* 82 (1994): 2472–73.

⁹Singer, "Alimony and Efficiency," 2442.

¹⁰Singer, "Alimony and Efficiency," 2437.

¹¹Joan M. Krauskopf, "Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery," *Family Law Quarterly* 23 (summer 1989): 260.

¹²Singer, "Husbands, Wives, and Human Capital," 126.

¹³Singer, "Husbands, Wives, and Human Capital," 127.