

### **Alimony and Property Distribution – Trends and Contemporary Approaches**

Does alimony have a place in the contemporary marital script? Do changing demographics; more egalitarian family models; increasing numbers of married women in the labor market and decreasing numbers of full-time homemakers; normative visions of marriage as a partnership of equals; and the availability of unilateral no-fault divorce – do all these changes make alimony obsolete? Is alimony an old-fashioned remedy that encourages full-time homemaking and rewards elite wives? Is it time to scrap this disdained tool and fully embrace the clean break model—divide marital property at divorce and give each spouse a fresh start on a new life, free of financial entanglements with a dead marriage?

Attractive as it is, the clean break model overstates the ability of the property distribution to single-handedly address the complex financial entanglement of married parties through a simple split of existing assets. Moreover, because most divorcing spouses have few assets, property distribution tools give courts little to work with. Alimony offers an additional tool, and a far less crude one, for equitably ending spouses' economic interdependence.

But alimony cannot survive in its current form. Alimony is a broken tool—unpredictable, uncertain, without a modern rationale, and increasingly the target of reform legislation. If alimony is to survive, it must be recharacterized. Contemporary scholars have long sought to reimagine alimony, often drawing on a vision of family teamwork in which a primary caregiver frees a primary breadwinner to enhance his human capital, while the caregiver foregoes opportunities to enhance her own. At divorce, alimony ensures that human capital gains and losses from this arrangement are shared. While these models offer a compelling basis for alimony in a thriving economy, they miss many marriages in a stagnant one.

Other scholars have based alimony on pooling principles, most recently Cynthia Starnes in The Marriage Buyout. Starnes's model begins with the marital commitment to pool labor, time, and talent in the expectation that pooling will generate shared value. As marriage endures, increasing portions of each spouse's human capital become a collective resource, creating a pool of shared (marital) human capital that generates shared benefits. If the couple divorces and one spouse reaps disproportionate post-divorce benefits from what has become marital human capital, that spouse must buy out the interest of the other spouse. After divorce, the pooling principle reverses, as individual effort gradually converts marital human capital into human capital that is predominately, and then totally, a separate resource. When disentanglement is complete, marital human capital disappears and so does the basis for buyout payments. This pooling model offers a new rationale for alimony, a new name (buyouts), and a sliding-scale formula that presumptively quantifies the amount and duration of a buyout.

The pooling principle is not new to family law—it is an integral part of the dual-property regimes that describe the divorce law of most states. These regimes reject the common-law notion that individual efforts during marriage produce individual rights at divorce, instead generally characterizing all property acquired through the efforts of *either* spouse during marriage as *marital* rather than individual property. Individual spousal efforts thus generate a pool of shared (marital) property. The ALI takes this sharing concept a step further, suggesting that a spouse’s separate property should be gradually recharacterized as marital property at a designated percentage for each year of marriage. The longer the marriage, the more extensive the pooling of property that would otherwise belong to one spouse alone. Starnes’s buyout model builds on both current property law and the ALI proposal, expanding the concept of pooling to include human capital and recasting alimony as a much-needed tool for equitably disentangling the economic interdependence of contemporary spouses.