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Applications of a Contemporary Partnership Model for Divorce

*Cynthia Starnes**

*She rose to his requirement, dropped
The playthings of her life
To take the honorable work
Of woman and of wife.¹*

I. INTRODUCTION

For over twenty years, large numbers of women who perform the “honorable work . . . of wife” have been sacrificed to no-fault’s selective partnership model of divorce.² Some of these women are America’s former heroines—homemakers of the “Betty Crocker” era. Others are younger, wage-earning wives whose marketplace participation has been limited by their primary caretaking responsibilities, often involving children. Each group of women has been hard-hit by the no-fault preference for a clean break and the consequent reluctance of courts to order substantial maintenance. Efforts to “repair” such caretakers through brief awards of “rehabilitative” maintenance have served primarily to soothe the no-fault conscience while caretakers continue to descend into poverty. This situation has prompted some commentators to counsel abandonment of the partnership model of divorce.

The problem, however, is not with partnership law. Rather, the problem is with no-fault’s selective incorporation of partnership principles. The resulting model speaks to the

* Professor, Detroit College of Law. The author first proposed the contemporary partnership model for divorce in a more detailed article entitled *Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993).

1 THE COMPLETE POEMS OF EMILY DICKENSON 359 (1960).

2 In this article, I presume that a spouse who performs caretaking chores is female. While some men certainly do assume the role of full-time or primary caretaker, their numbers are small. See *infra* note 15 and accompanying text.

termination of an ideal marriage, while dangerously ignoring real marriage. Partnership law can do much better. Indeed, broad use of partnership principles produces a no-fault model that both encourages the ideal in marriage and sensibly addresses the real. Under such a contemporary partnership model, divorce is seen as the dissociation of a spouse from a shared enterprise. While dissociation ends the relationship, it does not usually trigger a winding-up of any shared enterprise in which the spouses have invested. If this enterprise continues, a dissociated spouse should receive a buyout of her interest. This buyout right provides a theoretical basis for maintenance. It also provides an easily applied, presumptive method for calculating an appropriate amount of maintenance, thus limiting the broad judicial discretion that now makes divorce orders unpredictable, invites gender bias, and impedes meaningful negotiations between the parties.³

Section II of this article will discuss ideals in contemporary marriage. Section III will discuss realities of contemporary marriage. Finally, section IV will illustrate the contemporary partnership model by applying it to a paradigmatic marriage: (1) the traditional marriage, (2) the hybrid marriage, and (3) the egalitarian marriage. Section IV will discuss two variations involving the caretaker who outpaces her spouse in the market and the childless caretaker. This illustration will demonstrate the efficacy of a contemporary partnership model in addressing both the real and the ideal marriage.

II. IDEALS IN CONTEMPORARY MARRIAGE—ARE WE ONE FLESH?

Concepts of marriage have changed dramatically in recent decades. No longer is marriage viewed as a Blackstonian merging of husband and wife into one flesh—the husband's.⁴ And gone is the day when marriage imposed a lifetime duty on a husband to support his wife. Today's ideal marriage is an "egalitarian relationship with equal sharing of responsibility for decision making."⁵ During this marriage, spouses function

³ For a discussion of the problems of broad judicial discretion in divorce, see Cynthia Starnes, *Divorce and the Displaced Homemaker, A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 92-95, 101-06 (1993).

⁴ HARRY D. KRAUSE, *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 175 (3d ed. 1990). See also 1 WILLIAM BLACKSTONE, *COMMENTARIES* 442 (Layston Press 1966) (1765) (the husband and wife are one person in law).

⁵ Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV.

as a partnership, sharing resources, responsibilities, and risks,⁶ a framework that encourages cooperation and caretaking commitments.⁷ Although such a marriage hardly mirrors Blackstone's view, its emphasis on the unit over the individual reflects the Biblical image of spouses as "one flesh"⁸—the unit's.

No-fault's partnership model for divorce presumes this ideal marriage. In tune with egalitarian principles, no-fault adopts the partnership concept that any partner can leave the partnership at will,⁹ thus dissolving the relationship and triggering liquidation of assets, payment of debts, and distribution of remaining proceeds to the partners.¹⁰ This winding-up¹¹ of the partnership concludes the partners' rights and obligations.¹² Consistent with these selected partnership rules, no-fault divorce occasions division of marital property, after which marital partners, like commercial partners, leave the partnership free to begin new ventures without any lingering entanglements.¹³

If spouses are indeed partners who share equally the advantages and disadvantages of participation in a failed marriage, this simple no-fault scheme makes some sense. Unfortunately, most couples fall far short of achieving an ideal

J.L. & PUB. POL'Y 121, 152 (1985).

6 Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questions the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 198 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) ("the ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks").

7 *Id.* at 199.

8 *Genesis* 2:24.

9 See UNIF. PROB. CODE §§ 31, 32, 6 U.L.A. 376, 394 (1969) (providing that a partnership dissolves upon the at-will departure of a partner); see also UNIF. PARTNERSHIP ACT §§ 29, 31, 6 U.L.A. 364, 376 (1969) (stating the unalterable right of a partner to dissolve the partnership at any time).

10 See HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 345 (2d ed. 1990).

11 See UNIF. PARTNERSHIP ACT § 30, 6 U.L.A. 367 (1969) (distinguishes between a dissolution and a winding up: "On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed."); see also UNIF. PARTNERSHIP ACT § 29 commentary at 9, cmt. b, 6 U.L.A. 365 (1969) (defining "winding up" as the "process of settling partnership affairs after dissolution").

12 See ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 7.08 (1991).

13 See U.M.D.A., Prefatory Note, 9A U.L.A. 149 (1987): "the distribution of property upon termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."

marriage.

III. REALITIES OF CONTEMPORARY MARRIAGE—WHO MAKES THE BED AND HOW MUCH DOES IT COST?

Despite the popular rhetoric of equality, the reality is that contemporary marriage is not ideal marriage—it is still a gender-biased institution. Who makes the bed? In most homes, the honest response is that the wife does. Indeed, there is evidence that only one husband in twenty makes the bed in which he sleeps.¹⁴ “Making the bed” is only a euphemism for the many endless responsibilities involved in caretaking—the cooking, the cleaning, the washing, the shopping, the caring for children or aging parents.

For many wives, such caretaking is a full-time job. The Bureau of Labor Statistics reported that in 1991 approximately sixteen million women—as against only 415,000 men—were not in the labor force because they were “keeping house.”¹⁵ Even a wife who works outside the home is likely to undertake a disproportionately large share of caretaking responsibilities. One study indicates that women remain responsible for approximately seventy percent of the housework and working wives spend twice as much time on caretaking tasks as working husbands.¹⁶ Whether she is a full-time or part-time worker, Betty Crocker remains very much a part of most American marriages.

How much does it cost a woman to “make the beds?” The quick, if superficial, response of many men is likely to be: very little or nothing. In the words of a New York legislator:

The perception of most men—and the judiciary is mostly male—is that care of the house and children can be done with

14 DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 174 (1989).

15 BUREAU OF LABOR STATISTICS, UNITED STATES DEPT. OF LABOR, 39 EMPLOYMENT AND EARNINGS 204, at tbl. 35 (1992). In 1991, there were 51.5 million married women in the United States. *Id.* In that same year, 22.7 million women (married or unmarried) stayed out of the labor force because they were “keeping house.” An additional 1.2 million wanted a job, but did not look for one because of “home responsibility.” *Id.*

Moreover, at least 50% of wage-earning women report having previously dropped out of the labor force because of family reasons, as compared to one percent of all wage-earning men. RHODE, *supra* note 14, at 174.

16 RHODE, *supra* note 14, at 174; see also SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN, at xiv (1991) (noting that the only major change in the last fifteen years is that now middle class men *think* they do more around the house).

one hand tied behind the back. Send the kids out to school, put them to bed, and the rest of the time [is] free to play tennis and bridge.¹⁷

Actually, primary caretakers pay a high price for their efforts in the home. Mincer and Polacheck report that women who remain out of the labor market after the birth of their first child suffer a decline in earning capacity of about 1.5% per year.¹⁸ Because of her family responsibilities, the wage-earning caretaker has less time to devote to a career, which often limits her career choice and opportunities for advancement. The Bureau of the Census confirms that many wage-earning women "choose work that will fit around . . . their family responsibilities, a complication and impediment to occupational advancement not faced by most men."¹⁹ Not surprisingly, many caretakers are channeled into the secondary job market, where wages are low and opportunities for advancement minimal. The division of labor in the home thus exacts a high toll from women and contributes to the disparity in men's and women's wages.

When a caretaker divorces, she loses her male buffer and is thrust into the market economy where she alone faces the cost of her caretaking role. No-fault's partnership model, however, fails to acknowledge her situation, instead assuming the ideal where spouses are equal partners who can begin new lives on an equal footing. Herein lies a dangerous reverie of denial—"Women aren't caretakers; caretaking doesn't take time; caretaking doesn't disadvantage women; any disadvantage will disappear in the blink of an eye (rehabilitative maintenance)."²⁰

17 Lynn H. Schatran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 285 (1987) (quoting a New York legislator).

18 Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, in ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL 397, 415 (Theodore W. Schultz ed., 1974). Women with advanced degrees suffer an even higher rate of depreciation. *Id.* For a discussion of the difficulties faced by a homemaker entering the market after full-time homemaking, see Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 81-85 (1993).

19 BUREAU OF THE CENSUS, UNITED STATES DEPT. OF COMMERCE, SERIES P-23, WOMEN IN THE AMERICAN ECONOMY 7 (1986).

20 See Starnes, *supra* note 18, at 97-101 (addressing the illusion that rehabilitative maintenance can achieve equity for a caretaker); see also Ann L. Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L.

No-fault also erroneously supposes that dissolution of the marital partnership necessarily terminates the marital enterprise. In fact, this is hardly ever the case. Because a commercial partnership also often continues after a partner leaves, partnership law provides rules for these situations.²¹ These rules provide a rich model for divorce.

IV. A CONTEMPORARY PARTNERSHIP MODEL—DISSOCIATION AND BUYOUT

In the common case in which partnership business continues after a partner's dissociation, the Revised Uniform Partnership Act (RUPA) requires remaining partners to buy out the interest of the dissociated partner.²² The buyout price reflects the dissociated partner's interest in the continuing partnership. This buyout rule provides a conceptual basis for maintenance.

As in a commercial partnership, a spouse's dissociation terminates the relationship but does not necessarily trigger a winding-up of the marital enterprise. If this enterprise continues, a dissociated spouse should receive a buyout of her interest.

But what is a marital enterprise? Simply stated, it is the income-generating activity of the marriage. The value of this enterprise is measured by the spouses' enhanced human capital attributable to marital investment. While the marital unit may invest in a spouses' human capital through education or training, more often an investment occurs simply through the expenditure of time and effort in the market, which results in experience and perhaps seniority. Whether the marital unit invests in the human capital of one or both spouses, these investments are jointly made in the expectation, express or implied, that they will generate a return that will be jointly enjoyed.

Although dissociation terminates the parties' marriage, it usually does not terminate this income-generating marital enterprise, which continues to function in the marketplace as

REV. 721 (1993) (documenting how maintenance law takes little account of younger caregivers and advocating shifts in the law to rehabilitate family care values).

²¹ See Donald J. Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 U. TOL. L. REV. 825, 837 (1990).

²² See REV. UNIF. PARTNERSHIP ACT § 701 (1993); see also UNIF. PARTNERSHIP ACT § 38(a), 6 U.L.A. 456 (1969) (requiring a buyout of the interest of a departing partner in certain instances).

one or both spouses generate income attributable to marital investments. If, for example, the husband works outside the home and the wife works in the home, the marital unit invests exclusively in the human capital of the husband. While the husband and wife both labor for the benefit of the unit, only the husband experiences an enhanced ability to generate income. If the marriage ends, the husband takes this marital enterprise with him and should buy out the wife's interest.

A. *Calculating a Buyout*

The buyout price should be set at the time of divorce in order to afford spouses the emotional and financial planning benefits of a clean break. Determining this buyout price requires two steps: (1) estimating the value of the marital enterprise and (2) fixing a dissociated spouse's share of that value. Value lies in the parties' enhanced ability to generate income attributable to marital investment. One might presumptively estimate this value by approximating each party's future earnings (by averaging income over a previous period, e.g., three to five years) and then reducing that figure to roughly measure enhancement (by subtracting earnings at marriage).²³ This simple method of estimating value would maximize predictability and minimize costs for the parties.

Valuation of the marital enterprise triggers the second step in the buyout calculation—determining the share of that enterprise due a dissociated spouse. This buyout share should depend on marriage duration since the length of the marriage roughly reflects the extent of a spouse's investment and, in the case of a primary caretaker, her opportunity costs. The Uniform Probate Code (UPC) offers a reasonable model for establishing such a sliding-scale buyout share. The UPC bases a spouse's elective share of an augmented estate on the length of the marriage as a "first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up."²⁴ Under such a sliding scale model, a spouse who dissociates from a one-year marriage, for example, would receive only three percent of any disparity in enhanced earnings, while a spouse who dissociates after fifteen years of

²³ All figures represent net income and are adjusted to current dollars. For a more detailed description of the buyout calculation, see Starnes, *supra* note 18, at 131-38.

²⁴ UNIFORM PROB. CODE § 2-201 cmt., 8 U.L.A. 88, 89 (1983 & Supp. 1992).

marriage would receive fifty percent of any disparity.²⁵

While this buyout calculation will produce a reasonable buyout price in most cases, it raises a couple of concerns. Most obviously, what if estimated income is not realized? Predicting future earnings is a necessarily speculative process; a paying spouse may die, become disabled, lose his job, retire, or undertake low-paying, public service employment. Investing in the human capital of another person is risky business. The possibility that expected income will not materialize is a risk a spouse assumes both during and after marriage. Thus, the buyout price should be modifiable upon a substantial change in the payor's circumstance.²⁶

One might also question the presumption that enhanced income during marriage results from marital investment. While it is true that investments in human capital may actually occur over the course of a lifetime,²⁷ any unfairness in discounting most such long-term investments is greatly reduced by inclusion of marriage duration in the buyout calculation. The extent of marital investment, as measured by marriage duration, will ordinarily correlate with the amount of enhanced earnings and will define the buyout share. A one-year marriage, for example,

25 See UNIF. PROB. CODE § 2-201, 8 U.L.A. 88-89 (1983 & Supp. 1992). The UPC establishes the following sliding scale:

<i>If the decedent and spouse were married to each other:</i>	<i>The elective-share percentage is:</i>
Less than 1 yr.	Supplemental amount only
1 yr. but less than 2 yr.	3% of augmented estate
2 yr. but less than 3 yr.	6% of augmented estate
3 yr. but less than 4 yr.	9% of augmented estate
4 yr. but less than 5 yr.	12% of augmented estate
5 yr. but less than 6 yr.	15% of augmented estate
6 yr. but less than 7 yr.	18% of augmented estate
7 yr. but less than 8 yr.	21% of augmented estate
8 yr. but less than 9 yr.	24% of augmented estate
9 yr. but less than 10 yr.	27% of augmented estate
10 yr. but less than 11 yr.	30% of augmented estate
11 yr. but less than 12 yr.	34% of augmented estate
12 yr. but less than 13 yr.	38% of augmented estate
13 yr. but less than 14 yr.	42% of augmented estate
14 yr. but less than 15 yr.	46% of augmented estate
15 yr. or more	50% of augmented estate

26 The buyout price should *not* be modifiable, however, upon the remarriage of the dissociated spouse since a buyout is based on investment, rather than need or duty of support.

27 See Allan M. Parkman, *The Recognition of Human Capital as Property in Divorce Settlements*, 40 ARK. L. REV. 439, 446-65 (1987) (advocating treatment of human capital as marital property only when the investment during marriage is "substantial" and would not have occurred without the support of the spouse).

will ordinarily generate limited enhanced earnings and will trigger only a three percent buyout share. Thus, the buyout calculation will ordinarily produce a small buyout price when marital investment is small. There will be extraordinary cases, however, where the presumptive method for calculating a buyout price will be inappropriate. Consider, for example, the wife who marries a medical student in his last month of training. If this couple soon divorces, the wife might claim a huge buyout based on her husband's enhanced earnings which are largely attributable to his pre-marital investment. But in such an unusual case a husband could very easily rebut the presumption that value should be estimated through simple averaging and subtracting. In ordinary cases, however, presumptively attributing enhancement in earnings during marriage to marital investment will not unreasonably distort the buyout calculation and will afford the parties a simple, inexpensive, and predictable method for determining the buyout price.

B. Three Marriages

This contemporary partnership model can best be explained through three paradigmatic marriages: (1) the traditional marriage, (2) the hybrid marriage, and (3) the egalitarian marriage.

1. The traditional marriage

Suppose the spouses, either by decision or by default, opt for a traditional marriage in which the husband works outside the home and the wife is a full-time homemaker. In this case, the marital unit has invested exclusively in the husband's human capital. When the parties divorce, the husband may leave the marriage with enhanced earning capacity, resulting from a marital investment in his human capital. He thus takes the marital enterprise with him. When these traditional spouses divorce, the wife should receive a buyout of her interest in the marital enterprise.

If these traditional spouses were married fifteen years and during this period the husband's earnings increased from \$10,000 to \$100,000, the marital enterprise would be presumptively valued at \$90,000. Because the marriage lasted fifteen

years, the wife's buyout share would be fifty percent.²⁸ Thus, the buyout price would be: fifty percent times \$90,000, which equals \$45,000 per year. If, however, the spouses were only married five years and the husband's earnings increased from \$10,000 to \$40,000, the marital enterprise would be valued at \$30,000, and the wife would receive fifteen percent of that value, or \$4,500 per year.

2. *The hybrid marriage*

Suppose the spouses adopt a more common division of labor in which both parties work outside the home, but the wife is the primary caretaker. Because of her multiple responsibilities, this wife has fewer hours to devote to her job than does her husband, which may result in income disparity between husband and wife. When this wife dissociates from the marriage, she takes with her a part of the marital enterprise, measured by her own enhanced earnings attributable to marital investment. If she takes a smaller portion of the marital enterprise than her husband takes—i.e., if her enhanced earnings are less than his—she should receive a buyout.

If the parties were married fifteen years and the wife's earnings increased from \$10,000 to \$30,000 and the husband's earnings increased from \$30,000 to \$90,000, the marital enterprise would be presumptively valued at \$80,000 (\$20,000 + \$60,000). The wife, however, takes only \$20,000 of this value, while the husband takes \$60,000, producing a disparity of \$40,000. Because the marriage lasted fifteen years, the wife's buyout share would be fifty percent. Thus, her buyout price would be fifty percent times \$40,000 (the disparity), which equals \$20,000 per year. If, however, the marriage lasted only five years and the wife's earnings increased from \$10,000 to \$15,000 and the husband's earnings increased from \$30,000 to \$45,000, the marital enterprise would be presumptively valued at \$20,000. The wife would take \$5,000 of this value with her, while the husband would take \$15,000, producing a disparity of \$10,000. Given the five year duration of the marriage, the wife's buyout price would be fifteen percent times \$10,000, or a total \$1,500 per year.

28 See *supra* note 25 and accompanying text.

3. *The egalitarian marriage*

Suppose the spouses achieve the ideal—both parties work full-time and each performs exactly fifty percent of household chores and care for any children or other family members. In such an extraordinary relationship, the marital unit makes two equal investments—one in the husband and another in the wife. It might therefore appear that, because the egalitarian marital unit has invested equally in the spouses, each spouse takes one-half of the marital enterprise upon divorce and neither should receive a buyout.

If these spouses leave the marriage with disparate enhanced earnings, however, a buyout may be appropriate despite the egalitarian nature of the marriage. There are two reasons for this conclusion.

First, valuation of a continuing enterprise depends on the return on marital investments rather than the nature of each partner's contribution. If spouses are truly partners, these returns on joint investments are partnership returns, not individual returns. In the absence of the parties' agreement otherwise,²⁹ the character or identity of the individual partner's contributions to the unit should not be dispositive of her share in partnership returns.

Second, limiting buyouts to non-egalitarian marriages would invite an inappropriate debate over the nature and extent of caretaking services. If a husband could show, for example, that he performed fifty percent of caretaking services rather than forty-nine percent, he could avoid paying his wife a buyout. This ludicrous inquiry focuses on the wrong issue. For both conceptual and practical reasons, therefore, the question should not be identity of contribution, but rather the return to the marital unit on joint investments.

As these three paradigmatic marriages illustrate, a contemporary partnership model provides a conceptual basis for maintenance under no-fault, identifies cases where maintenance is appropriate, and prescriptively fixes the amount of maintenance, replacing the vagaries of judicial discretion with presumptive bright-line rules. Adoption of this contemporary partnership model would work a sea-change in current divorce

²⁹ A prenuptial agreement could fix the parties rights according to the identity or character of the contribution.

law by ordinarily beginning the divorce process with the presumption that a spouse with enhanced earnings owes indefinite maintenance to a caretaker. Such a starting point would do much to alter the current financial plunder of caretakers under no-fault. This contemporary partnership model will also usually deny or severely limit maintenance in marriages popularly thought to be inappropriate cases for maintenance, such as the very short marriage and the marriage later in life when income has already peaked.

While most marriages may fall within one of the three paradigms just described, there are two variations that warrant special attention: (1) the caretaking wife who outpaces her husband, and (2) the childless caretaker.

C. *Two Variations*

1. *The tortoise and the hare—the case of the high-achieving caretaker*

This contemporary partnership model will not always require the higher wage-earner to buy out the other spouse, and one can imagine a scenario in which the opposite result follows. Consider a wife who was employed as a sales clerk at the time of the marriage but was promoted to department manager by the time of divorce. Suppose that her annual earnings increased from \$10,000 to \$25,000 during marriage. Suppose further that at the time of their marriage, the husband was a corporate officer who netted \$100,000 annually, but that due to a negative economy, his earnings had only increased to \$110,000 at the time of divorce. Because this wife takes a larger share of enhanced earnings, she must buy out her higher-earning husband, and while this result may seem counter-intuitive, it is a fair application of the principle that maintenance is an investment return. The logic that a partner who makes a good investment is entitled to its reward is no less compelling where the lower wage-earner increases earnings more than the higher wage-earner.

One could, however, avoid the harsh effect on the lower wage-earner in two ways. One is by establishing a presumption that the spouse with the lower earnings at divorce need not buy out the other spouse's interest. Another is by establishing a rule that "catching-up is free," so that only enhanced earnings that exceed the other spouse's earnings at the time of marriage would be subject to buyout. If, for example, the wife's earnings increased during the marriage from \$10,000 to \$105,000, and

the husband's increased from \$100,000 to \$110,000, only the wife's excess enhanced earnings of \$5,000 (\$105,000 minus \$100,000) would be subject to buyout.

2. *Cooking for two—the case of the childless caretaker*

Some commentators have advocated barring maintenance in childless marriages. The justification seems to be that the full-time, childless caretaker was the principal beneficiary of her decision to stay home and has already reaped her reward. This rationale is conceptually troublesome. Focusing on the quality and quantity of an individual's contribution entertains a curious post hoc judgment of a division of labor that the spouses, whether expressly or by default, agreed to during the marriage. Such Monday-morning-quarterbacking is also inconsistent with the concept of marriage as a partnership of equals who make different but equally valuable contributions to the marital unit.

Also troublesome is the devaluation of caretaking implicit in the denial of maintenance to childless caretakers. Such a devaluation is, of course, not uncommon.³⁰ The message is that caretaking has little or no value unless it is directed toward a child. Cooking, cleaning, washing, shopping, entertaining of friends and associates, and caring for aging family members thus have little value.

Although it is not often held in high esteem, caretaking is a valuable service that is sometimes necessary.³¹ Caretaking

30 For a brief account of the glory days of caretaking as a highly esteemed profession, see Starnes, *supra* note 18, at 73-75. Today, the full-time caretaker may be embarrassed to confess her role. The wage-earning wife may confine herself to the closet, daily marching to the market rhetoric of self-investment while nightly succumbing, in private, to the realities of unmade beds, dirty clothes, a messy house, and a hungry spouse and children.

31 Responding to the needs of an infant is one example of on-demand caretaking. Not all caretaking services can be purchased, as they often must be provided at random and in small segments of time. Moreover, any purchased services will not duplicate the services of a caretaker who initially knows family members and takes responsibility for providing care as it is needed. Clare Brown, *Home Prediction in Use in a Market Economy*, in *RETHINKING THE FAMILY* 151, 155 (Barry Thorne & Marilyn Yalom eds., 1982). Ms. Brown also notes:

The home economy focuses on individual and family well being, and its personalized care and nurturing cannot be given a price tag by comparing the services of the home economy with what a family is willing to pay for occasional substitutes (e.g., child care, meals out, maid service), since the occasional substitute is not comparable to a permanent replacement So far the marketplace has not provided a permanent replacement for the

is also "socially necessary" in that it produces value above necessity, thus enhancing the family's life.³² Such socially necessary caretaking includes time spent in nurturing non-economic needs for love and self-development,³³ a process that may include entertaining friends and relatives. To deny maintenance to a childless caretaker is to deny the value and the cost of many valuable caretaking functions.

Most troublesome, however, is the devaluation of women implicit in a denial of maintenance to childless caretakers. A woman's ability to achieve the status of equal marital partner is made to depend on whether she has borne a child to her husband. Women who do not perform this function for their husbands are thus afforded second-class rights in the divorce courts. To hinge a woman's worth on her having children is an offensive notion with feudal overtones. Its continued viability in the 1990s is shocking.

In addition to these conceptual concerns, the denial of maintenance to childless marriages suffers from practical inconsistencies. The category of childless marriages is both over and under inclusive, since it would include a childless caretaker whose husband forbade her to work as well as the wife who gave up a career in order to relocate repeatedly with her husband for the advancement of his career. This category would also include the childless wife who spent her days clipping coupons, shopping, cleaning, washing, ironing, entertaining her husband's associates and volunteering her "spare" time to charitable causes, and who could ill-afford to contract out any caretaking services. There is no justification for denying maintenance to these women simply because they have not borne children to their husbands.

In addition, if the category of childless marriages is intended to preclude maintenance to caretakers who have been the main beneficiary of their lifestyle, then it is under inclusive, because it would allow maintenance to the wife who hires a live-in nanny, a maid, and perhaps a chauffeur and tutor, and who spends her days at the country club. And what of the wife whose children are in school? Is maintenance available to her

services provided in the home economy.

Id. at 163.

³² *Id.* at 153.

³³ Examples of such socially necessary caretaking might include counseling, tutoring and reading to a child, organizing family outings or vacations, coordinating visits and holiday and birthday correspondence with an extended family, or giving dinner parties.

even if she stays home from 9:00 to 3:00? And what of the nonwage-earning wife whose last child left home ten years ago? The category of childless marriages is thus both conceptually troublesome and practically ill-equipped to achieve its goals.

V. CONCLUSION

Now is the time for an honest evaluation of the costs of divorce to primary caretakers and for serious efforts to reform the law so that women no longer bear those costs alone. It is to be hoped that this contemporary partnership model will further these efforts and at the same time provide a model that encourages ideal marriage in which roles are determined through choice rather than gender.

