

# VACANT PROMISES?: THE ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION AND THE POST-DIVORCE FINANCIAL CIRCUMSTANCES OF WOMEN

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## I. INTRODUCTION

Certainly, the law of family dissolution needs reformation.<sup>1</sup> Marriage dissolution all too frequently devastates women and their dependent children financially,<sup>2</sup> and financial deprivation precipitates a broad range of social problems and squanders societal resources.<sup>3</sup> Many feminists argue for laws that increase women's access to financial resources at divorce.<sup>4</sup> Others encourage reforms that level the playing field between divorcing husbands and wives, hoping to improve the substance of negotiated separation agreements.<sup>5</sup> With this feminist agenda as a backdrop, this commentary evaluates the American Law Institute's *Principles of the Law of Family Dissolution* pertaining to spousal maintenance (hereinafter Maintenance Principles)<sup>6</sup>, property distribution (hereinafter Property Principles)<sup>7</sup>, child custody (hereinafter Custody Principles)<sup>8</sup>, and separation agreements (hereinafter Agreement Principles)<sup>9</sup> and concludes that they

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1. Nearly all who study family dissolution or work within the field agree that systemic reform must occur. But here agreement ends and controversy begins. Political factions offer dramatically different goals for reform. Compare Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1193-94 & nn.187-90 (1999) [hereinafter *Freedom*] with Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 724-25, 733-42 & nn.107-69 (2000) [hereinafter *Reasking*] and Leslie Joan Harris, A "Just and Proper Division": *Property Distribution at Divorce in Oregon*, 78 OR. L. REV. 735, 737 (1999).

2. *Freedom*, *supra* note 1, at 1155 nn.14, 19 & 20, 1204 & nn.236-37; *Reasking*, *supra* note 1, at 713.

3. *Freedom*, *supra* note 1, at 1155-69; *Reasking*, *supra* note 1, at 755-61.

4. *Freedom*, *supra* note 1, at 1210 n.256; *Reasking*, *supra* note 1, at 754-55.

5. PENELOPE EILEEN BRYAN, RECONSTRUCTION JUSTICE IN DIVORCE: PROCEDURAL AND SUBSTANTIVE REFORM (forthcoming 2002).

6. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 5 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES 1997].

7. *Id.* at ch. 4.

8. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 2 (Tentative Draft No. 3 Part 1, 1998) [hereinafter ALI PRINCIPLES 1998]; ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 2 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000].

9. ALI PRINCIPLES 2000, *supra* note 8, at ch. 7.

do little to alleviate the post-divorce financial distress experienced by women and their dependent children.<sup>10</sup>

The ALI's Maintenance and Property Principles do not explicitly attempt to improve the post-divorce financial circumstances of women and children.<sup>11</sup> Rather they aspire to foster predictable results by restricting judicial discretion.<sup>12</sup> Limiting the discretion of judges who typically discriminate against women on financial issues, could foster better results for divorcing women. The Maintenance Principles, for instance, provide standardized formulas for determining spousal maintenance (compensatory payments)<sup>13</sup> that might make these awards both more likely and more adequate.<sup>14</sup> The presumption the Property Principles afford in favor of an equal distribution of marital assets<sup>15</sup> may provide most women with at least half of the marital property at dissolution. The gradual conversion of separate property into marital property in long-term marriages<sup>16</sup> also offers women access to financial resources few states now provide.<sup>17</sup>

Many mothers trade away their financial rights at divorce in order to maintain custody of their children.<sup>18</sup> The Custody Principles offer a presumption that allocates custodial responsibility for children in proportion to the caretaking functions each parent previously performed for the child.<sup>19</sup> Under this standard, a caretaking mother would presumably have some assurance of retaining most of the custodial responsibility for the children,<sup>20</sup> making her less likely to trade-off important financial resources for the amount of custody she desires.

On their surface, the above proposals seem to promise better financial results for women and children than the current system now generates. Moreover, the consistency and predictability they offer at trial should strengthen women's position in divorce negotiations.<sup>21</sup> On closer inspection, however, I suspect they will only marginally improve the post-divorce financial circumstances of only a few women and children. Section II explores the conceptual

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10. In contrast, the *Principles'* proposals regarding child support make several meaningful changes in existing law. See generally ALI PRINCIPLES 1998, *supra* note 8. For example, Section 3.16(2)(a) requires parents with the financial ability to support their children through college, graduate school, and professional training. *Id.* at 124.

11. In this article, I take the position, well-supported by social science data, that the financial distress and decline of the residential parent necessarily and negatively affects the children. See *Freedom*, *supra* note 1, at 1157-65.

12. ALI PRINCIPLES 1997, *supra* note 6, § 4.02(3); ALI PRINCIPLES 1998, *supra* note 8, at 11, 13; see also J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 802 (1997).

13. ALI PRINCIPLES 1997, *supra* note 6, §§ 5.05, 5.06, 5.12, 5.15, 5.16.

14. Presumably judges would follow the law. Predictable results at trial likely influence settlement outcomes as well.

15. ALI PRINCIPLES 1997, *supra* note 6, § 4.15.

16. *Id.* § 4.18.

17. In all but very few states, a spouse's separate property remains separate throughout the marriage and at divorce. *Id.*

18. *Freedom*, *supra* note 1, at 1201.

19. ALI PRINCIPLES 2000, *supra* note 8, § 2.09(1).

20. See *infra* notes 126-39 and accompanying text for further assessment.

21. See *supra* text accompanying notes 11-20.

and substantive problems found in the Maintenance Principles. Section III examines the Property Principles and finds conceptual and substantive problems similar to those found in the Maintenance Principles. Section IV explains why the Custody Principles fail to discourage women from compromising their financial interests in order to secure custody of their children. Section V explores the reasons why the Agreement Principles' deference to separation agreements significantly undermines women's financial interests at divorce.

## II. SPOUSAL MAINTENANCE AS COMPENSATORY PAYMENTS

Current law and its application contribute to the post-divorce financial decline of women and children.<sup>22</sup> In order to improve this situation, the law must change radically and provide divorcing women greater access to income and property.<sup>23</sup> Yet the Maintenance Principles often justify specific provisions by noting that they mimic current statutes or decisional patterns reflected in caselaw.<sup>24</sup> For instance, the Maintenance Principles change the justification for spousal maintenance from "need" to "loss"<sup>25</sup> and label payments "compensatory awards"<sup>26</sup> rather than "spousal maintenance." They note that this reconceptualization leads to laws that reflect the award patterns commonly found in existing caselaw.<sup>27</sup> This conservative approach of linking reform to existing spousal maintenance patterns does not offer the more radical reforms necessary for real improvement.

The focus on "loss" also fosters a narrow vision of entitlement. The Maintenance Principles acknowledge only the standard of living an individual loses after a long-term marriage<sup>28</sup> or the individual's reduced earning capacity due to caretaking responsibilities.<sup>29</sup> The wife's household labor that facilitated the husband's ideal worker status<sup>30</sup> becomes conceptually peripheral, weakening the justification for her entitlement to a share of his post-divorce income. A more comprehensive justification would recognize that spouses (frequently wives)<sup>31</sup> who perform the bulk of marital labor<sup>32</sup> suffer losses<sup>33</sup> and make contributions<sup>34</sup>

22. *Freedom*, *supra* note 1, at 1191-1239.

23. BRYAN, *supra* note 5.

24. See, e.g., ALI PRINCIPLES 1997, *supra* note 6, § 5.03 cmt. c.; ALI PRINCIPLES 1998, *supra* note 9, at 8.

25. ALI PRINCIPLES 1998, *supra* note 8, at 8-9; ALI PRINCIPLES 1997, *supra* note 7, § 5.02.

26. ALI PRINCIPLES 1997, *supra* note 6, § 5.03.

27. *Id.*

28. *Id.* §§ 5.03(2)(a), 5.05.

29. *Id.* §§ 5.03(2)(b), (c), 5.06, 5.12.

30. Williams describes how wives tend to sacrifice their own market participation in order to facilitate the ideal worker status of their husbands. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2236-67 (1994). Williams also explains that even in two career families, couples commonly engage in a game of "chicken" over who will provide housekeeping and child care services. Due to her socialization that accords high priority to homemaking and child care, the wife typically loses this game and performs most of these functions. *Id.* at 2240-41.

31. See, e.g., Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208 (2000).

32. See *id.*; Williams, *supra* note 30, at 2245-47 n.91.

33. Williams notes that wives who interrupt their careers lose an average of 1.5% of income for each year they do not participate in market labor, with college-educated wives losing as much as

that entitle them to a share of their husbands' post-divorce income. The comments to the Maintenance Principles explicitly reject this contribution justification.<sup>35</sup> They acknowledge that undoubtedly "some" cases support a factual finding that the wife contributed to her husband's earning capacity.<sup>36</sup> But other cases, they claim, do not support such a finding.<sup>37</sup> They argue that if the Maintenance Principles adopted a contribution justification for all cases, awards in many cases would lack a factual foundation.<sup>38</sup>

The above rationale for rejecting a contribution justification is troubling for three reasons. First, it ignores a substantial body of research indicating that women today still perform at least twice as much routine housework as men,<sup>39</sup> with the average woman still performing about three times the amount of routine housework as the average man.<sup>40</sup> Presumably in the *typical*, rather than the *rare* household, the wife's services provide the husband with more hours in his day to devote to work or leisure, both of which may enhance his workforce performance.<sup>41</sup> Consequently I suspect *most* rather than *some* cases would provide a factual foundation that supports a maintenance award based on a contribution justification. Second, the *Principles* justify many of its proposals based on assumptions the drafters make regarding human behavior and expectations.<sup>42</sup> Many of these assumptions lack empirical verification and likely will lack a factual basis in many cases. I fail to understand the drafters' reluctance to take a less speculative leap of faith regarding the contribution justification for spousal maintenance. Third, theoretical justifications for spousal maintenance prove especially critical, because the Maintenance Principles defer to the states to develop many of the specific rules that govern the availability and amount of compensatory payments.<sup>43</sup> Presumably a stronger justification than loss would

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4.3%. *Id.* at 2257 n.148 (citing Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, in *ECONOMICS OF THE FAMILY* 395 (Theodore W. Schultz ed., 1974)). See also Elizabeth Smith Beninger & Jeanne Wielage Smith, *Career Opportunity Cost: A Factor in Spousal Support Determinations*, 16 *FAM. L.Q.* 201, 207 (1982); Jacob Mincer & Solomon Polachek, *Family Investment in Human Capital: Earnings of Women*, 82 *J. POL. ECON.* 576, 583 (1974). Estin reports a more recent study that found a typical wage gap of 33% the first year women returned to work, with a only a portion of that gap made up over time. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 *N.C. L. REV.* 721, 746 n.87 (1993) (discussing a study by Laurence Levin and Joyce Jacobsen and citing Laura Myers, *Women Who Interrupt Career Fall Into Pay Gap*, *BOULDER DAILY CAMERA*, Jan. 11, 1992, at 1A, 11A).

34. Williams, *supra* note 30.

35. ALI PRINCIPLES 1997, *supra* note 6, § 5.05 cmt. c.

36. *Id.*

37. *Id.*

38. *Id.*

39. See Coltrane, *supra* note 31 (reviewing more than 200 scholarly articles and books on household labor published between 1989 and 1999).

40. *Id.* at 1212.

41. The household version of the economic theory of human capital investment posits that men and women allocate time to household or paid work based on maximizing utility or efficiency. *Id.* at 1213. See generally GARY A. BECKER, *A TREATISE ON THE FAMILY* (1981). This theory thus suggests a direct link between the wife's household tasks and the husband's workplace performance.

42. See ALI PRINCIPLES 1997, *supra* note 7, § 4.18 cmt. a (offering justification for recharacterization of separate property).

43. *Id.* §§ 5.05(2), (3), 5.06(2), 5.06(4), 5.07(1), 5.12(2).

generate specific rules more favorable to dependent spouses. Moreover, a justification based on contribution might lead to distribution rules quite different from the patterns found in existing case law that the Maintenance Principles claim to reflect.<sup>44</sup>

The Maintenance Principles offer specific formulas for determining the entitlement to<sup>45</sup> and the amount<sup>46</sup> and duration<sup>47</sup> of spousal maintenance. These formulas limit judicial discretion, the exercise of which has historically provided wives with inadequate maintenance awards.<sup>48</sup> While limitations on judicial discretion may promise to enhance the availability, amount, and duration of spousal maintenance, the specific formulas offered in the Maintenance Principles prove problematic.

The Maintenance Principles authorize compensatory payments based on the parties' disparate financial capacity when 1) one spouse cannot maintain the marital living standard without assistance from the other;<sup>49</sup> or 2) one spouse has provided certain types of caretaking.<sup>50</sup> Awards based on the inability of one spouse to maintain the marital living standard, however, require marriages of a specified duration<sup>51</sup> and a financial disparity of a specified amount.<sup>52</sup> The Maintenance Principles delegate to the states the task of specifying the marital duration and the financial disparity that would support this type of compensatory payment.<sup>53</sup> In today's political climate, one can predict that male-dominated state legislatures will adopt rules that make compensatory payments available, if at all, only in lengthy marriages and only when a very wide gap exists in the parties' respective financial capacities.<sup>54</sup> This tendency throughout the *Principles* to punt difficult policy decisions to state legislatures severely compromises their ability to improve the post-divorce financial circumstances of women and their dependent children.<sup>55</sup>

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44. A maintenance law that recognized the wife's contribution to her husband's earning capacity might justify more generous levels of support. The wife's potential entitlement to maintenance also might begin at the date of the marriage, rather than only when the marriage endures for a specified duration.

45. ALI PRINCIPLES 1997, *supra* note 6, §§ 5.05(2), 5.06(2), 5.15(1).

46. *Id.* §§ 5.05(3), 5.06(2), 5.06(4), 5.07(1), 5.12(2), 5.15(4).

47. *Id.* § 5.07.

48. *Freedom*, *supra* note 1, at 1201-15.

49. ALI PRINCIPLES 1997, *supra* note 6, § 5.05.

50. *Id.* §§ 5.06, 5.12. The ALI *Principles*, in Chapter 5, also provide limited reimbursement for one spouse's financial contributions to the other spouse's education or training, irrespective of a disparity in the spouses' financial capacity, provided the recipient spouse has no entitlement to other types of compensatory payments. *Id.* § 5.15.

51. *Id.* §§ 5.05(1), 5.05(2).

52. *Id.*

53. *Id.* § 5.05(2).

54. State legislatures seem particularly resistant to spousal maintenance reforms that favor women. See Harris, *supra* note 1, at 737. The *Principles* do suggest that state rules should provide compensatory payments in marriage of five or more years when one spouse's income exceeds the claimant's income by twenty-five percent or more. They also offer suggestions on how to compute the value of compensation payments under Section 5.05. ALI PRINCIPLES 1997, *supra* note 6, § 5.05. However, the *Principles* do not obligate states to adopt any of their suggestions.

55. Perhaps the drafters of Chapter 5 of the ALI *Principles* deferred to state legislatures on critical issues in order to make their proposals politically palatable and encourage adoption. In the long

Equitable principles supply the rationale for compensatory payments based on loss of marital living standard and disparity of financial circumstances. The Maintenance Principles speak of differential risk, economic exploitation, and expectation. The Maintenance Principles, however, arbitrarily limit equitable justifications to long-term marriages. They explain that wives, especially long-term homemakers, generally face greater financial risks at the dissolution of marriage than do their husbands.<sup>56</sup> Social patterns suggest that the longer the marriage, the greater the wife's economic dependence upon her husband.<sup>57</sup> As time passes the gap widens between the marital living standard and the wife's earning capacity, and the wife's earning capacity becomes more difficult, or impossible, to recapture.<sup>58</sup> Although remarriage might help her reestablish her prior marital standard of living, marriage patterns of men make remarriage unlikely for older women.<sup>59</sup> The husband, in contrast, typically does not face the same risk of financial decline at divorce, and his remarriage prospects exceed those of his wife.<sup>60</sup> Equity, particularly in long-term marriages, suggests that the spouses should share the risk of financial decline at divorce.<sup>61</sup> Compensatory payments that minimize the decline in the wives' standard of living also deter the economic exploitation of wives by husbands. Over time the possibility of compensatory payments equalizes the financial stake each spouse has in the success of the marriage, presumably deterring husbands from abandoning older spouses.<sup>62</sup> Finally, the longer the marriage the more the wife and husband adjust to the marital living standard and legitimately expect it to continue.<sup>63</sup> The Maintenance Principles conclude then that the marital, rather than the premarital, standard of living gradually becomes the proper benchmark by which to measure the appropriate post-divorce financial circumstances of the spouses.<sup>64</sup>

The above equitable justifications are sensible and sensitive to the financial dependency patterns found in the vast majority of marriages.<sup>65</sup> Limiting this type of compensatory payment to marriages of a specified duration, however, is troubling. I fail to understand why these justifications and others do not support these awards in *all* marriages, no matter their duration. Certainly a wife in a two year marriage might suffer a differential risk at divorce, having more to

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run, however, this deference may cause more harm than good to women. Left to their own devices, I suspect that most state legislatures will develop rules of statewide application that substantially compromise the *Principles'* intent to make spousal maintenance more available and adequate. Moreover the state legislatures will receive political approval for having passed laws that purport to address the social problems inherent in divorced women's financial plight. On the other hand, if the Maintenance Principles offered their own rules that favored women, state legislatures might well reject them. Yet outright rejection undoubtedly would provoke criticism and expose the gender biased motives of state legislatures, perhaps promoting political unrest and meaningful reform.

56. ALI PRINCIPLES 1997, *supra* note 6, § 5.05 cmt. c.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. ALI PRINCIPLES 1997, *supra* note 6, § 5.05 cmt. c.

63. *Id.* § 5.05 cmt. a.

64. *Id.* § 5.05 cmt. c.

65. *Freedom*, *supra* note 1, at 1172-73 & nn.78-82.

lose at dissolution than her higher earning husband. The marital, housekeeping, and caretaking responsibilities she provides typically compromise her workforce participation,<sup>66</sup> increasing her differential risk at divorce. She may refuse overtime, travel with him more frequently, and prepare his meals and his laundry. She even may leave the workforce entirely. The wife in a short-term marriage also can develop an expectation interest in the marital living standard and alter her behavior in reliance upon that expectation. If she leaves the workforce entirely, for whatever length of time, her earning capacity declines permanently,<sup>67</sup> making her equitable claim stronger. Finally, if a husband knows that the law provides compensatory payments to his wife once their marriage reaches a specified duration, he may behave opportunistically and leave his wife just before her entitlement matures. Thus, the opportunity for exploitation continues under the Maintenance Principles. The availability of compensatory payments for loss of the marital living standard in all marriages would better eliminate opportunistic behavior and promote marital stability. Consequently, given available justifications, a wife in a short-term marriage seems as worthy as a wife in a long-term marriage to receive compensatory payments based on a loss in her standard of living.<sup>68</sup>

The Maintenance Principles attempt to address the above situation by providing for the restoration of the *premarital* living standard after a short marriage.<sup>69</sup> This provision, however, only *partially* restores the *premarital* living standard<sup>70</sup> and only under very limited circumstances.<sup>71</sup> The spouse seeking such an award must prove that her inability to recover her premarital living standard at dissolution results from significant expenditures she made during marriage, or in anticipation of marriage, from separate property or from her relinquishment of specific educational or occupational opportunities.<sup>72</sup> If our hypothetical wife did not leave the workforce, but simply pursued her occupational development with less zeal, this provision would provide her no relief. If she left the workforce entirely, the second requirement causes her trouble. The wife must establish that she made the expenditures from her separate property or relinquished opportunities in order to facilitate the husband's pursuit of similar opportunities without undue disruption of marital life, to facilitate the birth or adoption of children, or to serve a purpose that the spouses agreed contributed to their marital life.<sup>73</sup> Here our hypothetical wife must prove that her leaving the workforce enabled her husband to pursue occupational opportunities, or facilitated an important goal to which both spouses agreed. Both of these

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66. *Id.* at 1172.

67. *See* Williams, *supra* note 30.

68. She seems even more worthy of such an award if the court considers her "contributions" to her husband's market labors as an ideal worker, rather than just her lost earning capacity and differential risk.

69. ALI PRINCIPLES 1997, *supra* note 6, § 5.16.

70. *Id.* § 5.16(3).

71. *Id.* § 5.16(2).

72. *Id.* § 5.16(2)(a).

73. *Id.* § 5.16(2)(b).

provisions invite a potentially expensive and protracted factual fight, a fight she likely lacks the resources to pursue to the finish.<sup>74</sup>

Finally the wife must also establish that she cannot recover the expended assets or that her lost opportunities leave her with a *significantly* lower earning capacity than before marriage.<sup>75</sup> Thus our hypothetical wife can recover only if she has withstood the first two requirements *and* her lost opportunities have resulted in an earning capacity *significantly* lower than before marriage. The Maintenance Principles do not define *significantly* lower earning capacity, presumably leaving that determination to the discretion of judges who historically discriminate against women, particularly on financial issues in divorce.<sup>76</sup> This parsimonious provision provides little assistance to wives in short-term marriages, and it does nothing to protect the wife's expectation interest in the marital living standard.

In addition to compensatory payments based on loss of the marital living standard and financial disparity, the Maintenance Principles provide supplemental compensatory payments<sup>77</sup> when one spouse has performed a disproportionate share of the care of the marital children or the children of either spouse.<sup>78</sup> Section 5.06 recognizes what many state judges and laws ignore: primary caretakers often limit their workforce participation, resulting in a loss in earning capacity.<sup>79</sup> Section 5.06 seeks to compensate the primary caretaker for his or her loss in earning capacity due to his or her child caretaking responsibilities. While I find the goal laudable, the devil again lies in the details.

Section 5.06 (2) creates a presumption of entitlement when: 1) the marriage has produced children, or when either spouse has children; 2) these minor children have lived with the claimant for a minimum period specified in a rule of statewide application; and 3) the claimant has a *substantially lower* earning capacity than the other spouse.<sup>80</sup> The *Principles* do not define *substantially lower* earning capacity, presumably leaving that to judicial discretion. Allowing judges with a history of discrimination against women in dissolution cases<sup>81</sup> to decide whether the husband's earning capacity *substantially* exceeds his wife's promises to defeat the availability of such an award as well as the very predictability the presumption seeks to establish. Moreover, the other spouse can defeat the presumption by establishing that the claimant did not provide *substantially* more than half of the total care that both spouses together provided for the

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74. *Freedom*, *supra* note 1, at 1172-78.

75. ALI PRINCIPLES 1997, *supra* note 6, § 5.16(2)(c).

76. *Freedom*, *supra* note 1, at 1201-15, 1215-16.

77. A spouse can make a claim for compensatory payments under Sections 5.06 and 5.05. ALI PRINCIPLES 1997, *supra* note 6, § 5.06(5). In no case, however, can the combined value of the child care durational factor, and the durational factor employed to determine the presumed award under Section 5.05, exceed the maximum value allowed for the Section 5.05 durational factor alone. *Id.*

78. *Id.* § 5.06(1).

79. *Freedom*, *supra* note 1, at 1211 & nn.258-62.

80. ALI PRINCIPLES 1997, *supra* note 6, § 5.06 (2).

81. Judges seem particularly inept at accurately determining the wife's financial vulnerability at divorce. See also Harris, *supra* note 1, at 740 (noting the reluctance of lower courts in Oregon to recognize the value of homemaker contributions to the family economy).

children.<sup>82</sup> This opportunity to rebut the presumption undoubtedly will precipitate factual disputes,<sup>83</sup> particularly in dual-earner households, and legal and discovery expenses the claimant (usually the wife) cannot afford. Judges presumably will resolve these disputes, and judges tend to favor the childcare contributions that fathers make more than those made by mothers.<sup>84</sup> The mother's limited financial resources and biased judicial discretion suggest that many mothers will have difficulty triggering the presumption and that the presumption will dissolve in all but the most dramatic cases. Certainly providing primary caretakers compensation for lost earning capacity has merit, but the actual provisions in the *Principles* likely will not provide this relief to many mothers.

Assuming that a primary caretaker *can* trigger the presumption and withstand an attempt to rebut the presumption, a specific formula determines the amount of compensatory payments.<sup>85</sup> The formula applies a specified percentage (the child care durational factor) to the difference in the expected incomes of the spouses after divorce.<sup>86</sup> The Maintenance Principles require the specified percentage to increase as the childcare period increases.<sup>87</sup> The "child care period" is the "period during which the claimant provided *significantly more than half of the total care that both spouses together provided for the children.*"<sup>88</sup> However, divorce terminates the child care period providing no recognition for the differential loss in earning capacity the primary residential custodian will experience *after* the divorce due to her greater caretaking responsibilities.<sup>89</sup> Moreover, the Maintenance Principles do not offer a formula but again defer to the states,<sup>90</sup> creating the same practical and political problems mentioned above.

Finally, Section 5.07 governs the duration of awards based both on loss of living standard and on caretaking responsibilities. Section 5.07(1)(a) provides for awards of unlimited duration when the age of the claimant and the length of the marriage both exceed specified minimum values.<sup>91</sup> The *Principles* again defer to the states to develop these minimum values.<sup>92</sup> For compensatory awards based on standard of living loss, Section 5.07(1)(b) provides for indefinite

82. ALI PRINCIPLES 1997, *supra* note 6, § 5.06(3).

83. The *Principles* do not define what constitutes child care. If the father watches television with the child while the mother does the family laundry, which parent provides child care? If dad helps with the math homework while mom cooks the family dinner, which parent provides child care? If the father watches the child while the mother does the grocery shopping, which parent provides child care? Or do both parents provide child care in the above examples. Do the mother's household tasks, like housecleaning, that indirectly benefit the child constitute child care? Should a court attach more merit to particular parental behaviors? If so, which ones? The definition of caretaking function found in the Child Principles does not cure the problem of indefiniteness. See ALI PRINCIPLES 1997, *supra* note 8, at § 2.03(6).

84. *Freedom*, *supra* note 1, at 1195-97 & nn.197-208.

85. ALI PRINCIPLES 1997, *supra* note 6, § 5.06(4).

86. *Id.*

87. *Id.* § 5.06(4)(a).

88. *Id.* (emphasis added).

89. The child care period equals the entire period during which the relevant minor children *lived* in the same household as the claimant. ALI PRINCIPLES 1997, *supra* note 6, § 5.06(4)(b).

90. *Id.* § 5.06(4).

91. *Id.* § 5.07(1)(a).

92. *Id.*

awards and limits their duration to the length of the marriage multiplied by a specified factor.<sup>93</sup> The *Principles* defer to the states to designate the specific factor.<sup>94</sup> For compensatory awards based on caregiving, Section 5.07(1)(b) provides for indefinite awards and limits their duration to the length of the child care period multiplied by a specified factor.<sup>95</sup> The Maintenance Principles do not explain why the payments should not continue for the entire duration of the child care period. Further, the Maintenance Principles fail to explain why compensatory awards based on the primary caretaker's loss of earning capacity should terminate at all. If one parent has compromised workforce participation in order to provide childcare, she likely never will recover her reduction in earning capacity.<sup>96</sup> Finally, the Maintenance Principles defer to the states to designate the specific factor,<sup>97</sup> creating the obvious problem of deferring to male-dominated legislatures to develop critical rules.

In sum, the Maintenance Principles heroically attempt to create uniform and predictable law. Yet they build in judicial discretion at critical junctures that compromises this attempt. Substantively they suffer from a conservative linkage to existing patterns of judicial behavior, deference to state legislatures on critical issues, and refusal (without convincing justification) to extend compensatory payments to short as well as long-term marriages. The Property Principles offer even less potential to improve the post-divorce financial circumstances of women.

### III. PROPERTY DISTRIBUTION

The Property Principles adopt a presumption in favor of an equal distribution of marital property.<sup>98</sup> While this presumption limits judicial discretion, many equitable distribution states already employ a presumption in favor of an equal distribution of marital assets.<sup>99</sup> Many judges, however, continue to exercise their discretion and award wives less than half of the marital property.<sup>100</sup> In contrast to this judicial pattern, under the Property Principles only the economic fault of a spouse justifies an unequal division.<sup>101</sup> Consequently, judicial application of the Property Principles likely will result in an equal division of marital property far more frequently than judicial application of current law. While equal division might enhance the financial circumstances of some divorcing

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93. *Id.* § 5.07(1)(b).

94. *Id.*

95. *Id.*

96. See Williams, *supra* note 30.

97. ALI PRINCIPLES 1997, *supra* note 6, § 5.07(1)(b).

98. *Id.* § 4.15(1).

99. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 452-58 (1996); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988).

100. See Freedom, *supra* note 1, at 1216 & n.286.

101. See ALI PRINCIPLES 1997, *supra* note 6, §§ 4.15(2)(b), 4.16; see also Oldham, *supra* note 12, at 804.

women, many divorcing couples have little property that the law recognizes as marital.<sup>102</sup> Here the conservative nature of the Property Principles emerges.

The Property Principles passively accept conventional definitions and conceptualizations of marital property.<sup>103</sup> Constrained by existing judicial patterns and the statutory law of the majority of states, the Property Principles exclude from the concept of marital property, *inter alia*, occupational licenses and professional degrees,<sup>104</sup> the enhanced earning capacity of spouses acquired during the marriage,<sup>105</sup> and the increase in value of and income from separate property.<sup>106</sup>

The Property Principles offer weak justifications for these exclusions. They explain that most states have rejected such claims.<sup>107</sup> They also argue that enhanced earning capacity also should not constitute marital property, because an inequitable result may occur. Divorce law does not consider property acquired before the marriage as marital, thus a spouse's earning capacity prior to marriage remains separate property. The other spouse, however, might begin working during marriage, making all of that spouse's income marital. While the above scenario might well produce an inequitable result, nothing prevents the law from taking the above possibility into account in the actual distribution of the marital assets. Moreover, it is difficult to accept that a spouse's earning capacity prior to the marriage must remain separate property simply because existing law labels it separate.

The Property Principles also argue that marital property should not include earning capacity because under existing law courts cannot modify property awards.<sup>108</sup> An inequitable result may occur if the court makes a property award based on a spouse's earning capacity at divorce, that spouse's income declines

102. See *Freedom*, *supra* note 1, at 1216-17 nn.291-92. A law that requires equal distribution also eliminates the potential to award more of the marital property to the more economically distressed spouse, usually the wife.

103. See, e.g., ALI PRINCIPLES 1998, *supra* note 8, § 4.03 cmt. a; Oldham, *supra* note 12, at 803 (recognizing that the ALI provisions regarding property distribution comprise a restatement rather than a serious reform effort).

104. ALI PRINCIPLES 1997, *supra* note 6, § 4.07(2).

105. *Id.* § 4.07(1).

106. The increase in value of and income from separate property during the marriage are marital only to the extent they are recharacterized, *id.* §§ 4.04(1), 4.18(3), or are attributable to either spouse's marital labor, *id.* §§ 4.04(2), 4.05(2).

107. *Id.* § 4.04 cmt. a. Oregon provides an instructive example. In 1993 the Oregon legislature amended Oregon's property distribution statute to require courts to consider enhanced earning capacity as marital property. The legislature, however, did not extend Oregon's presumption of an equal contribution to the acquisition of marital property to the acquisition of enhanced earning capacity. Moreover a spouse claiming an interest in the other spouse's enhanced earning capacity had to establish that she made a material contribution to the enhancement. The claimant spouse could satisfy the requirement of material contribution by showing that, among other things, she contributed financially or otherwise to the education and training that resulted in the other spouse's enhanced earning capacity. The contribution had to be substantial and for a prolonged duration. In 1995 the Oregon legislature amended the statute to "allow" rather than require courts to consider enhanced earning capacity as marital property. In 1999 the legislature repealed entirely the portion of the Oregon property distribution statute pertaining to enhanced earning capacity. Oregon now considers enhanced earning capacity relevant only to an award of spousal maintenance. Leslie Joan Harris, A "Just and Proper Divison": *Property Distribution at Divorce in Oregon*, 78 OR. L. REV. 735, 737 n.9 (1999).

108. ALI PRINCIPLES 1997, *supra* note 6, § 4.07 cmt. a.

subsequent to divorce, and the court cannot modify the award to reflect the change in circumstance. I again agree that this situation might well produce an inequitable result, but cannot accept that a court cannot modify a property award based on earning capacity simply because existing law does not provide that opportunity.

The *Principles* also refuse to define the increase in value of separate property as marital property, noting that most jurisdictions reject this approach.<sup>109</sup> Certainly some jurisdictions do label such increases as marital.<sup>110</sup> Ignoring the justifications of these states<sup>111</sup> simply because the majority rejects them seems particularly weak. Just as with spousal maintenance, this conservative approach of wrapping reforms around existing law compromises the Property Principles' ability to alter the financial circumstances of divorced women.

The Property Principles do offer one substantial change in existing law. Section 4.18 gradually recharacterizes separate property as marital property in long-term marriages.<sup>112</sup> This recharacterization somewhat ameliorates the opportunities lost by the *Principles*' refusal to label as marital any currently recognized type of separate property. The specifics, however, limit recharacterization's usefulness.

First, as noted above, the Property Principles specifically exclude spousal earning capacity, spousal skills, post-dissolution spousal labor, occupational licenses, and educational degrees from the concept of property.<sup>113</sup> Thus, recharacterization does not affect these potential forms of property.

Second, recharacterization becomes available only in marriages that exceed a specified duration.<sup>114</sup> The Property Principles characteristically defer to the states to develop a marriage duration rule of statewide application.<sup>115</sup> Just as with compensatory payments, one can predict that male-dominated legislatures will adopt a rule, if they allow recharacterization at all, that requires marriages of significant duration before recharacterization begins.

Third, the Property Principles arbitrarily restrict recharacterization to long-term marriages. They explain that in lengthy marriages, parties likely expect that separate assets will provide for joint retirement, a medical crisis of either spouse, or other personal emergencies.<sup>116</sup> As the marriage duration increases,

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109. See ALI PRINCIPLES 1997, *supra* note 6, at 108-09.

110. *Id.* (noting that Rhode Island, Colorado and Pennsylvania classify as marital all increases in the value of separate property that occur during the marriage).

111. Due to the devastating social impact of the impoverishment of divorced women and dependent children, states might want to make additional financial resources available at divorce. A state also may recognize that married couples develop financial plans based on their combined assets. A wife, for instance, may not maximize her contributions to her retirement account, counting on the increased value of the husband's larger retirement account to provide for their joint financial future. One spouse may sell a valuable asset, because the couple needs cash and the other spouse's separate assets are increasing in value more rapidly. The spouse that sells expects the increased value of the other spouse's assets to offset his or her personal financial sacrifice.

112. ALI PRINCIPLES 1997, *supra* note 6, § 4.18.

113. *Id.* § 4.07 cmt. a.

114. *Id.* § 4.18(1).

115. *Id.* § 4.18(1)(a).

116. *Id.* § 4.18 cmt. a.

this expectation also increases.<sup>117</sup> The Property Principles further explain that in lengthy marriages, spouses will likely have made employment decisions or marital investment decisions that relied upon the availability of separate assets.<sup>118</sup> Spousal expectations and reliance then justify recharacterization. However, spouses in short-term marriages may well share the same expectations as spouses in long-term marriages. A spouse in a short-term marriage also may make employment and investment decisions based on the availability of the other spouse's separate wealth. The Property Principles ignore these possibilities,<sup>119</sup> constraining their potential to alleviate the post-divorce financial deprivation of many wives. Limiting recharacterization to marriages of a specified duration also invites opportunistic behavior by encouraging a spouse with valuable separate property to leave the marriage just before recharacterization begins. If recharacterization began at marriage, this encouragement would disappear.

Fourth, once a marriage has reached a specified duration only a percentage of separate property becomes marital.<sup>120</sup> The percentage increases as the length of the marriage increases until at some point all separate property becomes marital.<sup>121</sup> The *Principles* again charge states with the task of developing a percentage rule of statewide application.<sup>122</sup> One can only imagine the resistance of state legislatures to such a percentage rule, suggesting that the recharacterization process ultimately will proceed very slowly, if at all.

Fifth, even in marriages of significant duration, separate property received *during the marriage* does not become marital property until the spouse has "held" the separate property for a specified duration.<sup>123</sup> If a husband in a twenty-year marriage inherits several million dollars from his parents, no percentage of that separate property becomes marital until the husband holds that property for a specified time period. Once again, the *Principles* charge states with the task of developing a "holding" rule,<sup>124</sup> precipitating the same practical and political problems noted above. Even more problematic, a spouse can entirely avoid the recharacterization of gifts or inheritances received during the marriage simply by giving written notice of such an intent to the other spouse within a specified time period after the property's receipt.<sup>125</sup> Spouses can plan for twenty years on the inheritance of one spouse to fund their mutual retirements, yet the spouse who inherits can violate those expectations simply by declaring his or her intent to do so.

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117. *Id.*

118. ALI PRINCIPLES 1997, *supra* note 6, § 4.18 cmt. a.

119. Under very limited circumstances, the *Principles* do provide some relief for spouses in short-term marriages. See discussion of compensatory payments at *supra* note 77.

120. See ALI PRINCIPLES 1997, *supra* note 6, § 4.18(1)(a).

121. *Id.* § 4.18(1)(b).

122. *Id.* § 4.18(1).

123. *Id.* § 4.18(2).

124. *Id.*

125. *Id.* § 4.18(4). The Court also retains the discretion to refuse to recharacterize property if the Court explicitly finds that it must preserve the property's separate character to avoid a substantial injustice. *Id.* § 4.18(6).

The Property Principles' widespread deference to states on critical recharacterization rules and a spouse's ability to avoid entirely the recharacterization of gifts and inheritances received during the marriage, significantly diminish the ability of recharacterization to enhance the property available for distribution at divorce. As a result, recharacterization does not change property distribution law enough to substantially improve the post-divorce financial situation of most dependent wives and children.

#### IV. ALLOCATIONS OF CUSTODIAL RESPONSIBILITY FOR CHILDREN

As mentioned above, divorcing mothers frequently trade away their financial interests in order to secure custody of their children. An approach to child custody that honored the commitment of the primary caretaking parent might discourage this practice and improve the post-divorce financial circumstances of dependent mothers and their children. The Child Principles offer a presumption that instructs judges to allocate custodial responsibilities in proportion to the caretaking functions each parent previously performed for the child.<sup>126</sup> At first blush this presumption seems to honor the caretaking parent, providing some assurance to the mother of an allocation of custodial responsibility commensurate with her prior commitment. The broad definition of caretaking functions,<sup>127</sup> however, will undoubtedly precipitate factual quarrels, especially in dual-earner households where sources outside the nuclear family provide much of the caretaking.

If the father explains a televised football game to his daughter<sup>128</sup> while the mother cooks the family dinner,<sup>129</sup> which parent has provided the caretaking? If a mother helps with math homework<sup>130</sup> while the father launders the family clothing,<sup>131</sup> which parent has provided the caretaking? Are certain types of caretaking more important, and therefore more deserving than others? Very importantly, the Maintenance Principles provide a strong incentive for fathers to dispute mothers' claims of greater caretaking. If, on the issue of custody, a father concedes that a mother has performed substantially more of the child care than he has, he exposes himself to compensatory payments based on caretaking.<sup>132</sup> Consequently, the Maintenance Principles encourage disputes regarding the caretaking functions of each parent.

126. See ALI PRINCIPLES 2000, *supra* note 8, § 2.09(1). The *Principles* also attempt to allocate decisionmaking responsibilities based upon the parents' respective past participation in child-related decisionmaking. *Id.* § 2.10(1)(b). Other factors, however, also influence allocation of decisionmaking responsibilities. *Id.* § 2.10(a), (c), (d), (e), (f).

127. *Id.* § 2.03(6).

128. The father could argue that he performed the caretaking functions of "development and maintenance of appropriate interpersonal relationships with . . . adults," *id.* § 2.03(6)(e), or of "recreation and play," *id.* § 2.03(6)(a).

129. The mother could argue that she fulfilled the caretaking function of feeding the child. *Id.* § 2.03(6)(a).

130. Supervision of homework is a caretaking function. *Id.* § 2.03(6)(d).

131. *Id.* § 2.03(6)(a) (recognizing caretaking functions that meet the daily physical needs of the child).

132. ALI PRINCIPLES 1997, *supra* note 6, § 5.06.

Resolving a factual dispute in favor of a mother requires the expenditure of financial resources the dependent mother frequently does not possess.<sup>133</sup> Additionally, courts frequently value the caretaking that fathers provide more than that of mothers,<sup>134</sup> suggesting that gender bias will influence the actual application of this standard.<sup>135</sup>

If the court cannot determine how parents divided caretaking responsibilities during the marriage, then the court must employ the best interest standard in allocating these responsibilities.<sup>136</sup> Court application of the best interests standard frequently fails to honor the caretaking mother.<sup>137</sup> Moreover in making custody decisions the *Principles* allow courts to rely upon the same incompetent guardians ad litem and others<sup>138</sup> who historically have failed to protect mothers' interests in their children.<sup>139</sup> The above suggests that caretaking mothers likely will not trust the presumption or the default best interests standard to protect their interests in custody. They likely will continue to trade financial resources for custody.

## V. SEPARATION AGREEMENTS

Laws that honor divorce separation agreements make sense only if most separation agreements will provide adequate financial resources for women and their dependent children.<sup>140</sup> In order for a wife to obtain adequate financial resources during negotiations with her husband, the substantive law must support her claims. As argued, application of the substantive law that the ALI proposes likely will not provide the wife with adequate financial resources at divorce. Even if we assume that state legislatures have developed entitlement criteria that adequately protect women, however, enforcement of separation agreements remains highly problematic.

For the most part, the maintenance and property formulas and presumptions offered by the ALI will improve the ability of divorcing spouses and their lawyers to predict what a court would award at trial. The predictability of trial results arguably increases the likelihood that divorce settlement agreements will reflect existing law.<sup>141</sup> Presumably, if both spouses know that a court likely will

133. See *Freedom*, *supra* note 1, at 1172-80 nn.78-113, 1200 nn.219-20, 1220 nn.300-03.

134. *Id.* at 1195-98 nn.196-209, 1225-34 nn.334-77.

135. The *Principles* strongly encourage parents to bypass the court and develop their own parenting plans for their children, either on their own or in mediation. ALI PRINCIPLES 1998, *supra* note 9. Negotiations, however, will occur in the shadow of the substantive custody law that provides mothers little protection of their custody interests. Moreover, shuffling these disputes into the private realm of mediation and negotiation creates a context in which parents easily can make custody and financial trade-offs with little fear of detection or correction by the court. See generally ALI PRINCIPLES 1998, *supra* note 8, §§ 2.06, 2.08; ALI PRINCIPLES 2000, *supra* note 8, § 2.07.

136. ALI PRINCIPLES 2000, *supra* note 8, § 2.09(3).

137. *Freedom*, *supra* note 1, at 1192-201 nn.185-224.

138. ALI PRINCIPLES 1998, *supra* note 8, § 2.15.

139. *Freedom*, *supra* note 1, 1198-200.

140. *Id.* at 1153-70.

141. See ALI PRINCIPLES 1997, *supra* note 6, at 11; *Freedom*, *supra* note 1, at 1234 nn.379 & 380. See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 522 & n.320 (1992); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

award the wife five hundred dollars per month in compensatory payments for five years, the husband likely will agree to settle for comparable compensatory payments. Many factors other than law, however, influence the terms of settlement agreements.

Most wives depend financially upon their husbands.<sup>142</sup> Their economic dependency creates innumerable problems in divorce negotiations. Typically husbands resist paying,<sup>143</sup> and judges resist ordering,<sup>144</sup> temporary support for wives during the pendency of the divorce proceeding. When a wife can no longer meet her and the children's basic needs, she typically has difficulty "holding out" for a settlement agreement that reflects her legal entitlements.<sup>145</sup> Many wives cannot afford competent legal representation,<sup>146</sup> nor can they engage in the expensive discovery necessary to develop their cases.<sup>147</sup> A mother with inadequate financial resources risks losing custody of her children,<sup>148</sup> a factor that prompts women to trade away financial interests to secure custody.<sup>149</sup> Psychological factors and socialized tendencies also inhibit the ability of many women to negotiate effectively with their husbands during divorce.<sup>150</sup> Moreover many lawyers exhibit gender bias and encourage women to accept poor settlements in divorce.<sup>151</sup> The formulas the *Principles* offer for property distribution and spousal maintenance do nothing to alter these practical circumstances that promote unfair settlements.

The *Principles* recognize<sup>152</sup> and attempt to address the danger of unfair settlements in several ways. The *Principles* require an enforceable agreement to comply with general principles of contract law and Chapter 7 of the *Principles*.<sup>153</sup> The contract law that states apply to separation agreements recognizes the unconscionability, and resulting unenforceability, of grossly unfair agreements entered into under duress, coercion, or fraud.<sup>154</sup> Application of the unconscionability doctrine historically has provided little relief to women who have entered

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142. *Freedom*, *supra* note 1, at 1172-73 (explaining the source and the extent of wives' financial dependency on husbands).

143. *Id.* at 1174 & n.87 & 88.

144. *Id.* at 1173 & n.86.

145. *Id.* at 1173-74.

146. *Id.* at 1174-76.

147. *Id.* at 1174-77.

148. *Freedom*, *supra* note 1, at 1178-80.

149. *Id.*

150. Naive trust, care orientation, low status, depression, low expectations, and ineffective conflict resolution styles disadvantage women more than men during divorce negotiations. *Id.* at 1180-1191. See also Bryan, *supra* note 141, at 449-90 (exploring the tangible and intangible power disparities between husbands and wives that disadvantage wives in divorce negotiations and mediation).

151. See *Freedom*, *supra* note 1, at 1234-38 & nn.378-403 (exploring how and why lawyers frequently provide divorcing wives with inadequate representation).

152. The *Principles* recognize that policy concerns (presumably the impoverishment of women and children are among them) justify some constraints on the parties' freedom to contract at divorce. ALI PRINCIPLES 2000, *supra* note 8, § 7.02.

153. *Id.* § 7.15.

154. *Freedom*, *supra* note 1, at 1240-42.

unfair settlement agreements.<sup>155</sup> Nothing the *Principles* provide offers to alter this historical pattern. Consequently, any protection women have against inequitable settlement agreements must come from the Agreement Principles.

Section 7.15 addresses the enforceability of separation agreements.<sup>156</sup> It requires courts to enforce separation agreements if, prior to accepting the agreement, “each party had full and fair opportunity to be informed of the value of the parties’ marital and separate assets, each party’s current earning and prospects for future earnings, and the significance of the terms of the agreement.”<sup>157</sup> This provision assumes that an “opportunity to be informed” regarding the financial circumstances of each spouse and the meaning of the agreement’s terms protects a weaker spouse. Two fundamental problems, however, confront this assumption.

Although information clearly provides power in divorce negotiations,<sup>158</sup> this provision only requires an *opportunity* to obtain information. If gender-biased and self-interested<sup>159</sup> judges continue to decide the enforceability of separation agreements, we can expect them to find that all women represented by counsel, no matter how inadequate, had the requisite opportunity to obtain information.<sup>160</sup> We also can expect these judges to find that a woman had the requisite opportunity, when her husband or his attorney testifies that they encouraged her to obtain an attorney and she *refused*.<sup>161</sup> In sum, the difficulty lies not in the provision itself, but in its application.

Second, although information does provide some power in divorce negotiations, information alone does not guarantee a fair result. A wife may understand completely the financial circumstances of the marriage, yet, as noted above, lack the requisite power to negotiate effectively with her husband.<sup>162</sup> Gender-biased and self-interested courts also attribute understanding of an agreement to wives under egregious circumstances.<sup>163</sup>

The *Principles* offer one more protection against unfair settlement agreements. Section 7.15(2) instructs courts to refuse to enforce settlement agreements that differ *substantially* from the law that governs compensatory payments or property disposition *and* that *substantially* impair the economic well-being of a party who has primary or dual residential responsibility for children or has *sub-*

155. *Id.* at 1239-70 nn.419, 423-25 & 427-647 (reviewing cases in which judges applied the unconscionability doctrine to separation agreements).

156. ALI PRINCIPLES 2000, *supra* note 8, § 7.15.

157. *Id.* § 7.15(1)(c). The *Principles* also require that separation agreements satisfy the requirements of enforceable contract, *id.* § 7.15(a), that it be in writing and signed by the parties, or stipulated by the parties before the court, *id.* § 7.15(b), and that it satisfy other requirements of state law specially applicable to separation agreements, *id.* § 7.15 (1)(d).

158. See *Freedom*, *supra* note 1, at 1177 & n.103; Bryan, *supra* note 141, at 447 n.13.

159. Judicial frustration with overcrowded dockets, judicial deference to family privacy, and judicial distaste for divorce cases, and a pervasive preference for private settlement encourage judges to accept without serious question unfair divorce settlements. See *Freedom*, *supra* note 1, at 1238-39 n.405-08, 1243 n.428.

160. *Id.* at 1255 & n.520, 1177 n.103, 1265-69 & n.603, 1267 & n.618.

161. *Id.* at 1256-57.

162. See *supra* notes 158-61 and accompanying text.

163. See *Freedom*, *supra* note 2, at 1258-62 & nn.551 & 573.

stantially fewer economic resources than the other party.<sup>164</sup> This provision mimics the unconscionability doctrine, but differs in one important respect. Generally unconscionability requires procedural irregularity, *i.e.*, duress, fraud, coercion, as well as substantive unfairness.<sup>165</sup> Section 7.15(2) eliminates procedural irregularity and allows courts to focus exclusively on the substantive fairness of the separation agreement, making it easier for courts to invalidate unfair agreements. Historically, however, courts have found extremely lop-sided agreements substantively fair.<sup>166</sup> The requirements that an agreement substantially differ from the law and substantially impair the economic well-being of a party who has substantially fewer economic resources than the other party actually invite continuation of this pattern. Without meaningful intervention or control over judicial discretion, this pattern undoubtedly will continue.

States cannot rely upon contract doctrine or the Agreement Principles to protect women from unfair settlement agreements. Not only do judges have reprehensible track records in responding to women's challenges to separation agreements, most women lack the financial and emotional resources to mount such challenges in the first instance.<sup>167</sup> The important social policies at stake in divorce cry out for more meaningful intervention in the settlement process.

## VI. CONCLUSION

I regret this rather negative critique of the American Law Institute's *Principles of the Law of Family Dissolution* proposals. Certainly meaningful reform in this area is long over-due. While I doubt that the ALI proposals will significantly alter the financial circumstances of divorced women and their dependent children, the proposals remain important. In the area of compensatory payments and property distribution, the ALI moves in the right direction by attempting to limit judicial discretion and to solidify a wife's entitlements, however meager. More importantly the ALI proposals undoubtedly will give rise to a lively national debate on family dissolution issues. Hopefully those debates will generate more radical reform.

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164. ALI PRINCIPLES 2000, *supra* note 8.

165. See *supra* note and accompanying text.

166. See *Freedom*, *supra* note 1, at 1243-70 & nn.599, 603, 618, & 641 (reviewing cases in which judges refused to set aside lop-sided settlement agreements).

167. *Id.* at 1243 & n.429.