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A Comment on Property and Divorce

CAROL WEISBROD*

This comment responds to the broadest reading of Professor Williams's paper, one in which she invites us to consider large relationships between property and the law of marriage and divorce.¹

Professor Williams has suggested that we focus on ways to create a wife's entitlement to the future income of her former husband. Essentially, this entitlement is grounded in a combination of factors ranging from investment, to contribution, to expectations, to need, as well as to some idea of justice. An entitlement for women is needed to rectify an existing inequality resulting from our wage-labor system. Professor Williams argues, in effect, that in the context of post-divorce property division and alimony arrangements, we should move from a family law system based on discretion to a system that gives women a property-based entitlement equivalent to that presently held by husband wage-earners.

Passing the argument that there is likely to be discretion in all areas of law, including property, the more fundamental observation here is that Professor Williams's idea may be as much about entitlement as about property. Entitlements can be created in a variety of ways, including contracts and other instruments in commercial law. Creating a debtor-creditor relationship and moving into the field of creditor's rights is a possibility.² Contracts generally are a source of obligation and, thus, entitlement. In addition, property ideas may be useful.

More broadly, however, property in its larger history may have something to contribute to the discussion which is unique to property because of its long-standing connection to family law and to the shape of the family. While some of the current conversation suggests that there is something new in considering property and family law together, it seems that when one takes the long view, these fields are closer than one might think.

* *Ellen Ash Peters Professor, University of Connecticut School of Law. This text is an edited version of a talk given at the 1999 Gullivan Conference, commenting on Joan Williams's paper.*

1. See Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249 (1999).

2. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

A large focus of the history of the law of the family was once property.³ This is evident in Pollock and Maitland. The theme is also pursued in the work of Julius Goebel, who remarked, "as Karl Marx very clearly noticed, there has always been an interdependence of family and property."⁴ When, in 1946, Goebel included a section on family law in his *Cases and Materials on the Development of Legal Institutions*, he produced a table of contents that reads—at least in the section on the common law and the family—like the outline of the first semester of a standard property course.

This may surprise us because in recent decades family law has often been focused on conflicts of laws and, later, on issues of psychology and the integration of this field with the social sciences. Leading examples of such writings have, for example, focused on the welfare of children using social science perspectives.

As to the issue of family law and women, one might say that it has been conventional for decades that the subject is of special concern to women. But where family law once meant something about a description of the condition of women—a description written largely by men relatively satisfied with what they saw—to the extent that it deals with women now, it more and more opens questions about structural tensions between the family and the outside environment. Professor Williams's work has demonstrated its explicit connection to some of these tensions and issues in property. Professor Williams and others have also raised basic questions about the meaning of property. These questions are as radical as those traditionally posed by Marxist and Utopian thinkers.

We may also say, however, that there are significant differences in the fields of property and family law. One difference might be the time frame. At the risk of overstatement, I suggest this contrast. We often see family law as dealing with people in immediate crisis, as picking up the pieces of an urgent problem. Property, by contrast, is often focused on advanced planning. We look at people who have taken a long view forward—the control of the dead hand, for example—into the remote future and the field responds in terms that reflect that long view. The Rule Against Perpetuities acknowledges and attacks the explicit attempt to control the remote future. And the language of property describes the subjects of the field in terms that suggest the weight of continuities: ancestral lands and dynastic wealth. Stressing the historical aspects of the subject, we often teach property beginning with feudalism, one of the conditions—like "barbarism," "tribalism," and recently, "liberalism"—in which people are said to be

3. These paragraphs are adapted from Carol Weisbrod, *Susanna and the Elders: A Note on the Regulation of Families*, 1998 UTAH L. REV. 271, 288.

4. JULIUS GOEBEL, JR., *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 442 (1946).

“mired.” When family law reaches issues as long term as these, we often say, “Oh that is for another course—trusts and estates perhaps, or wills.”

But the emphasis on feudalism carries a subtext to the effect that the system of estates and the functions it served are obsolete and of historical interest only, if that. We might, therefore, remind ourselves that Alice James inherited a life estate in a shawl.⁵ We might further consider some of the actual functions of the old system and raise the following question: What legal structures are available today to perform such functions?

Recalling what we once knew about feudal estates, we quote such forms as, “A and the Heirs of his Body.” The formula creates an entail in favor of one generation and then the next, indefinitely.⁶ Over time, the entail could be broken by certain processes—for example, making the land alienable—which was, in any case, largely abolished in the United States.

It did survive, however, in some states. Raised in Maine, the poet Edna St. Vincent Millay seems to have been acquainted with the entail. She described the feudal estate in a late poem:

Those hours when happy hours were my estate,—
Entailed, as proper, for the next in line,
Yet mine the harvest, and the title mine—⁷

The powerful link between family and property continues; some of it is analyzed in terms of human capital, some is seen as involving more traditional forms of transfer. The recent changes in family wealth transmission and the inter vivos transaction have been discussed. Langbein writes:

My first theme . . . concerns human capital. Whereas of old,

5. See JEAN STROUSE, *ALICE JAMES: A BIOGRAPHY* 286 (1980) (“A life interest in a shawl! . . . [W]ith a reversion to a male heir, is so extraordinary and ludicrous a bequest that I can hardly think it could have been seriously meant.”).

6. For the history of the entail, we go back before the medieval statute *De Donis*. *De Donis* abolished the fee simple conditional and created the fee tail. “Entailed as Proper” for the next in line, and the next, and the next.

7. EDNA ST. VINCENT MILLAY, *MINE THE HARVEST: A COLLECTION OF NEW POEMS* 121 (1954). The poem continues:

Those acres, fertile, and the furrow straight,
From which the lark would rise—all of my late
Enchantments, still, in brilliant colours, shine,
But striped with black, the tulip, lawn and vine,
Like gardens looked at through an iron gate.

Yet not as one who never sojourned there
I view the lovely segments of a past
I lived with all my senses, well aware
That this was perfect, and it would not last:
I smell the flower, though vacuum-still the air,
I feel its texture, though the gate is fast.

wealth transmission from parents to children tended to center upon major items of patrimony such as the family farm or the family firm, today for the broad middle classes, wealth transmission centers on a radically different kind of asset: *the investment in skills*. In consequence, intergenerational wealth transmission no longer occurs primarily upon the death of the parents, but rather, when the children are growing up, hence, during the parents' lifetimes.⁸

There is also a certain amount of wealth transmission after the children are grown up and in the lifetime of the parents.

The connection between family and property may hold even in family law cases which are apparently not about property at all. Consider, for example, the famous conflicts case, *In re May's Estate*,⁹ about the validity in New York of an uncle/niece marriage celebrated in Rhode Island.¹⁰ While the case is formally about the conflicts rules relating to the recognition of marriages, the underlying issue seems to have been about property.¹¹

In the case of divorce, property issues are not, of course, the whole story. Despite all of our efforts, divorces cannot really be described as "messy." Our language continues to be intense, focused on pain, loss, and, in the more neutral idiom of contracts, on defeated expectations. We are ordinarily concerned with the couple and the children of the couple, but perhaps we should also look at the defeated expectations of an older generation—the grandparents, the testators of the inheritances and donors of the gifts which are, in many cases, by one route or another, part of the marital assets available for distribution.¹²

The expectations of the older generation may be defeated in general as well as in specific ways. The most general issue can be put in U.C.C. terms: a high divorce rate involves loss of "a continuing sense of . . . secu-

8. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmsission*, 86 MICH. L. REV. 722, 723 (1988).

9. 114 N.E.2d 4 (N.Y. 1953).

10. *See id.*

11. *See id.* This is suggested in the respondent's brief:

In 1946, the wife died intestate. She left surviving her a husband (the respondent herein), and six children of this marriage, all of whom were adults. The petitioner is one of these children. Six years after the death of her mother, the said daughter, as petitioner, filed this application for Letters of Administration in an effort to prevent her father from disposing of real property owned by her father and mother by the entirety. The petitioner leases one of the two apartments existing on this property. Her father occupies the other.

The procedural device used by this daughter—appellant herein—is solely a means by which the Court may determine the validity of the marriage of her parents and consequently the prospective property rights of the child as against the father. The petitioner is joined by two of her sisters. The father is supported by his two sons and the remaining daughter.

Respondents' Brief at 3, *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953).

12. The grandparents also enter the story when they ask for visitation rights or when they need support. They are described as grandparents in a full generational account. Using a more restricted lens, they are parents of adult children.

ity."¹³ It is as much about Thanksgiving dinners and the individual identity as existing within a particular family constellation as it is about caretaking in old age. Parents and children are still parents and children even when they are adults, and even when they are aged adults.

The available models of relationship here seem more various than the models for parents of young children, or spousal relations. Cross culturally, variations are common in inter-generational arrangements and also with respect to in-law relations.

Some people expect to add in-law apartments to their homes. Others do not. Some people expect to support parents and other extended family. Others do not. Some grandparents feel the need to pass property—not human capital—through the blood line. Others do not. To the extent that more variation is seen as acceptable, more systems for property arrangements may also be needed.

The older and obsolete mechanisms of future interests allowed many arrangements—many “preferences,” one might say. Some of these are now problematic because of our emphasis on the couple and on the individual affective relationship of the couple. The notion of divestment on failure to meet a condition, for example, is viewed with hostility.¹⁴ We see the over controlling dead hand. But, clearly, land could be used as mechanism for the enforcement of particular family values. The sanction was not prison but divestment.

Millay’s poem is evocative of divestment.¹⁵ The estate here is not, apparently, an ordinary life estate, passing at the death of the present owner. Rather, we see a former owner divested of the estate and excluded from it.

Examples from the Restatement of Property illustrate such divestments.

A, owning Blackacre in fee simple absolute, transfers Blackacre “to B for life or so long as B shall remain chaste.” The language “so long as B shall remain chaste” is a special limitation. B has a determinable estate for life.¹⁶

13. See U.C.C. § 2-609 cmt. 1.

14. See RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. a, at 53 (Tentative Draft No. 2, 1999) (“[T]he commentary here takes positions more restrictive with respect to certain types of trust provisions than the positions presently taken in some of the rules of Part III of Division I of Restatement Second, Property.”). Discussing this issue in 1977, Gareth Jones (of Trinity College, Cambridge) suggested that the courts should hesitate to strike down restraints which they find offensive to public policy before determining, through empirical studies, how “prevalent and influential the so called offensive restraints are.” Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in DEATH, TAXES AND FAMILY PROPERTY 119, 129 (Edward C. Halbach, Jr. ed., 1977). It is entirely possible that the legal systems of different countries will see these problems differently.

15. See MILLAY, *supra* note 7, at 121. Millay’s poem is built on a lost estate, a thing that was perfect and could not last. See *id.*

16. RESTATEMENT (FIRST) OF PROPERTY § 23 illus. 1, at 55 (1936).

X, wherein Blackacre is located, permits the creation of an estate in fee tail. A, owning Blackacre in fee simple absolute, transfers Blackacre "to B and the heirs male of his body so long as he and they continue as members of the Catholic Church." B has a determinable estate in fee tail male. A has a reversion.¹⁷

The world of the feudal estates provided a model for the maintenance of a set of values and institutions, including the family.

As indicated, the present understanding of marriage as a union of two loving individuals makes such provisions insulting. Moreover, wealth is no longer necessarily land, which ideally must be kept intact, but simply capital, which can be divided, used, and, in a consumption-oriented world, dissipated. And often whatever accumulation there is might not be called wealth in any case and will often be consumed in the form of annuities, exhausted by the time of the death of the oldest generation.

And yet the sense of collective ownership does not go away. In the novel *Le Divorce*, the property (a painting) is described by the wife's family as belonging to more people than the wife.¹⁸ In some cases, the holders of the property may see their connection in terms of stewardship more than ownership. The restraint on alienation is psychological and not legal; or, seen through another optic, it becomes a "law" of the family.

The present highly individualistic focus in legal materials sees the issue in terms of the rights of the individual grantor. He can do a great many things, including disinherit his children. What he does may limit the rights of an individual grantee—for example:

When a testator attempts to use his power to dispose of his property in such a way as to exert pressure on a legatee to conform to some religious preference of the testator, the stage would seem to be set for potential conflict between two fundamental policies of our legal system: freedom of testation and freedom of religion.¹⁹

As in other cases, we do not ask how the preference is formed or how this expression of the preference is related to other expressions of a similar position. We do not explore the issues of identity or group membership to which the preference may relate.

But this leaves a problem. How does a property scheme which is designed to protect long term interests survive a divorce regime focused on the immediate needs of a nuclear family? In some versions of the divorce distribution scheme, states will protect a "separate property" if it remains separate. But, of course, separate property may become marital property.

17. *Id.* at § 23 illus. 7, at 58.

18. See DIANE JOHNSON, *LE DIVORCE* 191 (1997).

19. Francis M. Nevins, Jr., *Testamentary Conditions: The Principle of Uncertainty and Religion*, 18 ST. LOUIS U. L.J. 563, 581-82 (1974).

A recent casebook reviews the point:

If, for example, one spouse receives a gift of money during marriage from a parent and deposits it into a bank account where she also deposits her earnings, the gift will likely become hopelessly mixed, or "commingled" with marital assets and, as a result, be treated as marital property. . . . Or, if the money is deposited in a joint account, in many states a presumption will arise that the owner intended to make a gift to the marital estate and the funds will be "transmuted" from separate to marital property.²⁰

And one can easily imagine a system in which any property acquired during marriage from any source will be available for distribution.²¹

This is more than an issue for the very rich. Many people want to give money or particular things whether or not of extrinsic value, within the blood line or within the group.²²

It may be that the older generation, having had notice and experience of the changes consequent on no-fault divorce, is taking steps to counteract its effects on inter vivos gifts.²³ Perhaps inter vivos gifts are made directly to grandchildren, or perhaps gifts are made on conditions, or later rather than earlier. (Some cases on their facts might seem to raise the issue of when a marriage vests.)²⁴ Perhaps there is less inter-generational transfer altogether. It may be that there is information available on such patterns—the responses to the shattering of expectations in the older generation which free divorce has produced. But if such information exists, I am not familiar with it. It may be that we have not yet analyzed the ways in which

20. FAMILY LAW 728 (Harry D. Krause et al. eds., 4th ed. 1998). A similar problem may arise in the context of the death of a spouse. Thus, in *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), where the grandparents (parents of a deceased daughter) fought the widower-husband for custody of his son, the court refers to the husband's dissipation of the grandparents' gift of money to the daughter, which she (and they?) had intended for the child's education. See *id.* at 155.

21. Contractual arrangements and rearrangements are possible, of course.

22. Professor Lewis M. Simes writes:

It must not be supposed that the future interest and the rules of law which restrict it can be understood outside its natural setting. That setting is the *family settlement*,—the dispositions, whether by will or inter vivos, by which the man of property attempts to tie up his estate in the family.

LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 3 (2d ed. 1966) (emphasis added). He then adds a footnote:

Professor Leach, in the preface to his casebook on Wills (2d ed., 1947), p. iv, referring to the course "which bears the unfortunate label 'Future Interests'," says: "It ought to be called something like 'The Substance of Gift Transactions, Testamentary and Inter Vivos, for Clients above the Shoe-Sales-man Income Level.'"

Id. at 3 n.4. "Above the Shoe-Sales-man Income Level" includes a great many people.

23. This point was suggested during a class on Family Law in spring, 1999.

24. See *Litteral v. Litteral*, 111 S.W. 872, 873 (Mo. App. 1908) (involving the conflict between a young widow and her deceased husband's family of origin).

those inter vivos transactions may have changed²⁵ in response to divorce and the new approaches to economic arrangements after divorce. It would seem to be a good subject for empirical research.

The field of property suggests various ways of arranging things as to these issues as well as a vocabulary in which to address them. We might try to reopen the story of free alienation of land associated with individualism to pick up the strands, the "segments of a past" as Millay wrote,²⁶ which stressed the continuities of families, and groups. Professor Williams has argued the connection between property ideas and divorce in a way which focuses on the children and the couple. In urging the importance of the property connection, she has directed our attention to issues that are of continuing significance in a variety of contexts. Herbert Wechsler noted some time ago to the "impingement of the law of property on human interests of the first importance."²⁷ This comment has simply offered some illustrations of this point.

25. Are down payments on a house given or withheld? Is money put into accounts for a grandchild? Or is assistance given for repayment of a student loan of a son or daughter (rather than a down payment)?

26. MILLAY, *supra* note 7, at 121.

27. Herbert Wechsler, *Forward to 1 RESTATEMENT (SECOND) OF PROPERTY* at vii (1983).