MARRIAGE AND DIVORCE IN THE TWILIGHT ZONE

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The past decade has shown a modest increase in the number of marriages and a dramatic increase in the divorce rate.[1] In 1975, there will be almost one million divorces and about twice as many marriages in the United States.[2] While the last 10 years have seen an 80 percent increase in the overall divorce rate,[3] there has been a smaller but significant increase in divorces involving persons in the higher age groups.[4] For example, it has been estimated that at least 25 and perhaps 40 percent of the women now aged 35 will be divorced by age 50.[5]

Some of the reasons for the increase in twilight or December marriages and divorces are obvious and the result of general trends.[6] However, there are special reasons for marriage or divorce which, although not peculiar to older citizens, are present in a more marked degree.[7]

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1. *See* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1202 (1974), *citing* NATIONAL CENTER FOR HEALTH STATISTICS, 21 MONTHLY VITAL STATISTICS REP. 3 (Mar. 3, 1973).

2. BUSINESS WEEK, Feb. 10, 1975, at 83.

3. Weitzman, *supra* note 1, at 1202.

4. In private correspondence, the Division of Vital Statistics of the Department of Health, Education, and Welfare [HEW] reports that the number of women who were involved in divorce at age 50 or older increased 27 percent between 1963 and 1969 and that there was a 26 percent increase for those age 60 and older. Of course, the overall increase in the divorce rate during the same period was far greater but nonetheless the above figures are impressive. The Bureau of Census reports that as of 1971, 11.3 percent of women in the 65-70 age bracket had been divorced, as compared with 12 percent in the 60-65 age bracket. In short, although divorce is less frequent for parties over the age of 60, it is by no means uncommon and its incidence is increasing.

5. Weitzman, *supra* note 1, at 1202-03.

6. *Id.* at 1203. Weitzman lists as causes of the increasing divorce rate such factors as: (1) lessened social stigma; (2) the increased alternatives available to women, especially economic alternatives; and (3) rising expectations for happiness in marriage which make it more difficult to justify remaining in an unhappy marriage.

7. Loneliness rather than physical attraction may be a prime motive for the mar-

The following discussion will attempt to explore these considerations and their legal consequences. Two areas of current financial significance to senior citizens have been singled out for comment: antenuptial contracts, and divorce and its economic consequences.

ANTENUPTIAL CONTRACTS

Currently there is a concerted effort to move the law governing the incidents of marriage from one of status to one of contract,[8] thus fulfilling the prophecy of Sir Henry Maine.[9] A status-based law of marriage seizes upon one aspect of the relationship between the parties—the fact that they are married—and proceeds to submerge individual differences by imposing upon all people within that class a set of legal incidents designed for a stereotypical marriage. The trouble with this approach is that the set of legal rights and obligations which has been developed may be totally unsuited to the needs of the individuals involved. This is of particular concern to senior citizens who often seek to modify contractually the law governing their marital relationship. Thus, the majority of antenuptial contracts have been executed by older parties who have children by a former marriage and wish to ensure their financial security.[10]

Before examining antenuptial contracts in more detail, the background of existing marriage law must be considered. The social institutions of marriage and divorce customarily have been singled out for state regulation and control.[11] Even in preliterate or primitive cultures, marriage and its termination are public events subject to group control and to which various social, religious, and economic consequences attach.[12] So too, the historical antecedents of Anglo-American and European marriage law emerged from a religious and moral tradition rather than from preexisting legal institutions. Until the 20th century,

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riages of older persons. Upon retirement and increased association, previous irritations may become chronic complaints. Consider the aphorism: "I married you for better or worse, but not for lunch!"

8. The literature favoring this development is legion. *See, e.g.*, Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 564 (1974); Weitzman, *supra* note 1.

9. *See* H. MAINE, ANCIENT LAWS 168 (4th Am. ed. 1906).

10. Gamble, *supra* note 8, at 730-33, reports that his sampling of 54 cases appearing in the Dicennial Digest for the 10-year period between 1956-1966 showed that 91 percent of the men entering into antenuptial contracts were over 50 years old and the average age was 63. The average age of the woman was 49, and 81 percent were over 40 years old. Eighty percent of the men had been previously married and of that number, 90 percent had children from the prior marriage. Seventy percent of the women had been previously married and of that number 94 percent had children of the prior marriage.

11. *See* Foster, *Common Law Divorce*, 46 MINN. L. REV. 43 (1961).

12. Foster, *supra* note 11, at 44. *See also* R. BENEDICT, PATTERNS OF CULTURE 243 (1934).

except for the dissent of an occasional iconoclast,[13] governmental regulation of marriage and divorce was taken for granted. Today, however, the younger generation's disdain for convention, history, and religion is reflected in the view that anything so intimate and personal as marriage and its termination should be a matter of free individual choice; a view often shared by their elders.

In much the same way that parens patriae power was assumed over juveniles,[14] public authority has imposed policy limitations upon individual freedom to marry and to terminate unsatisfactory marriages.[15] Originally, this authority was assumed in order to fill the gap when religious influence waned and more powerful sanctions were deemed necessary to preserve marital stability. More recently, the power to regulate the incidents of marriage has been asserted as an aspect of police power for reasons of public morality and the prevention of the exploitation of women. In a sense this is a relic of feudalism with an overlay of 19th century paternalism.[16] More important is the historical fact that the law limiting freedom to contract as to the incidents of the status of marriage is premised upon the social and economic circumstances of over a century ago.[17] Statutes and the common law in most states do not reflect contemporary social and economic reality. Over and beyond the momentum towards more personal freedom, the changing economic profile of the modern family[18] has rendered restrictions on the power of couples to define their own relationships obsolete. Therefore, the inherent folly of trying to force all marital relationships into a common mold is compounded because the mold itself is anachronistic.

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13. For example, John Milton in England, *see* J. MILTON, THE DOCTRINE AND DISCIPLINE OF DIVORCE; RESTORED TO THE GOOD OF BOTH SEXES, FROM THE BONDAGE OF CANON LAW AND OTHER MISTAKES TO THE TRUE MEANING OF SCRIPTURE IN THE LAW AND GOSPEL COMPARED (1645), and Clarence Darrow in the United States. *See* C. DARROW, THE STORY OF MY LIFE 85 (1932); I. STONE, CLARENCE DARROW FOR THE DEFENSE 116-17 (1941).

14. *See generally In re* Gault, 387 U.S. 1 (1967); Wizner, Book Review, 17 ARIZ. L. REV. 258 (1975).

15. *See* Foster, *Marriage: A "Basic Civil Right of Man,"* 37 FORDHAM L. REV. 51, 57-79 (1968).

16. *Id.* at 52.

17. *See* Gamble, *supra* note 8, at 705-07.

18. "At the turn of the century only 5 percent of all married women worked outside the home for wages and salaries. By 1940 this increased to 17 percent, by 1950 to 25 percent and by 1960 to 32 percent. By 1972, 42 percent of all married women were in the labor force." Weitzman, *supra* note 1, at 1217.

> Having two rather than eight or ten children frees many years of formerly full-time mothering and homemaking for other activities . . . . Rather than most women expecting to devote most of their lives to the child-rearing role, they find that that role now consumes only a fraction of their total adult life span. Even if mothers remain full time in the home until both children reach eighteen years, this is only twenty years out of an expected fifty-seven years of adulthood, leaving thirty-seven years without the responsibility of children.

Krauskopf & Thomas, *supra* note 8, at 583.

Although to date only a few jurisdictions have made a sharp departure from traditional law regarding the public policy limitations on ante- or postnuptial agreements,[19] a few other states have whittled away at the doctrine,[20] and the women's movement is pressing for reform.[21] The policy considerations supporting this anachronistic policy have little current relevancy. For the moral activist who insists upon the perpetuation of the slogans of public policy, there is the example of the Jewish ketubah[22] which certainly cannot be dismissed as immoral. The proponent of the status quo may have difficulty in distinguishing the management of other private and business affairs where predictability is also important,[23] and the legalistic exponent of the public policy rule may well be reminded of the relative freedom accorded separation agreements with regard to establishing support obligations.

Older people contemplating marriage may have especially compelling needs to fix the economic character of their relationship by an antenuptial contract. The prospective spouses often have children as well as grandchildren by a prior marriage, and it is understandable that they would desire to allocate their wealth to their first family.[24] Generally, protection of the first family's expectancy against the claims of a second spouse works no serious inequity. In all probability, each spouse's assets antedated their relationship,[25] and there is no economic reason to force upon either spouse an interest in the property of the other merely because they are married. Moreover, older marriages do not involve the career building partnership and division of labor which ordinarily occur in the case of young couples and thus their marriage is not centered on economic considerations.

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19. *See, e.g.*, Posner v. Posner, 233 So. 2d 381 (Fla. 1970); Volid v. Volid, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); Unander v. Unander, 265 Ore. 102, 506 P.2d 719 (1972). *See also* Gamble, *supra* note 8, at 715-19.

20. *See In re* Mansfield's Estate, 185 Iowa 339, 170 N.W. 415 (1919) (contract to share family expenses upheld during parties' lifetimes); Hudson v. Hudson, 350 P.2d 596 (Okla. 1960) (upholding waiver of alimony); Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1955) (public policy rule not automatically applied); Gamble, *supra* note 8, at 715-19. *See also* Spector v. Spector, 23 Ariz. App. 131, 531 P.2d 176 (1975); Buettner v. Buettner, 89 Nev. 39, 505 P.2d 600 (1973).

21. *See, e.g.*, B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, SEX DISCRIMINATION AND THE LAW 648-58 (1975); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 944-48 (1971); Edmiston, *How to Write Your Own Marriage Contract*, MS, Spring 1972, at 66.

22. "[A] formal Jewish marriage contract that provides for a money settlement payable to the wife in the event of divorce or at the husband's death." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1239 (1961). *See In re* Estate of Simms, 26 N.Y.2d 163, 257 N.E.2d 627, 309 N.Y.S.2d 170 (1970) (ketubah valid even though the marriage was void as incestuous).

23. *See* Gamble, *supra* note 8, at 707.

24. *See In re* Estate of Mackevich, 93 Ariz. 129, 133, 379 P.2d 119, 122 (1963); Gamble, *supra* note 8, at 730-33.

25. A paradigm situation in which an antenuptial contract would be useful and, indeed, was used for this reason, was the marriage of Aristotle and Jacquelin Onassis. *See* NEWSWEEK, Apr. 21, 1975, at 56; TIME, Mar. 31, 1975, at 29.

Yet the rules governing the enforceability of antenuptial contracts do not consider these unique factors. An antenuptial agreement which prescribes the rights of the parties in each other's property is enforceable provided certain procedural requirements designed to protect women are satisfied. A valid agreement must either provide adequately for the wife or there must be full disclosure of the husband's property interest prior to the agreement.[26] Although reasonable on its face, this requirement is often applied most unreasonably.[27] When coupled with the fiduciary responsibility that courts cast upon the prospective husband,[28] the requirement of either adequacy or disclosure frequently results in the invalidation of an agreement.[29]

There is some evidence that the stringent application of these requirements is being abandoned, and that the tide is turning toward a more realistic approach to antenuptial agreements in both doctrine and practice. To begin with, the factors being adopted to determine whether the provision made for the support of the wife is adequate should lead to enforcement of almost any agreement reached by a couple who married when they were elderly. Among the factors taken into account are: (1) the respective ages of the parties; (2) their separate families; (3) whether the wife had a part in amassing the wealth in controversy; and (4) other circumstances surrounding the agreement.[30] These factors realistically consider the economic relationship between the parties—generally, the only colorable connection they have with each other's property is the fact of marriage, their real economic commitments lying elsewhere. However, the courts also consider the relative wealth of the parties and the absolute wealth of the wife.[31] Unfortunately, they have been more concerned with these latter considerations than with those which would tend to validate an agreement.[32]

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26. *E.g.*, Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967); *In re* Perelman Estate, 438 Pa. 112, 263 A.2d 375 (1970); Friedlander v. Friedlander, 80 Wash. 2d 293, 494 P.2d 208 (1972).

27. *See* Gamble, *supra* note 8, at 719-28.

28. *See* 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 90, at 90-41 to -44 (rev. ed. 1967).

29. *See, e.g.*, Linker v. Linker, 28 Colo. App. 131, 470 P.2d 921 (1970); Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962); Kozik v. George, 253 Ore. 15, 452 P.2d 560 (1969). *See also* Gamble, *supra* note 8, at 724-25.

30. *In re* Estate of Cantrell, 154 Kan. 546, 553, 119 P.2d 483, 487 (1941). *See also In re* Gelb Estate, 425 Pa. 117, 123 n.7, 228 A.2d 367, 371 n.7 (1967); *In re* Kaufmann Estate, 404 Pa. 131, 137, 171 A.2d 48, 51 (1961).

31. *See, e.g.*, Levy v. Sherman, 185 Md. 63, 75, 43 A.2d 25, 30-31 (1945); *In re* Estate of French, 8 App. Div., 660, 661, 185 N.Y.S.2d 132, 134 (1959); Batleman v. Rubin, 199 Va. 156, 158, 98 S.E.2d 519, 521 (1957). *See also* 1 A. LINDEY, *supra* note 28, § 15, at 15-88.

32. *See, e.g.*, Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); *In re* Estate of French, 8 App. Div. 2d 660, 185 N.Y.S.2d 132 (1959); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957). *See generally* 2 A. LINDEY, *supra* note 28, § 90, at 90-36 to -38.

The language of the courts, both as to adequacy of the provision for the wife and as to the required disclosure, is obviously malleable in application. An examination of the more recent opinions suggests that the courts are adopting a more tolerant attitude toward antenuptial agreements.[33] However, mere judicial tolerance does not provide the security needed to justify reliance on an antenuptial agreement in light of the importance of the family interests which these agreements further. Therefore, the old principles should be abandoned and the courts should enforce such agreements unless the party seeking to invalidate the agreement can show actual overreaching or inequity.

The same considerations should apply to antenuptial contracts which contemplate divorce or separation. In the majority of jurisdictions, however, an antenuptial contract that tends to facilitate divorce is void as contrary to public policy.[34] Professor Gamble, in his provocative article on antenuptial contracts,[35] summarized the reasons for and against this antiquated public policy rule and found that most of the arguments supporting it are based on untested empirical assumptions which are out-of-date and do not further any recognizable public policy.

For example, one argument is that such contracts permit parties to contemplate the economic consequences of the breakup of their marriage and that to provide for such a contingency is "contrary to the concept of marriage in our society."[36] This makes no sense in light of the current divorce rate. It is questionable whether this is even an accurate statement of the current concept of marriage in our society. The argument that freedom of contract regarding marriage would cause that institution to "lose its dignity and sacredness"[37] is equally suspect. Another fear is that if the husband is allowed to limit his support obligations by private agreement it will increase the chances of exploitation of the wife. One consequence is that she may become a welfare case at state and federal expense. But this is pure speculation, and if it has any validity at all, it is rendered moot by the fact that welfare laws may impose such family responsibility regardless of the terms of the divorce or contractual agreement.[38] Alternately, it can be argued that an innocent wife may forego divorce and be bound to an intolerable marriage if

33. *See, e.g., In re* Estate of Jeurissen, 281 Minn. 240, 161 N.W.2d 324 (1968); Osborn v. Osborn, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969); McFerron v. Trask, 3 Ore. App. 111, 472 P.2d 847 (1970).
34. *See* Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1955).
35. Gamble, *supra* note 8.
36. *Id.* at 705.
37. *Id.*
38. *See* N.Y. Soc. Serv. Law § 101 (McKinney 1970).

the liquidation clause is inadequate.[39] While this has occurred in the past, the modern woman has greater economic freedom and is not hopelessly dependent. The final argument is that enforcement of liquidated support-alimony provisions would lead to endless bickering and controversy.[40] There is some evidence, however, that a contractual provision would in fact enhance family tranquility. For example, the well-known Los Angeles Conciliation Court uses the husband-wife agreement to reduce tensions and set ground rules for the relationship.[41]

There are numerous arguments against the current public policy rule. First, it is obsolete and was formulated in a period when "matrimony was the only vocation of women."[42] Further, even if it be admitted that establishing support obligations by antenuptial agreement facilitates divorce, facilitating the divorce process is not necessarily evil and does not mean that there will be an automatic increase in the divorce rate.[43] Additionally, as Professor Gamble notes, the public policy rule manifests a basic discrimination between the divorcee and the widow since it permits clauses waiving or limiting dower and its equivalents, yet voids provisions limiting alimony rights.

> It seems unfair to assert that the support of a divorcee is of more concern to the state than that of a widow. . . . The courts should recognize that with divorce such a common-place fact of life, many prospective marriage partners might want to consider the disposition of their property and the alimony rights of the wife in the event the marriage should fail.[44]

One of the most telling defects in the existing law is its rigidity since it is applicable regardless of the circumstances of the individual case. Instead of a flat prohibition as a matter of law, fair and reasonable liquidation clauses should be permitted, if not encouraged. This would bring the treatment of antenuptial agreements which provide for divorce into harmony with the usual rule of separation agreements.[45] It can be argued that the automatic bar to liquidation clauses in antenuptial agreements is necessary because if such clauses are sustained at all it may be more difficult to invalidate an exploitive provision. But so long as the marital relationship continues to be viewed as a special

39. *See generally* Gamble, *supra* note 8, at 705.
40. *Id.*
41. *See* Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 364-67 (1966); Henderson, *Marriage Counseling in a Court of Conciliation*, 3 FAMILY L.Q. 6 (1969).
42. *See* E. GROVES, SOCIAL PROBLEMS OF THE FAMILY 156 (1927).
43. Gamble, *supra* note 8, at 706.
44. *Id.*
45. *Id.* at 707-08.

or confidential one,[46] the equity jurisdiction of the courts is sufficient to police unfairness and overreaching.

The winds of change are already perceptible in the law governing the ability of the parties to formulate their divorce rights and obligations in advance marriage. Professor Gamble contends that the modern view is that such an agreement will be sustained if: (1) it does not completely abrogate the husband's support duty; (2) the parties contemplate a partnership where both will bear the financial burden; (3) the wife has separate income or resources sufficient to provide for herself; (4) the husband remains liable for unforeseen expenses of the wife; and (5) the amount agreed upon is not unreasonable in light of the spouse's means.[47] Thus, the new trend in the law merely applies to antenuptial contracts the criteria generally applicable to separation agreements. However, even these new criteria may not go far enough in implementing current values, principles of equality, and the reasonable expectations of parties entering into marriage. It is recommended that the parties have complete freedom to stipulate the economic consequences of divorce subject only to the equitable rules pertaining to confidential and special relationships, and the policy imposed by family responsibility laws and other statutes designating an ex-spouse as an economic resource to be tapped before public assistance may be provided.

In addition to the policy considerations previously discussed, there are special reasons why older citizens should be free to establish contractually the economic incidents of marriage and divorce. Ordinarily, unless it is a May-December union, there is no prospect of having children, and the childbearing and childrearing functions of marriage are not present. Thus, one of the most persuasive reasons for state regulation of the incidents of marriage is absent. The danger of exploitation ordinarily will be less when mature persons enter into marriage, and if it does occur, equitable principles will protect the exploited party. It is ironic and unreasonable to continue legal policies which permit a party suffering from senile dementia to contract a valid marriage,[48] but which prevent competent individuals from establishing the economic consequences of marriage and divorce.

DIVORCE

Today, more than ever before, people are getting married and

46. *See* 2 A. LINDEY, *supra* note 28, § 90, at 90-41 to -44.
47. Gamble, *supra* note 8, at 698.
48. *See* Fischer v. Adams, 151 Neb. 512, 38 N.W.2d 337 (1949).

divorced in their later years.[49] In contrast to antenuptial divorce agreements which, as previously discussed, may be very desirable in some circumstances, existing divorce laws may result in extreme economic hardships. The problems will become more acute as states rush to enact no-fault divorce laws.[50] Although English and Canadian divorce statutes have a hardship exception permitting a denial of divorce,[51] the new American no-fault statutes have no such provisions.[52]

Regard should be had for the age of the parties and the duration of the marriage in determining the economic consequences of dissolution. Unless there is a fair alimony and marital property law, a spouse—usually the wife—may be victimized by divorce, especially in no-fault jurisdictions where granting the decree is virtually automatic. Additionally, about 14 American jurisdictions[53] still cling to the separate property concepts of the common law, and in these states a husband who through inadvertence or design takes title in his own name to all or most of the property accumulated during the marriage may insulate it from any claim by the wife. The wife can only be compensated for her interest in the marital property if alimony is increased; if not, she receives nothing for her contributions to the marital partnership.

An excellent example of the inequity which may result is *Wirth v. Wirth*.[54] Both the husband and wife were employed and for 22 years of their marriage their earnings were pooled. In 1956 it was agreed that they would start a crash savings program and that all family expenses would be met out of the wife's income; the husband's income was used solely for investments. All the investments were taken in the husband's name, and at the time of divorce, it was held that Mrs.

49. *See* Payne & Pittard, *Divorce in the Middle Years*, 3 SOCIOLOGICAL SYMPOSIUM 115, 117 (1969). Weitzman, *supra* note 1, states that the assumption that the risk of divorce ends at age 50 is no longer viable as the number of divorces among persons of middle and older age is increasing. *Id.* at 1202. "Although only 4 percent of all divorces filed 30 years ago involved marriages of more than 15 years duration, the current figure is 25 percent, and about 16 percent of those involve couples who have been married 25 years or more." *Id.* Professor Weitzman adds, "It is probable that [there is] a 35-45 percent probability of divorce for women who are now 35 years old." *Id.* at 1203.

50. For a summary of existing fault and no-fault grounds, by state, see Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAMILY L. 443, 492 (1974).

51. *Id.* at 446. For a full discussion of the English and Canadian hardship provisions, see Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAMILY L. 179 (1968).

52. For example, see the UNIFORM MARRIAGE AND DIVORCE ACT § 302.

53. The jurisdictions still retaining the common law marital property system, without equitable discretion to divide property upon divorce, include: Alabama, Georgia, Hawaii, Maryland, Massachusetts, Mississippi, New York, North Carolina, Pennsylvania, Ohio, Rhode Island, South Carolina, Virginia, and the Virgin Islands. Foster, *Preface* to I. BAXTER, MARITAL PROPERTY at x (1973).

54. Wirth v. Wirth, 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (1971).

Wirth had no interest in the assets they had accumulated during the marriage.

The *Wirth* case speaks for itself, but all of its implications may not be obvious. If Mrs. Wirth had been the defendant in the divorce case and had lost on a fault ground, such as "cruel and inhuman treatment," alimony would be automatically barred in some states.[55] Thus, there would be no opportunity to compensate for an inequitable property distribution. While the severity of this rule has been mitigated somewhat by a reluctance to grant a divorce against a wife of many years,[56] it nevertheless retains an *in terrorem* effect. Moreover, even though the wife may have a claim for alimony during the ex-husband's lifetime, alimony usually is discontinued upon the death of the husband.[57] And, it may not be possible to protect the wife through life insurance. It has been held that in the absence of express statutory authority, the husband may not be required to take out insurance naming the ex-wife as the irrevocable beneficiary.[58] For an older woman, the risk of being impoverished as a result of these rules is a realistic and frightening possibility. Reform is obviously necessary.

The simplest reform would be to authorize the divorce court to require an ex-husband to take out insurance naming the former spouse as the irrevocable beneficiary. Beyond that, the economic incidents of dissolution should be approached in terms of safeguarding and providing for the financial future of the parties and making a fair and equitable distribution of family assets—those assets accumulated during the marriage. After all, these assets are attributable to the marital partnership of co-equals.[59] This approach reflects the values of contemporary society and would greatly benefit the elderly who are the most likely to have been partners in a long marriage.

In addition to the financial incidents of dissolution, there is the problem of the impact of other areas of law upon marriage and divorce by the elderly. The social security law, for example, contains various provisions affecting marital relations.[60] Although an in-depth treatment of the subject is beyond the scope of this discussion, that law merits brief comment. The most notorious social security provision

55. *See* N.Y. DOM. REL. LAW § 236 (McKinney 1964).
56. Hessen v. Hessen, 33 N.Y.2d 406, 308 N.E.2d 891, 353 N.Y.S.2d 421 (1974).
57. H. FOSTER & D. FREED, LAW AND THE FAMILY—NEW YORK § 22.14 (1966).
58. *See* Enos v. Enos, 41 App. Div. 2d 642, 340 N.Y.S.2d 783 (1973); Winter v. Winter, 39 App. Div. 2d 69, 331 N.Y.S.2d 747 (1972).
59. *See* Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAMILY L.Q. 169, 176 (1974).
60. *See generally* U.S. DEPT. HEALTH, EDUC. & WELF., SOCIAL SECURITY HANDBOOK §§ 305-32, 401-17, 1851 (1974).

provides for the loss of widow's benefits upon remarriage.[61] Thus, if a widow and widower on social security marry, the wife loses her social security benefits. This consequence, as well as the loss of payments under private or public pension plans, places an economic premium on "living in sin."[62] No sound public policy is promoted by the rule, and it is demeaning and impairs freedom of marriage. Another unfair rule requires a marriage to be of 20 years' duration before a divorcee may qualify for social security benefits.[63]

This cursory overview of the consequence of divorce for the elderly suggests that existing law in many jurisdictions disregards the special circumstances surrounding divorce in the twilight zone. First, an older woman has a far greater need for economic security than her younger counterpart. Second, while the movement toward no-fault divorce is responsive to the increasing economic independence of women, older women are not likely to become economically independent after a lifetime in a different social order. Thus, divorce does not have the same impact upon all age groups. Finally, the dissolution of a long term marriage requires equitable allocation of the assets acquired during that marriage.

CONCLUSION

We have endeavored to discuss two major areas of concern regarding the marital problems of senior citizens. The law as it pertains to antenuptial contracts and the economic incidents of dissolution can and does engender many hardships. We are moving towards laws which permit divorce upon demand, and the rules as to marital property and alimony should reflect this. First, we should encourage planning for such contingencies through equitably drawn antenuptial agreements. Since the availability of divorce upon unilateral demand enhances the danger of discrimination and hardship, special protection must be built into the dissolution process to protect elderly wives.

In addition to enacting statutory provisions to safeguard the just claims of parties to divorce and to ensure a fair division of marital property, perhaps courts should adopt a constructive role in the dissolution process. Instead of reviewing provisions in terms of unconscionability,[64] an affirmative approach might be taken in order to ensure that

61. 42 U.S.C. § 402(e)(1)(A) (1970).
62. Weitzman, *supra* note 1, at 1209 n.183.
63. 42 U.S.C. § 416(d) (1970). Regarding efforts to change the 20-year rule, see Brettschneider, *Eve Before the Bar, Some Inequities in Matrimonial Litigation*, 21 THE NASSAU LAW. 57 (1973); Weitzman, *supra* note 1, at 1190-91 & n.112.
64. The UNIFORM MARRIAGE AND DIVORCE ACT § 306(c) introduced the commercial law term "unconscionable" as a standard for passing on the reasonableness of separation agreements and their possible modification.

the division of property and provisions for alimony are just and equitable. Such an approach may be what is needed where the marriage has been of long duration and future employment of either or both parties is subject to uncertainty because of their ages, or where the parties desire to make provisions for members of a prior family.