Nous reptes del Dret de família

Materials de les Tretzenes Jornades de Dret Català a Tossa

23 i 24 de setembre de 2004

Nous reptes del Dret de família
(Materials de les Tretzenes Jornades de Dret Català a Tossa)

Nous reptes del Dret de família

Materials de les *Tretzenes Jornades de Dret Català a Tossa*

Coord:
Àrea de Dret Civil,
Universitat de Girona

Girona 2005

Documenta Universitaria

BIBLIOTECA DE CATALUNYA. DADES CIP

Jornades de Dret Català (13es : 2005 : Tossa de Mar) Nous reptes del dret de família : materials de les Tretzenes Jornades de Dret Català a Tossa / coord: Àrea Dret Civil, Universitat de Girona. -- Girona : Documenta Universitaria, 2005. -- p. ; cm. -- (Documenta Universitaria)
Text en català, castellà i anglès
ISBN 84-934685-2-5

I. Universitat de Girona. Àrea de Dret Civil
1. Dret de família – Congressos 2. Dret de família – Aspectes econòmics – Congressos 3. Patrimoni – Congressos 4. Unions estables de parella – Congressos

CIP 347.61/.64(063) JOR

www.documentauniversitaria.com
info@documentauniversitaria.com
Edicions a Petició, SL
CIF B17741240
Pl Ferrater Mora, 1
17071 GIRONA
tf. +34 972418992
fax +34 972418978
Pl. Europa, 3, 2on-2a
17005 GIRONA
tlf. +34 630608231
fax +34 972200049
www.edicionsapeticio.com
info@edicionsapeticio.com

Primera edició

ISBN: 84-934685-2-5
ISBN 13: 978-84-934685-2-1

D.L.: B-XXXX-2005

Imprès a PUBLIDISA

Girona, novembre de 2005

Aquestes *Tretzenes Jornades* han estat organitzades per l'Àrea de Dret Civil de la Universitat de Girona, en col·laboració amb el Departament de Justícia de la Generalitat de Catalunya i el suport de l'Ajuntament de Tossa de Mar i de:

Universitat de Girona

Generalitat de Catalunya. Departament d'Universitats,

Recerca i Societat de la Informació

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Diputació de Girona

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THE AMERICAN LAW INSTITUTE PRINCIPLES AND THE ECONOMICS OF FAMILY DISSOLUTION

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In May 2000 the American Law Institute (ALI) approved a document entitled "The Principles of Family Dissolution: Analysis and Recommendations."[1] The American Law Institute is perhaps the most prestigious private law institution in the United States. It is a national organization of judges, lawyers and legal academics, founded in 1923, for the purpose of improving the law. Its restatements of the law and model codifications of the law have been enormously influential in the development of the law in the United States.[2]

The approval of the Principles of Family Dissolution was an historic event for both the ALI and Family Law. For the ALI, it marked the first venture by that body into the subject matter of Family Law and, therefore, focused the attention of that prestigious body away from the kinds of issues that traditionally it has dealt with – issues of wealth and power – to the kinds of problems that affect the lives of everyday people. For Family Law, which historically has been an

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[1] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Lexis Nexis 2000).

[2] For an in-depth discussion of the role of the ALI in American law see, S. Abrahamson, "Refreshing Institutional Memories: Wisconsin and the ALI," 1995 *Wis. L. Rev.* 1 (1995).

intellectual stepchild in the law – a messy area that the bench and bar have tried to keep away from – it was important because it brought that subject to the agenda of one of the most prestigious organizations of American law and subjected it to the process of examination and rationalization which has been the great contribution of the ALI.

This paper gives a brief general description of the Principles, discusses some themes important to understanding them and then explores in more detail the economics of family dissolution as handled in the Principles.

As a preliminary matter, it should be remembered that there is no Family Law of the United States. There are 51 family laws, one for each state and the District of Columbia. Under the United States Constitution family law, along with most other areas, is a matter within the jurisdiction of the states. However, because Americans move freely from state to state there has long been an interest in making the state laws more uniform. The oldest organization working on uniformity is the Conference of Commissioners on Uniform State Laws founded in 1892 to determine areas of the law suitable for uniform legislation among the states and to recommend uniform acts to the states for their adoption.[3] It should be noted that, of the first two assignments to the Commissioners in 1892, one was the formulation of a Uniform Marriage and Divorce Act. This was a task that proved so difficult that it was not until 1970 that one was proposed. The Conference on Uniform State Laws has had a significant impact in the area of family law, having proposed uniform acts on about a dozen different family law topics considered suitable for uniform legislation, including child custody jurisdiction[4] and child support enforcement.

Another important force in the development of uniformity has been the federal government which has had a major impact on certain areas, such as child support, by conditioning the payment of federal funds for certain social welfare programs on the enactment of standards set by the federal government.[5]

The ALI has been a third influence on uniformity in state laws. Its proposed model codes and restatements of judge-made law, targeted at choosing the best of

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[3] The National Conference of Commissioners on Uniform State Laws is a permanent, state supported organization composed of representatives from each of the states, the District of Columbia and Puerto Rico. Although the number of representatives varies from jurisdiction to jurisdiction, there are an average of four from each state and they serve three year terms.

[4] The Uniform Child Custody Jurisdiction Act, 9 U.L.A. Part 1A, 261 (Supp. 2005) has been very influential and formed the basis for some of the provisions in the Hague Convention on The Civil Aspects of Child Abduction.

[5] In the family law area, the most significant federal legislation of this type has been the requirement for child support guidelines. 45 CFR § 302.56(a)(2) (1989). See also, Linda H. Elwood, "The Federalization of Child Support Guidelines", 6 *J. Am. Acad. Matrim. Law.* 102 (1990).

the existing doctrines developed by state courts, have had great influence on the law. The Principles of Family Dissolution are in this tradition. Two points should be made about this title. First, the work is called Principles, not a Restatement of the Law, because it goes beyond an attempt to restate the judge-made law and provides innovative new guides to both judicial and legislative bodies. Second, the term family dissolution, not divorce, is used because the Principles deal with informal as well as formal relationships. In the last quarter century there has been a significant increase in the number of adults who have formed informal intimate relationships. Although public policy is still somewhat ambivalent about cohabitation of unmarried persons, the courts are called on to deal with the problems growing out of the termination of these relationships, particularly when there are children. There is a developing body of legislation and case law in response to the termination of these informal families that merits treatment in any overall picture.

There are several themes that shape the approach taken in the Principles and are necessary to a proper understanding of them. One is that the law ought to achieve a more equitable sharing of the economic gains and losses of the family relationship. This objective reflects a recognition that, if as a society we are to tolerate a high rate of divorce – a matter on which there seems to be widespread agreement – we ought not to accept a public policy that makes dependent spouses (those who have devoted their major energies to homemaking and child caring) and the children who are in their custody bear the economic brunt of that policy. Yet, that is clearly what has been happening. Studies continue to find mothers and children in more straightened circumstances than the fathers post-divorce. Therefore, one of the main concerns of the Principles is to try to increase the share of the family enterprise that dependent spouses and children receive on dissolution and to distribute the economic losses of family dissolution more fairly. This objective clearly underlies the provisions in the Principles on the economics of family dissolution: child support, property division and compensatory payments.

A second theme that shapes the Principles is the relationship between fault and family dissolution. The Principles do not deal with the grounds for divorce but assume that divorce is available without regard to, and in spite of, fault in all American jurisdictions. Building on the no fault divorce concept, the Principles exclude marital fault from the economic considerations on dissolution. This is a controversial subject in the United States on which the states are divided.[6] But,

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[6] A majority of American states, approximately 32, retain fault grounds as alternatives to no fault. Linda D. Elrod and Robert G. Spector, "A Review of the Year in Family Law: Children's Issues Remain the Focus", 33 *Fam. L. Q.* 865, 911, Chart 4 (2004). About half the states retain fault as a consideration in property division and maintenance. Some commentators have

the idea of excluding fault from the economic decisions on divorce is not a new idea. In 1970 the Uniform Marriage and Divorce Act, promulgated by the United States Commissioners on Uniform State Laws eliminated fault from consideration in property division and maintenance.[7] Today, over half the states follow this approach.[8]

The third theme underlying the Principles grows out of a recognition that family dissolution is, in the vast majority of cases, a negotiated process not a litigated one.[9] In the past family law rules assumed that a judge is the decision maker and, therefore, they sought to guide judicial discretion in "*the best interest of the child*" or on "*equitable principles*" or in terms of a list of multiple factors to consider. But the reality is that judges review and approve the decisions negotiated by the parties. Most estimates are that settlements by parties constitute 90% or more of all cases. Consequently a main objective of the Principles is to acknowledge and control this negotiation.

The Principles recognize that there should be workable public constraints for the negotiation process through the use of appropriate presumptions and formulas. Such mechanisms perform multiple functions. In addition to informing negotiators of permissible limits, they also provide benchmarks against which reviewing courts, with limited time and information, may scrutinize the desirability of bargained settlements. Finally, in the cases that are litigated, they assist the courts in making decisions that are more predictable.

The Principles of Family Dissolution uses two ways of formulating guiding rules. One is by promulgating Black Letter Principles. An example is the area of property division on divorce where the Black Letter Principle chooses a rule of 50-50 division of marital property.

The other way in which the Principles propose guiding rules is by stating that the issue is to be the subject of a "*rule of statewide application*". That rule may be adopted by legislative, judicial or administrative action.[10] In the Principles these

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expressed concern that there should be some remedy for egregious fault. See, for example, Peter Nach Swisher, "The ALI Principles: A Farewell to Fault – But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse", 8 *Duke J. Gender L. & Pol'y* 213 (2001).

[7] Uniform Marriage and Divorce Act, 9A U.L.A. Pts. 1 & 2, §§ 307, 308 (2004-2005).

[8] The Principles contain an extensive discussion of the issue of fault. ALI, Principles, *supra* note 1 at 42-85.

[9] Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law: "The Case of Divorce", 88 *Yale L.J.* 950 (1979); Eleanor E. Maccoby and Robert H. Mnookin, "Dividing the Child", 160 (1992); Marygold S. Melli et al., "The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce", 40 *Rutgers L. Rev.* 1133, 1142 (1988).

[10] Principles, *supra* note 1, Section 1.01.

"*rules of statewide application*" often are intended to outline a mathematical formula – and this idea is one of the major contributions of the Principles.

The Principles cover six subjects: (1) the Allocation of Custodial and Decisionmaking Responsibility for Children; (2) Child Support; (3) Division of Property; (4) Compensatory Spousal Payments; (5) Domestic Partners; and (6) Agreements. The focus of this paper is on the economics of family dissolution and, therefore, the following discussion is limited to the Principles dealing with the three economic issues on dissolution: property division, spousal support and child support.

I. Property Division

The A.L.I. proposals on property division are stated in Chapter 4 of the Principles, entitled Division of Property Upon Dissolution.[11] A brief background discussion of the existing law on property division in the United States is helpful in understanding the ALI proposal.

In the United States there are two types of matrimonial property regimes: community property and separate property. Nine states[12] follow a community property regime under which property acquired during the marriage belongs jointly to the couple. Therefore, on dissolution, that marital property is to be divided equally between them. However, the majority of American jurisdictions follow common law principles, which by the end of the nineteenth century provided for individual ownership of property acquired during marriage. Under this system, called separate property, all property acquired during marriage is owned by the party whose income purchased it. Therefore, on dissolution the role of the court is to determine whose income had purchased a particular piece of property and allocate that property to its owner. Historically, these separate property rules were a source of unfairness on dissolution because the spouse

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[11] It should be noted that studies of property division have found that most divorcing couples have little property to divide. See Marsha Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes", 57 *Brooklyn L. Rev.* 621, 728 (1991).

[12] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Of these states, eight could be described as historical community property states based on their legal heritage of civil law from Spain or France. Wisconsin is a common law state. It adopted by statute a form of community property called marital property. Wis. Stat. ch. 766 (2003-2004). Alaska is sometimes considered a community property state because it has a statutory provision allowing married persons to opt in to a community property regime.

In 1983 the Commissioners on Uniform State Laws proposed a Uniform Marital Property Act but, to date, no state has adopted it. Uniform Marital Property Act, 9A U.L.A. Pt. II.

who was primarily the homemaker and child-carer and, therefore, was not an income producer, was entitled to very little of the property acquired during the marriage.[13]

Today, all separate property jurisdictions and most community property ones follow a rule of equitable distribution on dissolution. Under the concept of equitable division, the court has authority to consider all the property owned by both parties, including, in some states, property brought to the marriage or received by gift or inheritance by one of the parties, and to divide it between the parties fairly, taking into consideration a list of factors set out in the statute. In some equitable distribution states, the statutes provide for a presumption that an equitable division is one where the property is divided equally.

Chapter 4 substitutes clear cut rules for the "*equitable considerations*" of most present state laws. First of all, Section 4.03 adopts the community property distinction between "*separate property*", which is property acquired by a spouse prior to marriage or by inheritance or gift from a third party, and "*marital property*" which is property acquired during the marriage.[14] The Principles draw heavily on community property concepts in defining what is marital property. For example, increases in the value of separate property of one spouse resulting from contributions by the other spouse become marital property. Marital property is the property that is divided on divorce. Section 4.09 deals with the division of marital property and provides that both marital property and marital debts are to be divided equally at dissolution so that spouses receive net shares equal in value.[15] [15a]

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[13] As marital roles change and both parties became income producers, some advocate a return to the rules of separate property. See Note, Trevor S. Blake, "You Get What You Pay For: A New Feminist Proposal for Allocating Property Upon Divorce", 4 *Geo. J. of Gender & Law* 889 (2003).

[14] This distinction is made by the majority of American states today. J. Thomas Oldham, ALI Principles of Family Dissolution: Some Comments, 1997 *U. Ill. L. Rev.* 801, 831 (1997).

[15] The requirement of an equal division apparently is not a major change from present practices. A study of the operation of equitable division laws showed that in dividing property "equitably", judges tend to divide it equally. Marsha Garrison, "How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making", 74 *N.C. L. Rev.* 401, 452 (1996).

One scholar compared the result in a number of cases under his state's equitable division rule and the ALI Principles and concluded that his state should retain equitable division but add a presumption of equal division. This would provide the predictability of the Principles with the necessary flexibility to provide fairness in unusual situations. Craig W. Dallon, "Reconsidering Property Division in Divorce under Nebraska Law in Light of the ALI's Principles of the Law of Family Dissolution: Analysis and Recommendations", 37 *Creighton L. Rev.* 1 (2003).

[15a] Spousal compensation is discussed *infra* in II Compensatory Spousal Payments. In the ALI Principles, they replace alimony.

However, having decided against equitable division that is the rule in the great majority of states, the Principles propose several exceptions to the requirement of equal division. These are described as "well-defined departures" from an equal division for the purpose of curbing judicial discretion. These exceptions are set out in Section 4.09(2). They deal with cases (1) where the court determines that spousal compensation should be satisfied from marital property, not by periodic payments; (2) where one spouse has been guilty of financial misconduct;[16] (3) where the parties have incurred debt to finance the education of one of the spouses. That debt is treated as the separate property, i.e., the debt of the spouse whose education was financed; and (4) where the marital debts exceed the assets. In a substantial percentage of divorces, the debts exceed the assets so what the court is dividing are the debts. Section 4.09(2)(c) provides that the debts can be divided unequally if it is just and equitable because of a significant disparity in the spouses' financial capacity, their participation in the decision to incur the debt or their consumption of the goods or services the debt was incurred to acquire.

Section 4.11 states the traditional community property rule as to separate property, i.e. inherited property, property received by gift or property brought to the marriage. It is not subject to division. In equitable division states, statutes often provide that on dissolution the court may divide the separate property for hardship or other equitable reasons.[17] The Principles change these rules about transfers of this separate property from equitable rules exercised in the court's discretion to two specific reasons. One, stated in Section 4.11, is the need to compensate a spouse for the financial misconduct of the other

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[16] Section 4.10 describes financial misconduct of a type called dissipating assets at the time of divorce. It deals with three types of situations:
(a) The partner who gives away substantial amounts of marital property within a specified period prior to the divorce – that period to be determined by a "rule of statewide application. "In that case the court adds half of the value of the gift to the other spouse's share of the marital property.
(b) The partner who dissipates property through intentional misconduct within a specified period prior to the divorce, also set by a statewide rule. In that case the court adds half the value of the loss to the other spouse's share of the property.
(c) The partner whose negligence results in loss of property within a specified period prior to the divorce set by a rule of statewide application.
Additionally, if the trial court finds in writing that the facts establish that it is necessary to avoid a substantial injustice it may apply the rule to gifts etc. prior to that date.

[17] See, for example, Wis. Stat. § 767.26(2)(b) (2003-04). The Principles have been criticized for requiring an equal division even in cases where one party has considerable separate property. Research has found that in equitable division states courts consider the existence of separate property in arriving at a fair result. Marsha Garrison, "The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?" 8 Duke J. of Gender, L. & Pol'y 119 (2001).

spouse in cases where there is insufficient community property to do so. This reason seems to follow the idea of hardship under present equitable division rules.

Section 4.12 states the other reason for giving a spouse a share in the other's separate property: recognition of the roles of parties in a long term marriage. It provides for the recharacterization of separate property as marital property as the length of a marriage increases and for the division of it equally. If the separate property was brought to the marriage, it is to be recharacterized as marital property under a formula adopted by a rule of statewide application based on the length of the marriage and ultimately specifying a point at which all property brought to the marriage should be considered marital. If the separate property was acquired during marriage -- for example, by inheritance – the formula is to consider both the length of the marriage and the length of time that the property has been held. This is a very novel idea adapted from a provision in the Uniform Probate Code which gradually increases a spouse's "elective share", based on a formula related to the length of the marriage.[18] The Principles do not suggest a specific formula.[19]

II. Compensatory Spousal Payments

Chapter 5 of the Principles, entitled "*Compensatory Spousal Payments*" is probably the most innovative of the rules proposed by the Principles. It deals with what has historically been called alimony or maintenance.

Alimony or maintenance has had a long difficult history in American family law. Originally, in a world of fault divorce and gendered roles in marriage, it was seen as the continuation of a husband's duty to support his wife. Later it was justified on the basis of alleviating the post-divorce need of the homemaking wife and as a means of defeating the unfairness of the separate property rule by distributing some of the separate property to the non-income producing wife. Fault was an important consideration.

The latter part of the 20th century began to see alimony fall victim to the "clean break" idea of divorce influenced by the Uniform Marriage and Divorce Act, which had been adopted by the Commissioners on Uniform State Laws in 1970. The UMDA saw divorce as a means to achieve a clean break, to end a marriage with neither party having a continuing obligation to the other. A person was entitled to maintenance only if she lacked sufficient money from the property division

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[18] Uniform Probate Code, 8 U.L.A. § 2-202 (2004-2005). The Probate Code contains a schedule of the amount of the elective share, related to the length of the marriage.

[19] The Principles have been criticized for this failure. Garrison, *supra* note 17 at 126.

to provide for her reasonable needs or was unable to support herself through appropriate employment. Rehabilitative alimony became the major focus.

By the 1990s American courts were looking to other formulations. In my state of Wisconsin, for example, the Supreme Court held that the purpose of alimony is two-fold: (1) to provide support for a former spouse who needs financial help and (2) to insure post-divorce fairness between the parties.[20] For example, you don't want Mr. Jones to be living it up at the most expensive country club while his former wife works for minimum wage at WalMart. However, none of these formulations departed from the rule that the award of alimony was discretionary with the judge and appellate review was limited to whether the judge had abused his discretion.

Looking at these and other attempts to formulate a theory of alimony, the ALI concluded that the case law in the United States suggested that the award of alimony is really compensation for loss.[21] Therefore, the ALI Principles propose a clean break with the past of alimony, a completely new name, "Compensatory Payments" and an award with both entitlement and the amount set by a formula. The objective of the A.L.I. is "*to transform alimony from a plea for help, dependent upon the court's discretion, to a claim of entitlement to compensation based on objective criteria*"[22] that are consistent and predictable in application.

The Principles provide compensatory spousal payments for two main types of loss at marital dissolution: (1) compensation for the loss of the marital standard of living and (2) compensation for the primary caretaker's loss in earning capacity.

1. Compensation for the loss of the marital standard of living

Section 5.04 provides that entitlement to this type of payment is based on (1) the length of the marriage – longer term marriages entitle the spouse to larger amounts of compensation and (2) the disparity in income between the spouses. The Principles provide that there should be a rule of statewide application under which a presumption of entitlement arises when two things, the disparity in incomes between the spouses and the duration of the marriage, each exceed a value specified in the rule. The amount is then determined by a formula based on the amount of disparity and the length of the marriage. This compensable loss is aimed at the long-term marriage. An example given in the Principles of an appropriate formula is a 10 year marriage and an income disparity of 25 percent.

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[20] LaRocque v. LaRocque, 139 Wis.2d 23, 406 N.W.2d 736 (1987).

[21] See discussion in Principles, supra note 1 at 788.

[22] Ira Mark Ellman, "The Maturing Law of Divorce Finances: Toward Rules and Guidelines", 33 *Fam. L.Q.* 801 (1999).

2. Compensation for residual loss in earning capacity

Compensation for loss in earning capacity can arise in two situations. The principal one is for the primary caretaker's loss from child care. Section 5.05 provides that entitlement is based on the fact that there are marital children or children of either spouse, they have lived with the claimant a minimum period specified in the statewide rule and at dissolution the claimant's earning capacity is substantially less than that of the other spouse. The amount of compensation is determined by the number of years that the children lived in the household and the difference between the incomes of the spouses at dissolution.

The Principles also provide in Section 5.11 for compensation for earning capacity loss resulting from fulfilling the moral obligation of the other spouse or of both spouses jointly to care for a sick, elderly or disabled person. The Principles provide that the rules applicable to earning capacity loss for child care should apply here. Again the formula is based on the years of care and the disparity in income of the divorcing parties.

The statewide rules that govern the award of compensation under Sections 5.04, 5.05, and 5.11 create a presumption to compensation that can be rebutted by certain written findings by the court.[23]

Section 5.06 provides that both types of compensatory payments – for loss of living standard or earning capacity – are to be for a fixed term of years determined by the length of the marriage or the years of child care. However, the term is indefinite if the age of the claimant and the length of the marriage are greater than a minimum set in the statewide rule, thus recognizing cases of older spouses in long term marriages.

The amount of compensatory payment awards is subject to modification under Section 5.08 where there have been changes in the incomes of the parties so that either the disparity in income is more or less than at the time of divorce, the loss compensated is substantially less than that contemplated at divorce because of increase in the payee spouse's income or the payer's income, lower at divorce than earlier in the marriage, has increased substantially.

The obligation to make compensatory payments ends automatically on the remarriage of the recipient or the death of either party. It also ends on a showing by the payer spouse that the other party has established a domestic-partner relationship as defined in Chapter 6 of the Principles, Domestic Partners.

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[23] The use of the mechanism of a presumption has been criticized as too problematic. See Lara Lenzotti Kapalla, "Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form", 2004 *Mich. St. L. Rev.* 207 (2004). The author suggests that affirmative defenses be substituted.

The Principles envisage a system of compensatory payments developed with statewide coverage and statewide standards. However, to date the interest in the United States has been at the county level. In at least two states, Arizona and New Mexico, counties have adopted guidelines based on the ALI Principles.[24]

The Principles provide for two additional types of compensatory payments in Sections 5.12 and 5.13 which do not have a history in traditional alimony. Both deal with claims arising in short term marriages and relate to issues that have been raised more often as claims in property division. Section 5.12 provides for compensation for contributions to a spouse's education or training that enhanced the recipient spouse's earning capacity and was obtained shortly before the marriage ended. An example is the wife who works to support her husband in medical school and the marriage ends shortly after he begins to practice medicine. The A.L.I. Principles note that there is a substantial body of case law in the United States supporting these claims.[25]

Section 5.13 provides compensation for the loss of a premarital living standard after a short marriage. An example of the kind of recovery that would be allowed under this section is the spouse who left his employment to move to another city where the other spouse lives, is unable to obtain comparable employment in the new city and the marriage ends within a short time.[26]

III. Child Support

Chapter 3 on the "*Principles Governing Child Support*" builds upon one of the most successful programs in the history of Family Law in the United States. In the 1980's some American states, in particular my state of Wisconsin, reformed their child support law to require that child support be set by a formula that determined the amount of child support by a percentage of income that depended on the number of children to be supported. The Federal Government adopted this approach and required the states to promulgate statewide Child Support Guidelines setting child support with a formula as a condition for the receipt of federal child support funds. Today, all American states set child support using a

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[24] See discussion in Twila B. Larkin, "Guidelines for Alimony: The New Mexico Experiment", 38 *Fam. L.Q.* 29 (2004). Ira Mark Ellman, *supra* note 22 at 811. Virginia R. Dugan and Jon A. Feder, "Alimony Guidelines: Do They Work?" 25 *Fam. Advocate* 20 (Spring 2004).

[25] A.L.I., Principles of the Law of Family Dissolution, *supra* note 1 at 891-896.

[26] For a thoughtful criticism of the property division and compensatory payment provisions of the ALI Principles, see David Westfall, "Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property", 27 *Harv. J. L. & Pub. Pol'y* 917 (2004); also J. Thomas Oldham, *supra* note 14.

formula. The success of these formulas is undoubtedly one reason that the A.L.I. chose to make a proposal for alimony formulas.

The A.L.I. Principles adopt a formula approach to setting child support, but their approach differs substantially from the existing state guidelines. Almost all of the state guidelines are based on the theory that a parent ought to continue to spend the same amount on a child as that parent spent when the family lived together. This expenditure is determined by estimating how much a two parent family would increase spending to cover the addition of a child to the family. It is called the marginal expenditure formula or the continuity of expenditure formula.[27] The A.L.I. is critical of these guidelines asserting that they are fair to children only when the income of both parents is about equal. However in the majority of cases, where the income of the custodial parent is less than that of the noncustodial parent, the ALI finds the child receives less than a fair amount.

The A.L.I. approach sets forth two main objectives for child support: (1) that the child enjoy a minimum decent standard of living if parental income is sufficient and (2) that the child enjoy a standard of living not grossly inferior to that of the other parent.[28] It uses a formula that calculates a base award using the continuity-of-expenditure formula in use by most states and then adds a supplement to bring the standard of living in both parents' households into closer agreement.

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[27] Much has been written about the formulas in child support guidelines. A recent discussion is R. Mark Rogers and Donald J. Bieniwicz, "Child Support Guidelines: Underlying Methodologies, Assumptions, and the Impact on Standards of Living," in William S. Comanor (ed.), *The Law and Economics of Child Support Payments* at 60 (2004). See also Ira Mark Ellman, "Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines", 2004 *The U. of Chicago Legal Forum* 167 (2004).

[28] The provision in the Principles setting forth the objectives for child support includes a number of additional objectives. It's full provisions are included here:

§ 3.04 The Objectives of the Principles Governing Child Support

The Principles governing child support take into account competing values and resolve the competing claims and interests of the child, the child's parents, and society. The Principles set forth in this Chapter reflect and seek to achieve the following objectives:

(1) that parents share income with a child in order that the child enjoy

(a) a minimum decent standard of living when the combined income of the parents is sufficient to achieve such result without impoverishing either parent, and

(b) a standard of living not grossly inferior to that of either parent;

(2) that a child not suffer loss of important life opportunities that the parents are able to provide without undue hardship to themselves or their other dependents;

(3) that residential parents be treated fairly;

(4) that nonresidential parents be treated fairly;

(5) that child-support rules not discourage the labor-force participation or vocational training of either parent;

The A.L.I. guideline has been criticized as an attempt to equalize living standards in the parents' post divorce families.[29] It has not been adopted by any jurisdiction.

The Principles, like all American states, apply the child support formula to support by both married and unmarried parents in Section 3.03. But they also apply the formula in a much less usual context – to children of same sex relationships where the parties have agreed that they would share the responsibility of raising the child and that each would parent the child. See Section 3.03(1)(c).

IV. The Impact of the Principles of Family Dissolution on American Law

1. Property Division

The Principle choosing a 50-50 division of marital property on dissolution is actually in the mainstream of American law – either as it is now or as it is developing. Certainly, the prestige of the A.L.I. will encourage lawyers and courts to seek a 50-50 division.

The proposal in the Principles for a recharacterization of separate property, i.e., property brought to the marriage or inherited, in a long-term marriage is more problematic. It requires the adoption of a statewide rule which probably would require legislative action although it could perhaps be done with judge-made law; but, in any event, that is a stumbling block. More importantly, the Principle relies on a formula to recharacterize separate property as community property, based on a formula, but the Principles do not propose a formula.

2. Compensatory Payments

The reconceptualization of alimony as compensation for loss is brilliant. But presently alimony is a minor consideration in the economics of family dissolution – divorce statistics place it at around 15%. But will the Principles accomplish the objectives of making awards more predictable and available? The answer

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(6) that child-support rules take into account a child's need for care;

(7) that child-support rules be readily comprehensible and administrable, and reflect popular understanding of the duties and obligations of parents to a child and to each other;

(8) that child-support awards be readily enforceable and modifiable as the circumstances of the parties change; and

(9) that the design and implementation of child-support rules foster cooperation and minimize conflict between a child's parents.

[29] Sanford L. Braver and David Stockburger, "Child Support Guidelines and Equal Living Standards", in William S. Comanor (ed.) *supra* note 27 at 91.

to those questions is not clear. On the issue of predictability, a study of a county that adopted alimony guidelines based on the ALI Principles found a "*very high correspondence between the award amounts called for by the guideline and the amounts that family court judges and attorneys settling actual cases*" arrived at[30] – suggesting that the present practice may not be as unpredictable as thought!

On the issue of availability, will the Principles make these awards more available? This is difficult to predict because one of the constraints on alimony under present rules is the lack of money to pay it once property is divided and child support assessed. Another limitation is the fact that the rule requires implementation of a legislative type with rules of statewide application. The model for the rules of statewide application is the success of Child Support Guidelines but they were not adopted easily. It took the tremendous power of the federal government purse to bring the states in line.

3. Child Support

The Principles on Child Support may be ahead of their time. The proposed formula has many of the features of income equalization, an approach promoted unsuccessfully by some activists in the early days of child support formulas. In recent years the trend in child support formulas has been to reduce the amount – to recognize the problems of low income fathers – something the ALI Principles also do – and to give credit against child support for the time the child support payer spends with his child. A proposal to change the formula to increase payments – even though we would all agree on its validity – may not be widely followed.

4. Conclusion

The American Law Institute Principles of the Law of Family Dissolution represent over a decade of work by one of the most prestigious American legal institutions. The Principles are probably the most sweeping proposal for family law reform in the United States in more than a quarter of a century. They reflect the most current thinking about the direction of the law governing the family as it changes and adapts to 21st century social conditions.

I hope that the Principles will have some influence in the efforts at modernization of family law in Catalonia and Spain and in the effort to harmonize the law of the European Union.

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[30] Ellman, *supra* note 22 at 812.