

A Different Kind of Marriage Equality

Author : Cyra Choudhury

Date : November 13, 2015

Elizabeth R. Carter, [The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality](#), 48 **Ind. L. Rev.** 853 (2015).

If you are married to a miser who controls the family finances and refuses to give you money outside household expenses, what can you do about it other than get a divorce? What are the consequences of unequal power over property in marriage? In her article *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, [Elizabeth Carter](#) reminds family law scholars and practitioners of the importance of these questions raised so memorably in the 1953 case of *McGuire v. McGuire*.¹ There, Lydia McGuire sued her husband for maintenance and discovered that there was no legal remedy for her situation. In other words, the law could not compel spouses to be equitable about the family finances and property or give redress to past inequalities in an extant marriage. In the decision denying Lydia McGuire relief, Justice Messmore of the Nebraska Supreme Court found that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine.... As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.”²

Community property states, which historically had been more egalitarian in distributing ownership of marital property during marriage and at dissolution than common law states before their reform of post-dissolution property distribution, still had gendered management rights while marriages were intact. In most extant marriages, management rights or the rights to invest or use property such as paychecks, investments, and even real property had historically been vested in breadwinning husbands. Confronted with the possibility of the passage of the Equal Rights Amendment and the evolving Supreme Court jurisprudence in equal rights, community property states reformed their management rules in the 1960s and 70s to be gender neutral. One would imagine that with the increase in women’s participation in the workforce during this period and the reform of rules to formally bestow equality, *de facto* management would also become more or less equal. However, these neutral laws that “facially granted the spouses equal management rights over their community property” have largely failed to equalize management rights of that property in fact. (P. 854.) That is to say, the rules did not change the practices in family property management. In her article, Carter reminds us that now some seventy years after the *McGuire* case, and in spite of the dramatic changes in family and gender roles and the reform in community property states to gender-neutral management rules, the ability to control family resources continues to be demarcated unequally along gender lines in heterosexual marriages.

While it is important that marital partners be allowed to choose the management system that best suits them, the persistence of this inequality should concern lawmakers for a number of reasons. If the state is interested in equalizing gender roles and if it is concerned with the effects of property distribution at divorce, then it ought to be concerned with the property and power distributions during marriage. Even if the law cannot adjudicate conflicts that arise between partners, it can and has changed the rules regarding control of marital property and ought revisit these reform efforts, claims Carter.

To better understand intrafamily inequality, Carter describes six different family allocative systems identified by sociologist Catherine Kenney in her 2006 study.³ Partners’ choice of allocative frameworks,

according to this research, “impacts the quality and stability of their relationship, the wellbeing of their children, and women’s position in the economy and society as a whole.” (P. 857.) For instance, couples using allocative systems that empower one spouse over the other are more prone to dissolution. Of the six allocative models, only two are egalitarian. From Kenney’s research, we learn that families that use inequalitarian allocative systems such as separate money/women’s control or pooled money/women’s control where women control the property are more likely to be lower income, to experience abuse, and to experience child food insecurity. In other word, families that tend to be lower income adopt an allocative system where the wife is the decision maker but this does not reflect financial empowerment for the woman; rather, faced with scarce resources, the burden of making ends meet is placed on the wife. Husbands and children may hand over their paychecks but not before retaining their own spending money that they can use for their leisure activities. Women in these families tend not to retain their own discretionary funds as they are often in the position of trying to stretch whatever they get to meet basic needs.

Families that use separate money/men’s control or pooled money/men’s control tend to be wealthier. Women are often given a housekeeping budget and so have control over enough funds to keep the household running. They may be given some personal money but they rarely exercise control over all family assets. In the highest income families, husbands tend to control the property and income. These families typically follow traditional breadwinner/breadmaker gender roles with wives who do not work.

Finally, the two allocative systems that are more egalitarian are separate money/equal control and pooled money/equal control. Partners who choose separate money/equal control segregate some funds which are beyond the other’s control and pool some funds. Partners who choose to pool their money and share control are the most egalitarian in their management of property. These families tend to have two working partners. Clearly, the choice of allocative system and consequently the inequality of management may vary according to education, formal wage earning, and socio-economic status. But relying on Kenney’s study, Carter notes that 65-71% of married couples with children adopted an allocative system that disadvantaged the wife. (P. 872.)

Carter then traces the attempts at legal reform of community property management rules at the time when divorce and post-divorce property laws in common law states were being reformed. At that time, legislatures in community property states had the potential to radically change the allocative structure of marriage by enacting rules that closed the “money-power gap.” But, in spite of adopting gender-neutral rules, the opportunity was missed and community property wives fared no better than their common law counterparts. Carter asserts that the opportunity was missed because most legislators did not support such radical reform even though they were aware of its possibilities and had the opportunity to enact such rules. Instead, under the guise of neutrality, they continued to maintain the breadwinner’s dominance and the fiction of equal power within marriage. Furthermore, they failed to appreciate the ability of the law to effect substantive change. Surveying the reforms undertaken by the community property states, Carter contends that none of them take equal management of all assets seriously. Moreover, the unwarranted assumption that spouses consult each other before making financial decisions allowed the states to maintain the status quo and did nothing to encourage better communications and joint decision-making by spouses.

What then did the community property states do to reform their laws regarding management? Carter shows that the majority of the states enacted equal management rules that categorized assets and transactions differently allowing for different forms of management. She asserts that: “equal management applies to a shockingly small percentage of a couple’s assets. Nearly every valuable asset is governed by one of the exceptions to the default rule of equal management.” (P. 882.) While non-financial assets such as real property and household furnishing require joinder and the consent of both spouses in their management, many nonfinancial assets like business equity and vehicles can be

managed by one partner because of rules of privity. (P. 882.) Business assets can be held under the exclusive control of one spouse for practical reasons of efficiency and contract. Financial assets like joint transaction accounts may be managed equally but because of applicable banking laws and policies, they do not require any consideration of spousal community property rights during the marriage. (P. 884.) Retirement accounts are community property and the law protects the rights of a divorced spouse to a share of these benefits but the “law specifically prohibits a spouse from participating in the management of a retirement account during an intact marriage.” (P. 886.)

The majority of community property of value can be categorized out of equal management and into the exclusive management of one spouse by making them business assets or through the “practical matter” exception—an exception to the equal management rules that allows one spouse to control property when in relationship with a third party under contract law rules. Carter gives the example of stocks that may be community property but are titled to one spouse. While both spouses may theoretically have equal management, the broker will sell the stock over the signature of the title-bearing spouse. This exception, which seeks to recognize practical issues of privity and contract between the titleholder in the community and a third party, according to the article, “eviscerates the concept of equal management in all meaningful respects.” (P. 882.)

From her discussion of both allocative systems and categorization of assets, it is clear that there is some degree of choice involved in how families structure their management relationship. Carter argues that even though we know that egalitarian allocative systems make for healthier marriages and inegalitarian ones are detrimental to both the marriage and to society, without intervention, most couples fall into well-worn patterns of inegalitarian and gendered management systems with which they may be most familiar. The article relies on studies conducted in the 1990s and the most recent study by Catherine Kenney in 2006 to underscore this point. Carter acknowledges the limits of these studies and it is important that more recent data be gathered before advocating a particular set of legal reforms that might encourage more egalitarian management. Certainly, there are a great many more breadwinner wives today than there were twenty years ago and their ability to control their earnings must have an effect on their autonomy and power in the family. Feminist economists, who from the mid-1990s have argued against idealized notions of family, posited this connection between property owning and bargaining power. Challenging the view that families bargained cooperatively, they suggested that such models of altruism and harmony assumed an agreement regarding decisionmaking about allocation of family resources that did not exist—acquiescence was not in their view agreement.⁴ Development economists in particular have argued that many families do not actually cooperate with regards to property allocation and that the ability to control property improves the bargaining position of family members particularly women. It stands to reason that increases in wage labor and property ownership by women would change the allocative preferences in the household and newer data would better enable us to judge whether family bargaining remains unfair to women. What we do know is that in marital families, 53% of families had both spouses earning. In such dual earner families where women earned less than their spouse, women’s contributed 37% of the family income. In 19% of families, only the husband had earnings, in 6.8% of families, only the wife had earnings and 15.5% of families had no earners at all. In addition, 28% of women earned more than their husbands—a percentage that has grown significantly since the 1970s.⁵ Carter suggests that despite the decreasing gap in earnings and household contribution, there remains power gap in management of family assets that requires examination.

Carter’s article contributes to our understanding of power and control of property within marriage and their effects on the wellbeing of both the marital relationship and society. She demonstrates one partner’s ongoing dominance can potentially do substantial harm to the other’s economic prospects well before the marriage begins to fail. And in fact, she argues that one partner’s dominance can be an indication of a troubled marriage. Egalitarian management of assets, on the other hand, indicates

stronger and more durable marriages. Rather than primarily focusing on the distribution of property when the marriage dissolves, Carter's work suggests that legal reform that reduces the money-power gap between partners may do much to preserve marriages.

1. McGuire v. McGuire, 59 N.W.2d 336 (1953).
2. *Id.*
3. Catherine Kenney, *The Power of the Purse: Allocative Systems and Inequality in Couple Households*, 20 **Gender & Society** 354 (2006).
4. See Naila Kabeer, **Reversed Realities: Gender Hierarchies in Development Thought** 101-15 (1994) (discussing economic fallacies about intrahousehold altruism and decision making); Bina Aggarwal, [Bargaining and Gender Relations: Within and Beyond the Household](#), 3 **Feminist Econ.** 1, 14-20 (1997) (discussing intrahousehold gender dynamics and bargaining as they pertain to women's role in the household).
5. United States Bureau of Labor Statistics, [Women in the Labor Force: A Databook May 2014](#), (2014).

Cite as: Cyra Choudhury, *A Different Kind of Marriage Equality*, JOTWELL (November 13, 2015) (reviewing Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 **Ind. L. Rev.** 853 (2015)), <https://family.jotwell.com/a-different-kind-of-marriage-equality/>.