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Christopher L. Blakesley

University of Nevada, Las Vegas -- William S. Boyd School of Law

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THE LAW OF ALIMONY†

CHRISTOPHER L. BLAKESLEY*

I. INTRODUCTION

This article provides a detailed study of alimony, its development, purpose, function and measure. It is a study of alimony with a theme. It recognizes that although one hopes that all marriages will endure forever, some fail to meet that standard. Alimony should provide a means of ensuring that neither party is unfairly advantaged or disadvantaged for services rendered to the family during the marriage. Alimony, ironically, may be a symbolic means of recognizing and promoting the traditional family, as well as the loyalty and devotion needed for healthy families. The opportunity to protect and compensate for that loyalty and the human capital of which it is constituted, paradoxically, is realized when a lengthy marriage breaks down. Therefore, the theme of this article is that alimony should be utilized appropriately to provide a means of economically equalizing parties to a dissolved marriage. Significantly, in order to equalize parties when one of them has spent a large portion of her life rearing the children and caring for the needs of the household, it is necessary to compensate her for that time and effort by awarding alimony.

Respect, honor, promotion of the family and devoted parenting have traditionally been part of American rhetoric. Yet, they dissolve rather quickly and seem somewhat hypocritical when a long-term marriage ends and the spouse who has remained at home, having to rear the children and care for the home at the cost of never starting or ending early her career development, receives no compensation for that human cost and capital. The spouse who has pursued his career will be compensated throughout his life for that development. Analogously, the other spouse

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* Professor of Law, Louisiana State University Law Center; B.A., University of Utah, 1969; M.A., The Fletcher School of Law and Diplomacy, 1970; J.D., University of Utah College of Law, 1973; L.L.M., Columbia University School of Law, 1976; J.S.D., Columbia University School of Law, 1985.

should also be compensated for her services to the family. This theme runs throughout each section of this article as the key to understanding the proper function of alimony. The history and early conceptual development of alimony; the authority and jurisdiction to award it; its current function, purpose and measure; alimony for a specific term (rehabilitative alimony); alimony and the professional license or degree; fault and the determination of alimony; and the effects of modification, termination, enforcement and the Full Faith and Credit Clause on the alimony award will be considered.

The policy of awarding the payment of alimony to a wife as an incident of divorce migrated to America with the English common law. Although the American law of marriage has always been controlled by civil law, the notion of marriage and alimony developed in the ecclesiastical courts of medieval England. Prior to the promulgation of the Divorce Act of 1857, the ecclesiastical courts in England exercised jurisdiction over matrimonial causes of action.¹ These courts generally enforced rules of canon law,² which had evolved in the civil and natural law traditions on the Continent. Marriage in this tradition and under the canon law was based on contract theory, but was also considered a sacrament.³ As a sacrament, it was indissoluble.⁴ Although marriage was indissoluble, "divorces," really forms of annulment, were granted by the ecclesiastical courts in certain limited circumstances.⁵

A divorce *a vinculo matrimonii* was a decree nullifying the marriage contract because of an impediment that existed at the time of the mar-

¹ See Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 197 (1939). The Divorce Act of 1857, 20 & 21 Vict., ch. 85, terminated the divorce jurisdiction of ecclesiastical courts in England. *Id.* at 198. Alimony was clearly not within the jurisdiction of the equity courts, but was exclusively within the competence of the ecclesiastical courts. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.1, at 421 (1968) (citing Anonymous, 89 Eng. Rep. 941 (K.B. 1683); *Ball v. Montgomery*, 30 Eng. Rep. 588 (Ch. 1793)). However, equity would enforce separation agreements. See *Head v. Head*, 26 Eng. Rep. 1115 (Ch. 1747); *Angier v. Angier*, 24 Eng. Rep. 222 (Ch. 1718). Equity would also assist in the enforcement of alimony decrees of the ecclesiastical courts. See H. CLARK, *supra*, § 14.1, at 421. See, e.g., *Dawson v. Dawson*, 32 Eng. Rep. 71 (Ch. 1803). The Divorce Act of 1857 allowed absolute divorce by judicial decree and removed such power from the ecclesiastical courts. See Vernier & Hurlbut, *supra*, at 198.

² See Vernier & Hurlbut, *supra* note 1, at 197. See also A. OGLE, *THE CANON LAW IN MEDIEVAL ENGLAND* 52-53 (1912) (comparison of Roman canon law with English church and state law on marriage and divorce).

³ See *Dalrymple v. Dalrymple*, 161 Eng. Rep. 665, 669 (Ecc. 1811).

⁴ See R. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 74 (1974); Vernier & Hurlbut, *supra* note 1, at 197. See also *Evans v. Evans*, 161 Eng. Rep. 466, 467 (Ecc. 1790) (marriages are indissoluble).

⁵ See R. HELMHOLZ, *supra* note 4, at 76-100.

riage.⁶ In effect, the ecclesiastical court ruled that the marriage never legally existed at all and was void (or voidable) *ab initio*.⁷ Ecclesiastical law did not allow the wife to receive permanent alimony after a divorce *a vinculo matrimonii*.⁸ Dissolution of a valid marriage by absolute divorce required a private act of Parliament.⁹ This type of divorce developed as an alternative method to dissolve marriages, particularly when there were no grounds for annulment.

A judicial separation, known as a divorce *a mensa et thoro*, was granted for reasons of adultery, cruelty, or "spiritual" fornication (apostasy or heresy).¹⁰ This separation decree did not dissolve the marriage bond, but allowed the man and wife to live separate and apart from each other. The decree prohibited a later marriage.¹¹ Alimony awards were permitted pursuant to decrees of divorce *a mensa et thoro*.¹²

The exact rationale upon which medieval alimony decrees were based is unclear. One canonist believed that a divorce *a mensa et thoro* left the husband's duty to support his wife intact and alimony payments were merely a continuation of this duty.¹³ This conclusion appears to be logical and sound. On the other hand, several medieval decisions appear to consider alimony, or other means of supporting the wife after the divorce *a mensa et thoro*, as being based on an agreement between the parties.¹⁴ It is unclear what the term "agreement" meant in this context. Did it mean that the courts believed that the parties bargained over support payments? This is doubtful, considering the beliefs regarding marriage and the relative independence of the parties. If based on an agreement, was alimony a voluntary obligation? Was the notion of an agreement simply an aphorism based on the notion of marriage as a "civil contract?"¹⁵ In

⁶ See R. HELMHOLZ, *supra* note 4, at 75, 500; Vernier & Hurlbut, *supra* note 1, at 197-98 (citing 2 R. BURN, THE ECCLESIASTICAL LAW (9th ed. 1842)).

⁷ See R. HELMHOLZ, *supra* note 4, at 74; Vernier & Hurlbut, *supra* note 1, at 197-98.

⁸ See Vernier & Hurlbut, *supra* note 1, at 201. See also Bird v. Bird, 161 Eng. Rep. 227 (Ecc. 1754). In Bird, a husband obtained a divorce *a vinculo matrimonii* based on his wife's previously existing valid marriage. See *id.* at 227-28. The ecclesiastical court held that because there was a "nullity of marriage by reason of a former [one]" no alimony could be granted to the wife. *Id.* at 228.

⁹ See Vernier & Hurlbut, *supra* note 1, at 198. "If the party injured wishes to marry again, application must be made to Parliament for an act of the legislature to dissolve the marriage entirely." 2 R. BURN, THE ECCLESIASTICAL LAW 502 (9th ed. 1842).

¹⁰ See R. HELMHOLZ, *supra* note 4, at 100.

¹¹ See *id.*

¹² See, e.g., Cooke v. Cooke, 161 Eng. Rep. 1072, 1073 (Ecc. 1812) (wife granted divorce and alimony award due to husband's adulterous activities).

¹³ See R. HELMHOLZ, *supra* note 4, at 106 n.114. See also H. BASS & M. REIN, DIVORCE OR MARRIAGE 31 (1976); H. CLARK, *supra* note 1, § 14.5, at 420 (1968).

¹⁴ See R. HELMHOLZ, *supra* note 4, at 106-07.

¹⁵ 1 W. BLACKSTONE, COMMENTARIES *185.

that sense, the parties voluntarily agreed to enter into this marriage status and to assume the obligations appertaining thereto.¹⁶

Leading sixteenth century English ecclesiastics claimed the power to grant a divorce *a vinculo matrimonii* on the ground of adultery.¹⁷ By the beginning of the reign of Queen Elizabeth I, the position of the Church of England was that after a divorce *a vinculo matrimonii* for adultery was granted, each party became free to marry another.¹⁸ Since divorce *a vinculo matrimonii* was essentially an annulment and the parties were viewed as if they had never been married, it was natural to allow them to marry again. It is further noted that, during this time, men took the opportunity to repudiate their wives for adultery and to enter into "second marriages."¹⁹

¹⁶ Burn, in his study on ecclesiastical law, divides support payments into two categories: alimony, which is established by the judicial act of a court of justice; and separate maintenance, which is established by agreement of the parties. See 2 R. BURN, *supra* note 9. See also *Corbett v. Poelnitz*, 99 Eng. Rep. 940 (K.B. 1785). In *Corbett*, a creditor sued a woman who had agreed to a separation with her former husband. See *id.* at 940-41. The husband had agreed to pay maintenance payments to his wife. See *id.* at 940. The general rule regarding creditors' suits against wives was that, inasmuch as a married woman had no property, her personal contracts were void and she could not be sued on them. *Id.* at 942. However, in this instance, King's Bench ruled that the woman was liable for all debts, even though still married because her separate maintenance payments allowed her to act as a "femme sole" (independent woman). See *id.* at 943. Lord Mansfield noted that: "[i]n modern days, a new mode of proceeding has been introduced, and [agreements] have been allowed under which a married woman assumes the appearance of a feme [sic] sole In the ancient law there was no idea of a separate maintenance." *Id.*

If Lord Mansfield's last sentence is a sound proposition, rather than merely a justification snatched from the great jurist's perceptions of history and ancient law, separate maintenance agreements would appear to be of relatively recent origin in England. Very few medieval ecclesiastical court decisions mention alimony or any other form of support for the wife at all. See R. HELMHOLZ, *supra* note 4, at 106. Those that do mention it, consider support as an "agreement" between the parties. See *id.* at 106-07. Thus, it appears that alimony decrees made by courts are of very recent origin (late 18th to early 19th century) and that voluntary separate maintenance agreements were the only form of support for a separated wife until that time.

¹⁷ See Vernier & Hurlbut, *supra* note 1, at 197 n.3. Protestant canonists attempted to reform ecclesiastical laws to allow absolute divorce on the grounds of adultery, desertion, long absence, mortal enmities, and lasting fierceness of a husband to his wife. They wanted the divorce *a mensa et thoro* to be abolished as unnecessary, because of the more significant breadth of absolute divorce. Parliament, in 1551, partially approved of this view of the Protestant canonists; however, the power to make ecclesiastical law remained vested in the ecclesiastical courts. Hence, no change in the law evolved at this point. See 2 R. BURN, *supra* note 9, at 503.

¹⁸ See *id.* Burn states: "In the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was that after a divorce for adultery, the parties may marry again." *Id.* See also 2 G. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 81 (1904) ("New marriages were freely contracted after obtaining divorce from unfaithful partners.").

¹⁹ See R. HOULBROOKE, CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION

The ecclesiastical courts would have been presented with an interesting question if women had been able to take advantage of this opportunity to repudiate their spouses for adultery and to receive a divorce *a vinculo* decree. Would these women be eligible to receive alimony? If they were, that alimony would not have been based on the husband's duty to support his wife during marriage because no such duty would have arisen due to the retroactive effect of the annulment. Although this apparently did not ever arise, at the close of Elizabeth's reign, official Church opinion was altered to remove adultery as a cause for divorce *a vinculo matrimonii*. In the case of *Rye v. Fuliambe* (Foljambe's Case),²⁰ the Star Chamber held that adultery was cause only for an action for divorce *a mensa et thoro*.²¹ Inasmuch as divorce *a mensa et thoro* was really a legal separation from bed and board, it was natural to award alimony based on the husband's duty to support his wife and, therefore, the obligation to support would continue.

By the nineteenth century, policies of social economy and fault provided the underlying rationale for alimony payments.²² The wife's property at marriage, according to the common law of England, vested in her husband. The courts reasoned that a portion of the income and value that this property generated for or added to the family could be assigned or allocated to the maintenance and support of the wife when she and her husband were separated pursuant to their divorce *a mensa et thoro*.²³ If the husband had been the adulterer, he was considered to have been "at fault" and to have caused the divorce *a mensa et thoro*; thereby separating the wife from both matrimonial and familial society.²⁴

The ecclesiastical judge was the sole person to determine the amount of alimony to be awarded. He had absolute discretion, but considered such factors as the need of the wife and the ability of the husband to pay.²⁵ Presently, courts continue to consider both of these factors along with many others discussed below. The ecclesiastical court also considered the support of the children when determining the amount of alimony to be awarded to the wife.²⁶ As previously noted, another important factor which greatly affected the support award was the notion of the par-

70 (1979).

²⁰ 72 Eng. Rep. 838 (K.B. 1602).

²¹ See *id.*

²² See, e.g., *Cooke v. Cooke*, 161 Eng. Rep. 1072, 1072 (Ecc. 1812) (husband committed adultery); *Vernier & Hurlbut*, *supra* note 1, at 198 (recompense of wife matter of social economy).

²³ See *Cooke*, 161 Eng. Rep. at 1073.

²⁴ See *Otway v. Otway*, 161 Eng. Rep. 1092, 1093 (Ecc. 1813).

²⁵ See *Vernier & Hurlbut*, *supra* note 1, at 198-99.

²⁶ See *id.* at 199.

ties' respective and relative guilt or fault as to the marital breakdown.²⁷ Early in the development of this canon law determination of alimony, a wife who was guilty of an indiscretion would receive nothing from her husband. Later, alimony was granted to the wife, even if she was at fault, as a condition placed upon the innocent husband before he would be granted a divorce. The courts reasoned that, regardless of whether the wife was guilty of an indiscretion or not, she still needed support;²⁸ thus, the notion that the award of alimony after the divorce was encouraged by an underlying policy of having someone other than the public support the spouse. Since the husband (today, either spouse) had committed himself to care for his spouse "until death," this commitment would last until death as long as it was needed and he had the ability to pay.

After the ecclesiastical courts eliminated the utilization of fault to determine whether the wife ought to receive alimony, the primary objective of an order decreeing the payment of permanent alimony was to provide continuing support for the wife who would otherwise be without means.²⁹ In determining the amount to be awarded, the courts generally looked to the amount of the husband's income³⁰ and granted a reasonable proportion to the wife for her "comfortable subsistence."³¹ The courts were also concerned with the husband's obligation to support his children,³² and any special needs of the wife.³³ Therefore, even at this early stage in the development of alimony, the application of a sort of formula considering need and the ability to pay is apparent. Moreover, the tendency to aggregate the husband's obligation to support his wife and his children is also evident—a tendency which causes confusion and problems today. Finally, ecclesiastical judges had the authority to modify an alimony decree when the circumstances of the parties changed in a manner that impacted on need or ability to pay, although few such modifications were actually granted.³⁴

Enforcement of an alimony order was often accomplished by the pro-

²⁷ See *id.*

²⁸ See *id.* at 200-01.

²⁹ See *id.* at 198.

³⁰ See, e.g., *Kempe v. Kempe*, 162 Eng. Rep. 668, 669 (Ecc. 1828); *Smith v. Smith*, 161 Eng. Rep. 1105, 1105 (Ecc. 1813).

³¹ *Kempe*, 162 Eng. Rep. at 669.

³² See *Street v. Street*, 162 Eng. Rep. 196, 197-98 (Ecc. 1823); *Blaquiere v. Blaquiere*, 161 Eng. Rep. 1319, 1319 (Ecc. 1820).

³³ See, e.g., *Durant v. Durant*, 162 Eng. Rep. 667, 668 (Ecc. 1826) (wife in delicate health and mother of a large family).

³⁴ See *De Blaquiere v. De Blaquiere*, 162 Eng. Rep. 1173, 1175-76 (Ecc. 1830). See, e.g., *Neil v. Neil*, 162 Eng. Rep. 1446, 1447 (Ecc. 1832) (as reduction in husband's income caused by unwise investments, modification not granted).

cess of excommunication from the Church.³⁶ Courts could also utilize the common law writ *de estoveriis habendis* (of recovering estovers) to force recovery of alimony.³⁶ At times, the Chancellor would compel payment by issuance of a writ *ne exeat Regno*.³⁷ After Parliament abolished excommunication for civil purposes, alimony decrees were enforced by contempt and sequestration by the High Court of Chancery.³⁸

Much of the family law in America was imported from English ecclesiastical law as it had developed before the Divorce Act of 1857. Similarly to the English view, the essence of alimony was perceived to be the enforcement of the husband's canon/common law duty to support his wife.³⁹ A perception of this nature was quite logical under English ecclesiastical law since the divorce to which it applied was really only a legal separation from bed and board. It was harder to rationalize the continuation of the support obligation in America where one could obtain a definitive divorce.⁴⁰ Today, it is incorrect to say that support during marriage or alimony after dissolution is based upon the husband's duty to support his wife. There should be no problem, however, in recognizing a commitment on the part of each spouse to support the other during and, depending on conditions, even after marriage. Notwithstanding the difficulty in articulating the logic of awarding alimony after divorce, it has been awarded consistently in America from "the earliest colonial times to the present."⁴¹

A logical but rarely articulated justification for the continuation of support is that once one commits to a marriage, he has committed himself to support and maintain his spouse in accordance with his abilities and the spouse's needs for life, or until remarriage, unless circumstances arise which would terminate or alter that obligation. Other justifications for or perceived central purposes of alimony that have been articulated include that alimony represents damages for breach of the marriage covenant,⁴² or a penalty imposed upon the guilty spouse.⁴³ These latter two

³⁶ See 2 R. BURN, *supra* note 9, at 505-06; Vernier & Hurlbut, *supra* note 1, at 201.

³⁶ See 1 W. BLACKSTONE, COMMENTARIES *189.

³⁷ See Vernier & Hurlbut, *supra* note 1, at 201 (citing 3 E. DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 1996 (2d ed. 1851)).

³⁸ See *id.* at 201 & n.41.

³⁹ See, e.g., Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945) (duty to provide support is not a debt but obligation imposed by law). See also H. BASS & M. REIN, *supra* note 13, at 31; H. CLARK, *supra* note 1, § 6.1, at 181, § 14.5, at 441. The husband's common law duty to support his wife depended upon the existence of a valid marriage. See 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 15.01, at 83 (rev. ed. 1987).

⁴⁰ See H. CLARK, *supra* note 1, § 14.1, at 421.

⁴¹ *Id.* (citing 2 G. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 332, 338, 339, 349, 368, 370, 374, 377 (1904); 3 G. HOWARD, 28-30, 90-95 (1904)).

⁴² See H. CLARK, *supra* note 1, § 14.1, at 422. See, e.g., Driskill v. Driskill, 181 S.W.2d 1001, 1004 (Mo. Ct. App. 1944) (alimony constitutes damages for breach of marriage contract).

bases for justifying alimony are anachronistic, although approximately seventeen states still allow fault to be considered as a factor in deciding the issue of alimony⁴⁴ and for some it is even a bar to receiving alimony.⁴⁵ Another view is that alimony is necessary to keep the formerly dependent spouse off the public dole.⁴⁶ The suggestion has also been made that "[t]he economic rationale for alimony may be closer to that which underlies the payment of severance pay and other forms of unemployment compensation."⁴⁷ Thus, there are various interpretations by the courts and commentators regarding the primary purpose of permanent maintenance or post-decretal alimony.

Defining alimony has been described as similar to trying to grab a slippery fish.⁴⁸ This is not surprising in light of the history of alimony; evolving from the ecclesiastical notion, wherein no permanent dissolution was contemplated, to the American concept, controlled by its ecclesiastical history but functioning within a secular setting which would recognize permanent dissolution and attempt to develop justification for permanent, post-decretal alimony. Given this dispute over definition and purpose, it should not be surprising that predictability is not the byword for alimony orders. Nevertheless, alimony today, more often referred to as

⁴³ See H. CLARK, *supra* note 1, § 14.1, at 421-22 (citing *Lewis v. Lewis*, 202 Ark. 740, 151 S.W.2d 998 (1941)); see also *Gusman v. Gusman*, 140 Ind. 433, 39 N.E. 918 (1895). *Contra Bonanno v. Bonanno*, 4 N.J. 268, 274, 72 A.2d 318, 320 (1950) (alimony not meant to punish guilty husband); *Miles v. Miles*, 185 Or. 230, 202 P.2d 485 (1949) (guilty husband may not be penalized by large alimony award); 2 W. NELSON, *DIVORCE AND ANNULMENT* § 14.06 (2d ed. 1961) (rejecting idea that alimony intended to punish the guilty).

⁴⁴ Many states retain fault as a factor to be considered in determining who should receive alimony and how much they should receive. Some of the states include: Alabama, Connecticut, Florida, Georgia (adultery is bar), Hawaii (the court shall consider the parties' respective merits), Louisiana (alimony allowed for spouse without marital fault), Maryland, Massachusetts, Missouri, North Carolina (adultery is a bar), Pennsylvania, Rhode Island, South Carolina (adultery is a bar), Tennessee, Virginia (fault is a bar), West Virginia. See generally Recent Cases, *Divorce—Fault is Relevant in Determination of Alimony in Divorce Action Brought Under No-Fault Prolonged Separation Statute*: *Flanagan v. Flanagan*, 87 HARV. L. REV. 1579 (1974).

⁴⁵ See, e.g., *Broussard v. Broussard*, 462 So. 2d 1386, 1387-89 (La. Ct. App. 1985) (permanent alimony denied because of wife's unjustified refusal to have sexual intercourse with husband); *Rutherford v. Rutherford*, 452 So. 2d 432, 433 (La. Ct. App. 1984) (paying spouse has burden of proving post-separation fault on the part of receiving spouse, which, if proved, would bar alimony); LA. CIV. CODE ANN. arts. 148, 160 (West Supp. 1988); W. VA. CODE § 48-2-15(i) (1986).

⁴⁶ See H. CLARK, *supra* note 1, § 14.5, at 442 (alimony "prevents the wife from becoming a financial burden to the community"); see also *Taake v. Taake*, 70 Wis. 2d 115, 122, 233 N.W.2d 449, 453 (1975) (Heffernan, J., dissenting) (alimony prevents dependent spouse from becoming a public charge).

⁴⁷ R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 5.3, at 109 (2d ed. 1977).

⁴⁸ Elrod, *The Widening Door of Alimony*, 8 FAM. ADVOC. 4 (1986).

maintenance,⁴⁹ may be defined as the monetary support of one spouse by the other spouse⁵⁰ following their legal separation or the dissolution of their marriage. This support may be based upon need and ability to pay, with the concept of need including the element of a right. This right is based upon recognition of and compensation for the receiving spouse's contribution to the family and concomitant cost in loss of earning capacity caused by devotion of time and talent to the family rather than to career development.

The obligation to pay and the opportunity to receive alimony has been gender-neutral since the Supreme Court's decision in *Orr v. Orr*,⁵¹ and the promulgation of gender-neutral statutes pursuant to that decision. Indeed, some forty states had already "de-sexed" their alimony statutes prior to the *Orr* decision.⁵² The duty to pay alimony would arise essentially if there were need on the part of the receiving spouse and ability to pay on the part of the paying spouse.⁵³ The determination to award alimony may occur at two stages: first, at the time of the decision to award a separation from bed and board (temporary support or maintenance); and, second, when permanent divorce or dissolution is awarded (permanent alimony or maintenance).⁵⁴ Technically, temporary alimony is the actual enforcement of the duty to continue support because the marriage is still in existence. Permanent alimony is awarded only after the dissolution of a valid marriage, although some states allow it after annulment.⁵⁵

Traditionally, alimony has been used to provide the necessities of life, including food, clothing and shelter.⁵⁶ Additionally, it has been demanded for reasonable transportation expenses, medical and drug expenses, household expenses and income tax liability generated by support

⁴⁹ See 1 A. LINDEY, *supra* note 39, § 15, at 83 ("Alimony is becoming obsolete and is being supplanted by support or maintenance.").

⁵⁰ W. STATSKY, *DOMESTIC RELATIONS: LAW AND SKILLS* 265 (1978). As a result of the decision handed down by the United States Supreme Court in *Orr v. Orr*, 440 U.S. 268 (1979), it is unconstitutional for state statutes to grant alimony to wives but not to husbands. Such statutes must be gender neutral in order to be valid. *Id.* at 82-83.

⁵¹ 440 U.S. 268 (1979). See generally W. O'DONNELL & D. JONES, *THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES* 158 (1982) (discussing *Orr* and gender-neutral laws).

⁵² See Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331, 369 (1986).

⁵³ See 1 A. LINDEY, *supra* note 39, § 15. See also *O'Neill v. O'Neill*, 164 Neb. 674, 83 N.W.2d 92 (1957); *Rubin v. Rubin*, 284 App. Div. 76, 130 N.Y.S.2d 463 (1st Dep't 1954).

⁵⁴ See W. O'DONNELL & D. JONES, *supra* note 51, at 156 (describing three varieties of alimony).

⁵⁵ See generally H. CLARK, *supra* note 1, § 3.4, at 133 (1968) (majority of jurisdictions do not allow permanent alimony without statutory authority).

⁵⁶ See *Ward v. Ward*, 332 So. 2d 868, 872 (La. Ct. App. 1976), *modified*, 339 So. 2d 839 (La. 1986) (reversed, insofar as rejected alimony to wife on basis of insufficient earning capacity).

payments.⁵⁷ Sometimes alimony has been awarded in an amount sufficient to allow the supported spouse to continue the lifestyle to which such spouse was accustomed during the marriage. Many states award rehabilitative alimony, whereby alimony or maintenance is awarded for a specific and limited period of time. This is done, theoretically, to assist the receiving spouse in achieving a position of equality or self-sufficiency with respect to earning capacity as compared with the paying spouse.⁵⁸ Currently, there is significant debate over the application of rehabilitative alimony; whether it is appropriate instead of permanent alimony and, if appropriate, when and under what conditions it should be awarded.⁵⁹

II. PERMANENT ALIMONY: ITS CURRENT PURPOSE, FUNCTION AND MEASURE

The opportunity to obtain alimony is directly provided for in all states of the Union, except Texas. Texas is the only state which does not provide for permanent or rehabilitative alimony upon dissolution.⁶⁰ Nonetheless, it would be inaccurate to state that in Texas one spouse will not be obliged to provide funds for the care and support of another spouse upon the dissolution of a marriage. Parties to a dissolution proceeding in Texas have only two options; they can either effect a property settlement agreement or have the court divide their marital property.⁶¹ A property settlement may provide one party with funds for future support. The Texas Supreme Court has held, however, that a contractual obligation to make future payments for support is not alimony.⁶² The agreement will have whatever legal force the law of contracts will give to it and only contravenes state policy when ordered by a court pursuant to a final decree of divorce.⁶³ In another decision, a Texas Court of Appeals held that

⁵⁷ See *Moss v. Moss*, 379 So. 2d 1206, 1208 (La. Ct. App. 1980) (alimony includes reasonable and necessary expenses beyond basic necessities).

⁵⁸ See Note, *Rehabilitative Alimony: An Old Wolf in New Clothes*, 13 N.Y.U. REV. L. & SOC. CHANGE 667 (1984-85). States which award so-called rehabilitative alimony include: Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, New York, Oregon, Pennsylvania, Tennessee, Vermont, Washington and Wisconsin. California denominates its awards rehabilitative spousal support. *Id.* at 667 n.4. See, e.g., *Reback v. Reback*, 296 So. 2d 541 (Fla. Dist. Ct. App. 1974) (definition of rehabilitative alimony), *cert. denied*, 312 So. 2d 737 (Fla. 1975); *Mertz v. Mertz*, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973) (same).

⁵⁹ See Note, *supra* note 58.

⁶⁰ See *Freed & Walker*, *supra* note 52, at 369.

⁶¹ See Comment, *Permanent Alimony—Disguised in Property Settlement Agreements*, 11 S. TEX. L.J. 269 (1969). It is noted that enveloping alimony within property division is interesting, in light of the fact that Texas is a community property state. *Id.*

⁶² *Francis v. Francis*, 412 S.W.2d 29, 33 (Tex. 1967). See Comment, *supra* note 61, at 270.

⁶³ See Comment, *supra* note 61, at 276.

a trial court may require one party to make monetary payments to the other after divorce, as long as the payments are referable to rights and equities of the parties and to the matrimonial properties at time of dissolution of the marriage.⁶⁴ Moreover, payments may be ordered to be made from a spouse's separate, personal property. These payments will not be considered alimony.⁶⁵

Although the function of alimony has traditionally been to provide for the receiving spouse's needs to the extent the other spouse has the ability to pay,⁶⁶ a question still arousing debate is whether the function of alimony should be to allow the receiving spouse to live in the lifestyle to which he or she was accustomed during the marriage.⁶⁷ A related debate concerns whether alimony should compensate the receiving spouse to the degree that he or she merits compensation for non-monetary contributions to the family and other spouse during the marriage. Provision for necessities of life undeniably forms part of the alimony function, but it is appropriate to ask whether more is required; whether alimony should play an equalizing role for the parties to a marriage. Should alimony be the mechanism which enables parties to exit the marriage on equal monetary footing, aware that all contributions to the marriage merit recognition and monetary reward? The simple fact that one party has contributed to the marriage and the family by caring for the home, rearing the children and supporting the money-making endeavors and career development of the other spouse indicates that this party should not be monetarily disadvantaged when the marriage dissolves. This view certainly has merit if society really wishes to promote the traditional family, the value of child rearing, and freedom of choice within the family.

The determination whether to grant or deny permanent alimony, as well as the amount and duration, are matters that rest within the broad discretion of the trial court. Over half of the states have promulgated statutory guidelines or factors⁶⁸ to assist the trial court in reaching a de-

⁶⁴ *Price v. Price*, 591 S.W.2d 601, 603 (Tex. Civ. App. 1979).

⁶⁵ *See id.* at 604. *See, e.g., Musslewhite v. Musslewhite*, 555 S.W.2d 894, 897 (Tex. Civ. App. 1977) (in divorce proceeding, court may award substantial portion of other spouse's separate personal property when necessary to effect fair and just division) (citing *Trader v. Trader*, 531 S.W.2d 189 (Tex. Civ. App. 1975)).

⁶⁶ *See* 1 A. LINDEY, *supra* note 39, § 15, at 21. *See also Alibrando v. Alibrando*, 375 A.2d 9, 13 (D.C. 1977) (wife's needs and husband's ability to contribute factored into alimony award); *Taylor v. Taylor*, 378 So. 2d 1352, 1353 (Fla. Dist. Ct. App. 1980) (needs of one spouse are met by alimony award to the extent the other spouse is able to pay).

⁶⁷ *See Freed & Walker, supra* note 52, at 370.

⁶⁸ New York has promulgated an elaborate scheme, which includes formulae or factors for property division, maintenance, and child support. *See* N.Y. DOM. REL. LAW § 236 (McKinney 1986 & Supp. 1988). *See also Freed & Walker, supra* note 52, at 361-64 (enumeration of common statutory guidelines and listing of states with such guidelines).

termination. The relevant criteria include: the length of the marriage;⁶⁹ the age, physical condition and emotional health of the parties;⁷⁰ the distribution of the property;⁷¹ the education level of the parties at the time of marriage and at the time that the action is commenced;⁷² the homemaker services and contributions to the career or career potential of the other party by the party seeking alimony;⁷³ the earning capacity of the party seeking alimony (which involves an evaluation of educational background, training, employment skills, work experience, length of absence from the job market, and custodial responsibilities for children);⁷⁴ and the possibility that the party seeking alimony can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.⁷⁵ Other guidelines include: the tax consequences to each party;⁷⁶ any agreement made by the parties before or during the marriage;⁷⁷ the needs of the potential recipient and the ability of the potential obligor to meet his own needs and financial obligations while meeting those of the recipient;⁷⁸ the financial resources of each party;⁷⁹ and any other relevant factors that the court deems just and equitable.⁸⁰ Sometimes fault or marital misconduct which is sufficient to constitute a cause for dissolution is a bar to alimony or a factor to be considered. It is notable that statutory guidelines speak very specifically about the health care of the spouse

⁶⁹ See, e.g., ARIZ. REV. STAT. § 25-319 (Supp. 1987); CONN. GEN. STAT. § 46b-82 (1987).

⁷⁰ See, e.g., ARIZ. REV. STAT. ANN. § 25-319 (Supp. 1987); COLO. REV. STAT. § 14-10-114 (1987).

⁷¹ See, e.g., IDAHO CODE § 32-709 (1984) (focus upon sufficiency of property to provide for party's reasonable needs); N.C. GEN. STAT. § 50-16.5 (1985) (alimony shall be in amount as circumstances render, having due regard to the estates).

⁷² See, e.g., CONN. GEN. STAT. § 46b-82 (1987); IND. CODE ANN. § 31-1-11.5-11 (Burns 1987).

⁷³ See, e.g., CAL. CIV. CODE § 4801 (West Supp. 1988); FLA. STAT. ANN. § 61.08 (West 1985).

⁷⁴ See, e.g., FLA. STAT. ANN. § 61.08 (West 1985) (statute considers time necessary to acquire sufficient education or training to enable party to find employment); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1987) (statutory language mentions vocational skills and employability of party seeking maintenance).

⁷⁵ See, e.g., GA. CODE ANN. § 30.209 (Harrison Supp. 1986) (jury may grant alimony and may consider standard of living as a factor); N.C. GEN. STAT. § 50-16.5 (1985) (standard of living to which parties are accustomed is a factor in determining alimony).

⁷⁶ See, e.g., IOWA CODE ANN. § 598.21 (West 1981); TENN. CODE ANN. § 36-5-101 (1987).

⁷⁷ See, e.g., MD. FAM. LAW CODE ANN. § 11-106 (1984); WIS. STAT. ANN. § 767.26 (West 1981).

⁷⁸ See, e.g., HAW. REV. STAT. § 580-47 (1985); KY. REV. STAT. ANN. § 403.200 (Michie/Bobbs-Merrill 1984).

⁷⁹ See, e.g., OHIO REV. CODE ANN. § 3105.18 (Anderson Supp. 1987) (court considers retirement benefits, expectancies, inheritances and property brought into the marriage); TENN. CODE ANN. § 36-5-101 (1987) (includes income from pension, profit sharing and retirement benefits).

⁸⁰ See, e.g., N.Y. DOM. REL. LAW § 236 (McKinney 1986 & Supp. 1988); TENN. CODE ANN. § 36-5-101 (1987); W. VA. CODE ANN. § 48-2-15 (1986).

and/or children.⁶¹ No one state has provided an all-inclusive statute. In addition, despite the statutory guidelines, judicial discretion is still extremely broad because the factors are not generally weighted in terms of impact or importance. Some courts have complained that there are so many factors available for consideration that it is possible to "[s]upport . . . absolutely any argument or position one wants to pursue."⁶² Indeed, little is known about the standards that are actually applied by trial judges in making alimony decisions.⁶³ Notwithstanding this uncertainty, a trial judge's decision may not be reversed unless it is clearly erroneous, an abuse of discretion or unsupported by sufficient evidence.⁶⁴ It has been noted by Professors Weitzman and Dixon that, typically, alimony is awarded on the basis of the attorneys' (in negotiated settlements) or judges' perceptions of what the husband can afford. Judges often feel compelled to place an equal burden "on men and women whose position and capacity for support are, by virtue of their experiences in marriage, typically unequal."⁶⁵ This raises doubt as to the validity of past and current legal evaluations of spouses' relative monetary positions during and after dissolution and forces a question regarding the appropriate response for the future. It is clear that the current approach has impoverished millions of mothers and children.⁶⁶ Finally, it is interesting to note that, al-

⁶¹ CONN. GEN. STAT. § 46b-85 (1987) (order for support of mentally ill spouse which may be set aside or altered by said court); IND. CODE ANN. § 31-1-11.5-11(e)(1) (West Supp. 1987) ("[i]f the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself is materially affected, [the support during this period of incapacity is] subject to further order of the court").

⁶² *Rogers v. Rogers*, 49 OKLA. B.A.J. 492-496 (Ct. App. Mar. 21, 1978). "[A]ttorneys search the cases for only those criteria most favorable to their side . . . and ignore the rest. The trial bench, the bar, and the litigants, more often than not, after considering these criteria, are still left in the dark as to what the ultimate award of alimony will be, if indeed any is given at all." *Id.* at 496.

⁶³ See FOOTE, LEVY & SANDLER, *CASES AND MATERIALS ON FAMILY LAW* 681 (3d ed. 1985).

⁶⁴ See *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 64 (Mo. 1983) (en banc) (review of trial court's decision on alimony is limited to abuse of discretion); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976) (en banc) (trial court decision will be sustained, "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law."). See also Krauskoph, *Maintenance: A Decade of Development*, 50 Mo. L. REV. 259, 262-63 (1985) (discussing trial court's broad discretion in granting maintenance awards).

⁶⁵ Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 184-85 (1980) (emphasis omitted). See L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985) (divorced woman and their children suffer an immediate 74% decrease in their standard of living, while their ex-husbands enjoy a 42% increase). See generally Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981) [hereinafter Weitzman, *The Economics of Divorce*].

⁶⁶ The staggering proportions of this impoverishment are graphically manifest in Bruch & Wikler, *The Economic Consequences*, in *Special Issue on Child Support Enforcement*, 36

though all states but one provide for alimony, it appears that alimony is *not*, in reality, awarded in most divorces.⁸⁷ Furthermore, when it is awarded, it is not awarded in excessive amounts.⁸⁸

III. ALIMONY FOR A SPECIFIC TERM

When post-decretal alimony is granted, some states allow a limitation on the amount of time that the receiving spouse will be supported. This approach, known as rehabilitative alimony, has been widely utilized in past years.⁸⁹ For example, in 1971, Florida promulgated its Dissolution of Marriage Act,⁹⁰ implementing the notion of rehabilitative alimony. The popularity of rehabilitative alimony increased significantly throughout the country in conjunction with the advent of no-fault divorce and equitable property distribution.⁹¹

The articulated goal of limiting the duration of alimony is to encourage the recipient spouse to become self-supporting and to give such spouse "a sense of independence and psychological fulfillment."⁹² Moreover, it has been argued that some of the attendant financial problems of divorce may be alleviated by this device. It has been stated that rehabilitative alimony "contemplates sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining and for the further purpose of preventing financial hardship on society or individuals during the rehabilitative process."⁹³ The very idea of a need for "rehabilitation" or "ther-

JUV. & FAM. CT. J. 5 (1985). See also Weitzman, *The Economics of Divorce*, *supra* note 85, at 1249 (discussion of impoverishment of women and children).

⁸⁷ See H. KRAUSE, *FAMILY LAW* 485 (2d ed. 1984).

⁸⁸ See H. CLARK, *supra* note 1, § 14.1, at 422.

⁸⁹ Note, *supra* note 58, at 667 n.4.

⁹⁰ FLA. STAT. § 61 (1983). Florida courts have granted rehabilitative alimony in cases where there is a strong chance that the dependant spouse will return to a state of self-sufficiency. See *Beard v. Beard*, 262 So. 2d 269, 273 (Fla. Dist. Ct. App. 1972) (rehabilitative alimony granted to a 48 year old woman with demonstrated capacity for gainful employment); but see *Kalmutz v. Kalmutz*, 299 So. 2d 30, 34 (Fla. Dist. Ct. App. 1974) (rehabilitative alimony improper where 45-year-old-woman incapable of working except for a short period in which she worked for her husband). See generally Comment, *Rehabilitative Alimony—A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285 (1984).

⁹¹ See Gillman, *Alimony/Spousal Support: From Punishment to Rehabilitation*, 7 COMMUNITY PROP. J. 135, 135 (1980); Note, *supra* note 58, at 676.

⁹² *Molnar v. Molnar*, 314 S.E.2d 73, 76 (W. Va. 1984). See also *Luff v. Luff*, 329 S.E.2d 100, 102 (W. Va. 1985) (to obtain extension of rehabilitative alimony receiving spouse must show expectation of rehabilitation has not been realized).

⁹³ See Note, *supra* note 58, at 667-68 (quoting BLACK'S LAW DICTIONARY 1157 (5th ed. 1979)); *Mertz v. Mertz*, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973); see also *Reback v. Reback*, 296 So. 2d 541, 543 (Fla. Dist. Ct. App.) (illustrative of common usage and ordinary definition of term rehabilitation), *cert. denied*, 312 So. 2d 737 (Fla. 1974).

apy" to help a recipient spouse regain a useful role in society when applied to a spouse who has spent her life rearing the couple's children and caring for their home suggests disrespect and some institutionalized hypocrisy regarding reverence for the family and the homemaker.

There is, however, an appropriate justification for rehabilitative alimony. In addition to the equitable division of property, the paying spouse ought to pay maintenance to provide the receiving spouse with compensation for her expenditure of "human capital" for the benefit of the family and for her sacrifice with respect to career development and earning capacity.⁶⁴ It is significant that the alimony award should be in addition to equitable property division. This would allow both parties to make a "clean break." Where the marriage has been one of short duration and children are not involved, there may be little need for long-term compensation. In such cases, rehabilitative alimony is appropriate. The proper function of the court is to allow the parties to exit the marriage on a relatively equal financial footing.

If there is a danger related to rehabilitative alimony, it is not based on its essential concept but, rather, on its misapplication. Commentators have suggested that, in practice, rehabilitative alimony is not serving the appropriate theoretical purpose. It has been opined that some trial courts have utilized short-term alimony simply as a time-limiting device and as a substitute for equitable property division.⁶⁵ Hence, it adds to the impoverishment of women when applied to those who have devoted many years to their families and to homemaking; to those who are divorced after marriages of long duration; and to those who, because of their age and level of experience, will have a difficult time attaining economic self-sufficiency.⁶⁶ Thus, while rehabilitative alimony is conceptually sound, "flexible standards and broad judicial discretion [have] allow[ed] . . . the economic contributions of women to be undervalued or ignored."⁶⁷

The appropriate use of rehabilitative alimony would be to limit its application to situations where the receiving spouse has a realistic opportunity to reach a comparable level of economic development. Rehabilitative alimony would be proper in situations where a younger spouse has entered into marriage with marketable skills which have deteriorated

⁶⁴ See Note, *supra* note 58, at 668-69. See also Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 275, 277-78 (1973) (trend toward regarding alimony or "maintenance" as supplemental to distribution of marital property).

⁶⁵ See Note, *supra* note 58, at 668.

⁶⁶ See *In re Marriage of Morrison*, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978).

⁶⁷ Note, *supra* note 58, at 669. See generally L. WEITZMAN, *supra* note 85; Weitzman, *The Economics of Divorce*, *supra* note 85, at 1235-41 (women experience a greater decline in standard of living following divorce due to judicial difficulty in evaluating child-rearing contributions and in light of inadequate child support).

through non-use, or where the recipient spouse has otherwise evinced a potential for self-support and the capabilities could be developed or redeveloped through training or academic study. In these circumstances, an award of alimony for a limited period of time would provide an opportunity to refurbish old skills or to acquire new ones.⁹⁸ Once again, it is emphasized that such alimony should be awarded in addition to an equitable property division. Short-term alimony generally should not be granted to older spouses, to those who have been in marriages of long duration or where a spouse will never be able to achieve the standard of living which her ex-spouse enjoys—a standard which she helped him to achieve. Some courts have recognized these principles.⁹⁹

Various means have been utilized to implement time-limited alimony. A number of jurisdictions provide for it statutorily by authorizing consideration of the employment potential of a dependent spouse; the length of the marriage; the age, health and skills of the dependent spouse; and any other relevant economic factors which are normally considered for permanent alimony.¹⁰⁰ Some courts have upheld awards of rehabilitative alimony under their general alimony statutes, concluding that these statutes confer powers broad enough to fashion such awards. They have reasoned that unless the statute specifically prohibits rehabilitative alimony, its breadth encompasses the right to award it.¹⁰¹ Broad discretion, while important and valuable, is subject to abuse. Decisions awarding rehabilitative alimony to older spouses or those who have sacrificed their careers for the sake of the family should be closely scrutinized.

IV. ALIMONY AND THE PROFESSIONAL LICENSE OR DEGREE

Some jurisdictions have allowed consideration of one spouse's contributions which had enabled the other spouse to obtain a professional degree or license in their computation of alimony awards. For example, a Wisconsin court allowed the valuation of the contribution of one spouse to the other's training, education and increased earning power.¹⁰² The val-

⁹⁸ See *Molnar v. Molnar*, 314 S.E.2d 73, 74 (W. Va. 1984). Cf. *Oviatt v. Oviatt*, 355 N.W.2d 825, 827 (N.D. 1984) (rehabilitative alimony is appropriate for party disadvantaged after a marriage of short duration).

⁹⁹ See *Holston v. Holston*, 58 Md. App. 308, 473 A.2d 459 (1984).

¹⁰⁰ See, e.g., ARIZ. REV. STAT. ANN. § 25-319 (Supp. 1987); CAL. CIV. CODE § 4801 (West Supp. 1988); HAW. REV. STAT. § 580-47 (1985); ILL. ANN. STAT. ch. 40, para. 504 (Smith-Hurd Supp. 1987); MONT. CODE ANN. § 40-4-203 (1983); N.H. REV. STAT. ANN. § 458.19 (1983); OR. REV. STAT. ANN. § 107.105 (1971); PA. STAT. ANN. tit. 23, § 501 (Purdon Supp. 1987); S.D. CODIFIED LAWS ANN. § 25-4-41 (1984); VT. STAT. ANN. tit. 15, § 752 (Supp. 1987); WIS. STAT. ANN. § 767.26 (West 1981).

¹⁰¹ *Molnar*, 314 S.E.2d at 77.

¹⁰² *In re Marriage of Lundberg*, 107 Wis. 2d 1, 16, 318 N.W.2d 918, 925 (1982) (majority allowed for such contribution in a maintenance award, pursuant to Wisconsin statute which

uation has often been based on the amount that the degree or license actually cost (tuition, expenses, books). Sometimes it has been limited to those costs and granted only to spouses who worked to pay those costs. Most persons would admit that a degree or license is worth more than the expenses that went into its achievement. Therefore, even if the receiving spouse would receive restitution for the cost of the degree, treating the additional value of the degree as a gift to the other spouse would result in the unjust enrichment of this other spouse.¹⁰³

Consequently, the degree or license must be valued in light of some standard. The Michigan Court of Appeals has stated that the following factors must be considered: the length of the marriage after the degree was obtained; the source and extent of the financial support provided by the non-degree earning spouse during the years that the degree was earned; and the division of the other marital property.¹⁰⁴ This standard does not explicitly take into account the non-monetary contributions made by the non-degree earning spouse. It appears to be morally, conceptually, and practically appropriate to recognize a spouse's contribution to the other spouse's career development and professional or other educational degree. Monetary and non-monetary contributions should be recognized as factors in determining the amount of alimony.

It has been suggested that a better way to recognize the contribution to a degree or license would be in the equitable division of property, rather than in the alimony award.¹⁰⁵ Otherwise, the spouse who contributed to the family would lose the economic recognition of that contribu-

allowed trial courts to consider contribution of spouse to "education, training or increased earning power of the other").

¹⁰³ See *Woodworth v. Woodworth*, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983).

¹⁰⁴ *Id.* at 269, 337 N.W.2d at 337.

¹⁰⁵ See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (plaintiff's medical license constitutes "marital property" pursuant to New York Domestic Relations Law § 236(B)(1)(c) (McKinney 1986)). "[O]ur statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship." *Id.* at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746. See also *In re Marriage of Sullivan*, 37 Cal. 3d 762, 767-68, 209 Cal. Rptr. 354, 356-57, 691 P.2d 1020, 1023 (1984) (case remanded for decision under the new California Civil Code § 4800.3, which provides that community property contributions to the education of one spouse are to be reimbursed); *Scott v. Scott*, 645 S.W.2d 193, 197 (Mo. Ct. App. 1982) (spouse's contribution toward the other's professional degree may be taken into account in equitable distribution of property); *In re Marriage of Newhaus*, 9 Fam. L. Rep. (BNA) 2168 (Wash. 1982) (dental license is community property). *Contra In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244, 470 N.E.2d 551, 559 (1984) (degree not marital property); *Olah v. Olah*, 135 Mich. App. 404, 410, 354 N.W.2d 359, 361-62 (1984) (medical degree is not property subject to distribution, but rehabilitative alimony is available). See generally *Freed & Walker, supra* note 52, at 376-79 (decisions discussed and chart indicating recognition of contribution to professional degree); Krauskoph, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 382-84 (1980) (discussion of valuation of degree).

tion if she were to remarry or if the other spouse were to die. On the other hand, considering the degree or license to be marital property suggests that if it were earned and paid for prior to marriage, it is separate property. If this were the case, earnings based on the degree, even during marriage, would be considered separate property. No portion of property generated by the degree, which may well be everything, would be divisible at divorce. To avoid this inequity, it would be better to consider all contributions made by both spouses to the family and to determine alimony based upon a portion of the paying spouse's income.¹⁰⁶ Professor Krause has suggested that the legislative emphasis should shift away from classifying all post-marital payments as either alimony or property. Instead, new classifications that satisfy societal and individual needs should be created.¹⁰⁷ Included in these classifications should be solutions to the problems concerning rights to the professional degree or license.

V. FAULT AND THE DETERMINATION OF ALIMONY

Fault and its impact on alimony has been a durable and abiding phenomenon. The rationale behind fault influencing alimony is that the party to the marriage whose misconduct caused the dissolution should not be allowed to receive payment for these misdeeds.¹⁰⁸ Today, only a minority of states still retain fault or marital misconduct as a statutory consideration in awarding alimony.¹⁰⁹ Alimony statutes may be divided into several categories: those which bar alimony when the party seeking alimony is guilty of fault or marital misconduct;¹¹⁰ those which expressly state that fault or marital misconduct shall or may be considered as a factor in granting alimony;¹¹¹ those which allow consideration of economic

¹⁰⁶ See H. KRAUSE, 1986 SUPPLEMENT TO FAMILY LAW, CASES AND MATERIALS 81 (2d ed. 1986).

¹⁰⁷ See H. KRAUSE, 1986 SUPPLEMENT TO FAMILY LAW: CASES, COMMENTS AND QUESTIONS 84 (1986) [hereinafter KRAUSE, QUESTIONS SUPPLEMENT].

¹⁰⁸ See, e.g., *Swanson v. Swanson*, 233 Minn. 354, 360, 46 N.W.2d 878, 882 (1951) (court noted that "[it] does not seem likely that marital harmony will be promoted if a wife may drive her husband from her without prejudice to her claim for alimony and property.").

¹⁰⁹ See *infra* notes 110 & 111.

¹¹⁰ See, e.g., GA. CODE ANN. § 30-201 (Harrison 1981) (if preponderance of evidence establishes adultery by party seeking alimony no award); LA. CIV. CODE ANN. art. 160 (West Supp. 1988) (alimony awarded provided "spouse has not been at fault"); N.C. GEN. STAT. § 50-16.6(a) (1984) (alimony not payable when adultery is committed by party seeking alimony); S.C. CODE ANN. § 20-3-130 (Law Co-op. 1976) (no alimony granted to adulterous spouse); VA. CODE ANN. § 20-107.1 (Cumm. Supp. 1987) (no permanent alimony awarded to spouse who committed adultery, has been a convicted felon, or has been guilty of cruelty or desertion); W. VA. CODE § 48-2-15(i) (1986) (same).

¹¹¹ See, e.g., ALA. CODE § 30-2-52 (1975) (misconduct may be considered); CONN. GEN. STAT. § 46b-82 (1987) (causes for the annulment shall be considered); FLA. STAT. ANN. § 61.08(1) (West 1985) (adultery of alimony-seeking spouse may be considered); HAW. REV. STAT. §

misconduct;¹¹² those which expressly exclude marital fault as a consideration in awarding alimony;¹¹³ and those which do not mention fault at all. Judicial interpretation of these indifferent statutes has been mixed, with some allowing the consideration of fault¹¹⁴ and some refusing to do so.¹¹⁵

In the past, the use of fault was one of the mechanisms whereby husbands were able to avoid paying alimony. When a finding of fault was necessary to attain a dissolution of marriage, it was found—often contrived—and animosity was exacerbated.¹¹⁶ As “no-fault” divorce became possible, many felt that it was inappropriate to consider fault in relation to the question of alimony. If fault existed, it was argued, the likelihood is that both parties contributed their share. If one ex-spouse is in need after the dissolution, the other should continue to support her, as long as he has the ability and capacity to do so. Whether the obligation to pay alimony is seen as either a continuation of the marital support obligation or as a method of ensuring equal economic status of two ex-partners who have equally contributed to the marital relationship, fault is seen as having no place in the alimony determination according to those states which have abolished its consideration.

580-47(a) (1985 & Supp. 1987) (“respective merits” of parties shall be considered); PA. STAT. ANN. tit. 23, § 501(b)(14) (Purdon Supp. 1987-88) (“marital misconduct” shall be considered); TENN. CODE ANN. § 36-5-101(d)(10) (Supp. 1987) (“relative fault” of parties shall be considered in court’s discretion).

¹¹² Economic considerations are often illustrated in calculating the amount of the alimony award. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-319(B)(7) (Supp. 1987) (the extent to which spouse seeking maintenance has reduced potential income shall be taken into account); FLA. STAT. ANN. § 61.08(2) (West 1985) (court shall consider all “relevant economic factors” in determining alimony or maintenance award); N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986) (“court shall consider . . . (9) the wasteful dissipation of marital property by either spouse”).

¹¹³ *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347-48 (1987) [hereinafter UNIFORM ACT] (award of maintenance “in amounts and for periods of time the court deems just, without regard to marital misconduct.”); ALASKA STAT. § 25.24.160 (1983) (court may provide for maintenance and division of property without regard to fault); ARIZ. REV. STAT. ANN. § 25-319(B) (Supp. 1987) (marital misconduct irrelevant in determination of maintenance); CAL. CIV. CODE § 4509 (Deering 1984) (“evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue”); COLO. REV. STAT. § 14-10-114 (1987) (marital misconduct irrelevant to maintenance award). *See generally* Freed & Walker, *supra* note 52 (discussing states which do not consider fault a factor).

¹¹⁴ *See, e.g.*, *Arnholt v. Arnholt*, 129 Mich. App. 810, 814, 343 N.W.2d 214, 216 (1983) (relative fault of parties may be considered in determining alimony awards); *Peterson v. Peterson*, 308 Minn. 365, 373, 242 N.W.2d 103, 108 (1976) (en banc) (in proper circumstances marital misconduct relevant under no-fault divorce laws).

¹¹⁵ *See, e.g.*, *In re Marriage of Williams*, 199 N.W.2d 339, 345 (Iowa 1972) (no-fault law requires no consideration of fault in alimony determination). *Cf.* *Boyd v. Boyd*, 421 A.2d 1356 (Me. 1980) (no-fault law eliminates fault from affecting property distribution).

¹¹⁶ *See* UNIFORM ACT, *supra* note 113, 9A U.L.A. at 148 (prefatory note).

It might be wise to allow proof of only egregious fault by one of the parties.¹¹⁷ The cost of allowing such an exception, however, is that dissolution actions might degenerate into what they were before "no-fault" divorces. Unfortunately, the facts of some cases indicate that allowing this proof might be worth the risk. For example, a psychiatrist apparently tried to hire a "hit man" to kill his wife. He was unsuccessful, although his conduct did prompt a divorce action in which he sought \$120,000 per year tax-free as alimony.¹¹⁸ In another case, a woman received past due temporary alimony and a property settlement of \$250,000 after serving nineteen months in prison for attempting to hire someone to kill her husband.¹¹⁹ Such flagrant cases demonstrate that perhaps extreme misconduct should be relevant to the awarding of alimony. However, this egregious fault exception should be limited to extreme instances and should require a very high standard of proof.

VI. MODIFICATION AND TERMINATION OF ALIMONY AWARDS

Alimony awards are generally modifiable upon proof that circumstances have changed materially and substantially such that the modification is just and equitable.¹²⁰ In addition, they typically terminate upon the death of either party or the remarriage of the receiving spouse. The Uniform Marriage and Divorce Act requires that the change in circumstances be so substantial that it would be "unconscionable" to continue

¹¹⁷ See *Lynn v. Lynn*, 165 N.J. Super. 328, 337, 398 A.2d 141, 144-45 (App. Div.) (egregious marital fault might equitably preclude right to claim alimony), *certification denied*, 81 N.J. 52, 404 A.2d 1152 (1979).

¹¹⁸ *D'Arc v. D'Arc*, 164 N.J. Super. 226, 232, 395 A.2d 1270, 1274 (Ch. Div. 1978), *aff'd*, 175 N.J. Super. 598, 421 A.2d 602 (App. Div.), *certification denied*, 85 N.J. 487, 427 A.2d 579 (1980), *cert. denied*, 451 U.S. 971 (1981).

¹¹⁹ *Popeil v. Popeil*, 2 Fam. L. Rep. (BNA) 2601 (1976).

¹²⁰ See, e.g., *Sanchione v. Sanchione*, 173 Conn. 397, 407, 378 A.2d 522, 527 (1977) (modification only when substantial change in circumstances of either party); *Olsen v. Olsen*, 98 Idaho 10, 11, 557 P.2d 604, 605 (1976) ("moving party has the burden of establishing a material, permanent and substantial change in circumstances"); *Smith v. Smith*, 73 Ill. App. 3d 423, 426, 392 N.E.2d 292, 295 (1979) (modification only upon showing of change in circumstances). See generally H. CLARK, *supra* note 1, § 6.4, at 199 (discussing modification).

On the other hand, property division is not modifiable, and extended property division payments do not terminate at the death or remarriage of the parties. *But see* NEV. REV. STAT. ANN. § 125.150(6) (Michie 1986) (when court adjudicates property rights, whether or not jurisdiction is retained to modify, property rights may be modified by court).

alimony as it was.¹²¹ Statutes often specifically authorize modification¹²² and termination of alimony awards.¹²³

Even without statutory authorization, trial courts have the power to modify or terminate spousal support. Generally, however, this power exists only if the court had initially ordered the payment of alimony and only if the court reserved its jurisdiction when it granted the divorce and awarded the alimony.¹²⁴ A court that has failed to retain jurisdiction is theoretically without power to modify or terminate the support.¹²⁵ In at least one state which requires reservation of jurisdiction to modify, failure to expressly reserve jurisdiction has been regarded as a mere clerical error when the tenor of the judgment itself had clearly indicated the court's intention to retain jurisdiction.¹²⁶ Moreover, in a "lengthy marriage," it has been held an abuse of discretion to refuse to retain jurisdiction.¹²⁷ Jurisdiction should be reserved unless the record "clearly" indicates that the receiving spouse will be adequately provided for by the amount awarded.¹²⁸

¹²¹ See UNIFORM ACT, *supra* note 113, § 316, 9A U.L.A. at 489-90. Modifications are only allowed for installments accruing subsequent to the motion to modify. See *id.* § 316(a), 9A U.L.A. at 489.

¹²² See, e.g., CAL. CIV. CODE § 4801(a) (Deering Supp. 1987) (court may modify or revoke support order if deems necessary); CONN. GEN. STAT. ANN. § 46b-86(a) (West Supp. 1988) ("substantial change" in circumstances allows modification); ILL. ANN. STAT. ch. 40, para. 510(a) (Smith-Hurd Supp. 1987) (same); KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1984) (decree can provide for modification or party can seek hearing to modify future installments); MASS. GEN. LAWS ANN. ch. 208, § 37 (West 1987) (either party may move for modification).

¹²³ See, e.g., CAL. CIV. CODE § 4801(b) (Deering Supp. 1987) (support terminates at death of either party or remarriage of recipient spouse); ILL. ANN. STAT. ch. 40, para. 510(b) (Smith-Hurd Supp. 1987) (terminates upon death of either party, remarriage of recipient spouse, or if recipient spouse cohabitates with another person); N.Y. DOM. REL. LAW § 236 (McKinney 1986) (termination by death of either party or remarriage of recipient spouse); UNIFORM ACT, *supra* note 113, § 316(b), 9A U.L.A. at 490 (same).

¹²⁴ See, e.g., C. MARKEY, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE § 21.60, at 21-78 (1984).

¹²⁵ See *Cochran v. Cochran*, 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630, 632 (1970).

¹²⁶ See *In re Marriage of Sheridan*, 140 Cal. App. 3d 742, 746, 189 Cal. Rptr. 622, 624 (1983); C. MARKEY, *supra* note 124, § 21.62(2), at 21-82.

¹²⁷ See *In re Marriage of Morrison*, 20 Cal. 3d 437, 454, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978); *In re Marriage of Norton*, 71 Cal. App. 3d 537, 539-40, 139 Cal. Rptr. 728, 730 (1976).

¹²⁸ *In re Marriage of Vomacka*, 36 Cal. 3d 459, 467, 683 P.2d 248, 253, 204 Cal. Rptr. 568, 573 (1984) (where there is ambiguity regarding termination of support, strong policy favoring retention of jurisdiction exists (citing *In re Marriage of Morrison*, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978))). See also *In re Iverson*, 12 Fam. L. Rep. (BNA) 1067 (Cal. Ct. App. Nov. 20, 1985) (implicitly retained as original award did not explicitly terminate jurisdiction); *In re Marriage of Morrison*, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978) (jurisdiction retained so as to ensure that "common-sense, basic decency and simple justice" are carried out (quoting *In re Marriage of Brantner*, 67 Cal. App.

In personam jurisdiction is required to modify an alimony decree, just as it is for the initial award of alimony. Modification of foreign alimony awards is generally possible as long as the court ordering modification has jurisdiction over the subject matter and the parties.¹²⁹ Additionally, if the petition for modification concerns a foreign alimony decree and if the court has *in personam* jurisdiction over both parties, then a choice of law problem arises.¹³⁰ A party seeking modification of an alimony decree must file a motion or petition with the appropriate court and give reasonable notice to the adverse party. The date of the notice of motion or the order to show cause why modification or termination should not occur is instrumental in that many jurisdictions allow modification only for future installments. Relief to the petitioning party will be granted only as to the amount of alimony which is due subsequent to the filing date of the motion¹³¹ because the court's order will not be retroactive. Any amount of money which has accrued before the filing of such motion, and which is still owed will not be modified or revoked.¹³² Other jurisdictions allow modification of both accrued and future alimony installments unless the decree or amount is judicially rendered non-modifiable.¹³³

3d 416, 136 Cal. Rptr. 635 (1977))).

¹²⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 37 (West 1987) (can modify foreign decree to extent modifiable in foreign jurisdiction). In *Bohner v. Bohner*, 18 Mass. App. Ct. 545, 468 N.E.2d 653, review denied, 393 Mass. 1102, 470 N.E.2d 798 (1984), the court held that this statute did not counter substantial rights, but was remedial in nature. See also CAL. CIV. PROC. CODE § 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

¹³⁰ See, e.g., *Petersen v. Petersen*, 24 Cal. App. 3d 201, 205, 100 Cal. Rptr. 822, 824 (1972) (California's view of changed circumstances applied in a choice of law question on modification). See generally E. SCOLES & P. HAY, CONFLICT OF LAWS §§ 15.33-15.38, at 514-20 (1982) (discussing conflict of laws choices in enforcement and modification); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 5.2E, at 248-57 (3d ed. 1986) (jurisdictional requirements for decrees); Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (reviewing choice of law theories).

¹³¹ See CAL. CIV. CODE § 4801(a) (Deering Supp. 1987) (modification can be granted retroactively until date motion filed); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd Supp. 1987) (only subsequently accruing installments can be modified provided due notice given by movant and only upon showing of significant change in circumstances); KAN. STAT. ANN. § 60-1610(b)(2) (Supp. 1984) (future payments may be modifiable or terminable). Where a statute does not address this issue, case law in most jurisdictions limits modification to future installments of alimony. See, e.g., *Engleman v. Engleman*, 145 Colo. 299, 303, 358 P.2d 864, 866 (1961) (en banc) (modifications only take effect in futuro).

¹³² See H. CLARK, *supra* note 1, § 14.9, at 454 (without an express provision, majority of courts refuse to allow modification of accrued installments); Freed & Walker, *supra* note 52, at 411. See, e.g., NEV. REV. STAT. ANN. § 125.150(7) (Michie 1986) (accrued payments not subject to modification).

¹³³ N.Y. DOM. REL. LAW § 236 (McKinney 1986) (authorizing both prospective and retrospective modification); *id.* § 244 (authorizing and providing mechanism to render final and

The trial court has broad discretion to affect or modify a spousal support award. The court's decision to modify must be based on the facts and circumstances of each case. The standard is generally whether circumstances, with respect to the receiving spouse's financial needs or the paying spouse's ability to pay, have changed materially and sufficiently since the original award (or a prior petition for modification) so as to warrant modification.¹³⁴ A person seeking the reduction of an alimony obligation must not have voluntarily induced his inability to pay.¹³⁵

The court may consider virtually any factor when deciding whether the circumstances have changed sufficiently to modify or terminate alimony.¹³⁶ Changes in the needs of the parties and the ability to pay,¹³⁷ whether the paying spouse is in arrears in alimony payments,¹³⁸ cohabitation,¹³⁹ death,¹⁴⁰ and remarriage¹⁴¹ are commonly considered. Some state statutes specifically provide that alimony may be modified or terminated upon the remarriage or cohabitation of the spouse receiving alimony, or

nonmodifiable judgment and amount due).

¹³⁴ Some statutes which state that showing a change of circumstances gives the court the power to modify or terminate an award of alimony include: ALASKA STAT. § 25.24.170 (1983); CAL. CIV. CODE § 4801(a) (Deering Supp. 1987); COLO. REV. STAT. § 14-10-122(1) (1987); FLA. STAT. ANN. § 61.14 (West Supp. 1988); GA. CODE ANN. § 30-220 (Harrison Supp. 1986); ILL. ANN. STAT. ch. 40, para. 510 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 31-1-11.5-17 (Burns 1987); KAN. STAT. ANN. § 60-1610(b)(2) (1983); MASS. GEN. LAWS ANN. ch. 208, § 37 (West 1987); NEB. REV. STAT. § 42-365 (1984); N.Y. DOM. REL. LAW § 248 (McKinney 1986); OKLA. STAT. ANN. tit. 12, § 1289 (West Supp. 1988); R.I. GEN. LAWS § 15-5-16 (Supp. 1987); and UTAH CODE ANN. § 30-3-5(3) (Supp. 1987).

¹³⁵ See, e.g., Tydings v. Tydings, 349 A.2d 462, 463 (D.C. 1975) (voluntary or self-inflicted inability to pay alimony insufficient ground for modification); Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978) ("defendant cannot voluntarily abandon his employment, reduce his wages, or by other conduct bring about a reduced income and thereby avoid, or cause the reduction of, a reasonable support order"); Mazon v. Mazon, 163 Pa. Super. 502, 505, 63 A.2d 112, 114 (1949) (same).

¹³⁶ H. CLARK, *supra* note 1, § 14.9, at 456; C. MARKEY, *supra* note 124, § 21.63(1). See *infra* notes 137-38.

¹³⁷ See McCann v. McCann, 191 Conn. 447, 464 A.2d 825 (1983) (husband's change in earnings held to constitute unforeseen change in circumstances, allowing modification); Jeppson v. Jeppson, 684 P.2d 69 (Utah 1984) (when receiving spouse is able to maintain standard of living enjoyed during marriage, alimony rightly terminated).

¹³⁸ See C. MARKEY, *supra* note 124, § 21.63(3). But see Zirkle v. Zirkle, 304 S.E.2d 664 (W. Va. 1983) (if failure to pay past alimony was willful or intentional, court may refuse to hear petition seeking modification).

¹³⁹ See Bisig v. Bisig, 124 N.H. 372, 375-76, 469 A.2d 1348, 1350 (1983) (cohabitation alone does not allow automatic modification or termination of alimony because there must be change in financial circumstances); Gayet v. Gayet, 92 N.J. 149, 153-54, 456 A.2d 102, 104 (1983) (cohabitation one factor in determination of changed circumstances where supported spouse's financial needs decreased). See also H. CLARK, *supra* note 1, § 14.9, at 463; C. MARKEY, *supra* note 124, § 21.63(4); Freed & Walker, *supra* note 52, at 410-11.

¹⁴⁰ See, e.g., *In re Estate of Kuhns*, 550 P.2d 816, 817 (Alaska 1976) (obligation to pay alimony terminates on death of obligor absent contrary provision); *In re Marriage of Hayne*,

provide that the court may consider remarriage or cohabitation as one relevant factor among others which bears upon the decision to modify.¹⁴² Other statutes provide for automatic termination of alimony upon remarriage or cohabitation unless the parties have agreed otherwise.¹⁴³ The general rule appears to be that remarriage terminates the obligation to pay alimony.¹⁴⁴ Some courts have held that even a null remarriage will terminate the alimony obligation.¹⁴⁵ Others provide that annulment of the receiving spouse's remarriage revives a former alimony obligation.¹⁴⁶

Where the statutes do not specifically provide for modification or termination because of remarriage, case law so provides.¹⁴⁷ The majority position on cohabitation appears to be that, absent a statute calling for automatic termination upon proof of cohabitation, the court will modify alimony if cohabitation has caused a change in the financial needs of the receiving spouse.¹⁴⁸ A minority of states consider cohabitation to be the equivalent of marriage for alimony purposes and thus provide for auto-

334 N.W.2d 347, 351 (Iowa Ct. App. 1983) (alimony payments presumed to terminate upon obligor's death); *Clark v. Clark*, 601 S.W.2d 614, 615 (Ky. Ct. App. 1980) (obligation to pay maintenance terminates upon obligor's death unless express provision otherwise); *MacFadden v. MacFadden*, 46 N.J. Super. 242, 247, 134 A.2d 531, 533 (Ch. Div. 1957) (obligation to pay terminates upon death of husband), *aff'd*, 49 N.J. Super. 356, 139 A.2d 774 (App. Div.), *certification denied*, 27 N.J. 155, 141 A.2d 828 (1958).

¹⁴¹ H. CLARK, *supra* note 1, § 14.9, at 457, 463; C. MARKEY, *supra* note 124, § 21.63(1)(d).

¹⁴² Some statutes which authorize modification of alimony because of remarriage or cohabitation are: CAL. CIV. CODE § 4801.5(a) (Deering 1984); GA. CODE ANN. § 30-220(b) (Harrison Supp. 1986); OKLA. STAT. ANN. tit. 12, § 1289(D) (West Supp. 1988); and TENN. CODE ANN. § 36-5-101(a)(3) (Supp. 1987).

¹⁴³ Statutes which authorize the automatic termination of alimony after remarriage or cohabitation include: CAL. CIV. CODE § 4801(b) (Deering Supp. 1987); HAW. REV. STAT. § 580-51(a) (1987); ILL. ANN. STAT. ch. 40, para. 510(b) (Smith-Hurd Supp. 1987); MONT. CODE ANN. § 40-4-208(4) (1987); and NEV. REV. STAT. ANN. § 125.150(5) (Michie 1986).

¹⁴⁴ See *Bubar v. Plant*, 141 Me. 407, 44 A.2d 732 (1945); *Wolfe v. Wolfe*, 55 Ohio Op. 465, 124 N.E.2d 485 (1955); *Austad v. Austad*, 2 Utah 2d 49, 269 P.2d 284 (1954).

¹⁴⁵ See, e.g., *Sefton v. Sefton*, 45 Cal. 2d 872, 876, 291 P.2d 439, 441 (1955) (en banc) (paying spouse entitled to rely upon supported spouse's remarriage and his alimony obligation does not "relate back" with respect to annulments). See also N.Y. DOM. REL. LAW § 236(B)(1)(a) (McKinney 1986) ("award of maintenance shall terminate upon . . . recipient's valid or invalid marriage").

¹⁴⁶ See, e.g., *Sutton v. Lieb*, 199 F.2d 163, 164-65 (7th Cir. 1952) (purported remarriage by wife did not release former husband's obligation as void marriage is absolute nullity); *Cecil v. Cecil*, 11 Utah 2d 155, 158, 356 P.2d 279, 281 (1960) (as second marriage annulled after two weeks because of mental capacity, first husband still obligated to support).

¹⁴⁷ See *In re Marriage of Woodward*, 229 N.W.2d 274, 280 (Iowa 1975) (remarriage may require court to terminate alimony); *Myhre v. Myhre*, 296 N.W.2d 905, 908 (S.D. 1980) (remarriage or cohabitation a factor to consider as change of circumstances).

¹⁴⁸ See, e.g., *Alibrando v. Alibrando*, 375 A.2d 9, 14-15 (D.C. 1977) (per curiam) (cohabitation might affect alimony amount). See also 1985 *Survey of American Family Law*, 11 Fam. L. Rep. (BNA) 3015, 3018-19 (May 7, 1985) (discussing modification and termination for cohabitation).

matic termination.¹⁴⁹ Cohabitation is defined in various terms but generally means living together "on a resident, continuing conjugal basis."¹⁵⁰ In the event of the death of either the paying spouse or the supported spouse, statutes or case law permit termination of support unless the court decree or an agreement between the parties states otherwise.¹⁵¹

When the court makes its decision to modify or terminate alimony, it must take into consideration any property or marital settlement agreements, court orders or stipulations in open court regarding support of either of the parties.¹⁵² If the parties agree in writing or orally in open court not to modify or terminate, then that agreement controls. The courts will uphold an agreement not to modify or terminate alimony only if the agreement expressly states such intentions,¹⁵³ the court will state that it has the power to modify or terminate alimony if such was not expressly prohibited.¹⁵⁴ Furthermore, the court must also determine whether periodic alimony payments in installments were awarded since this situation

¹⁴⁹ See, e.g., *Capper v. Capper*, 451 So. 2d 359, 360 (Ala. Civ. App. 1984) (cohabitation sufficient to terminate alimony).

¹⁵⁰ ILL. ANN. STAT. ch. 40, para. 510(b) (Smith-Hurd Supp. 1987). See also *Northrup v. Northrup*, 43 N.Y.2d 566, 570-71, 373 N.E.2d 1221, 1223, 402 N.Y.S.2d 997, 999 (1978) (habitually living with a man and holding self out as his wife proof of cohabitation).

¹⁵¹ Some of those statutes which expressly state that alimony terminates upon death of the obligor or either party are: CONN. GEN. STAT. § 46-54 (1987) (obligor's death); MINN. STAT. ANN. § 518.64(3) (West 1969) (death of either party); MO. ANN. STAT. § 452.370(2) (Vernon 1987) (death of either party); MONT. CODE ANN. § 40-4-208(4) (1987) (death of either party); NEV. REV. STAT. § 125.150(5) (1986) (death of either party); VA. CODE ANN. § 20-109 (1987) (death of supported spouse).

¹⁵² C. MARKEY, *supra* note 124, § 21-62.

¹⁵³ See, e.g., *Klein v. Klein*, 3 Conn. App. 421, 423, 488 A.2d 1288, 1289 (1985) (where separation agreement provided for cessation only upon wife's cohabitation "with an unrelated male after and for four continuous months in the same residence" court refused to modify alimony award upon showing of shorter cohabitation period); *In re Marriage of Bolstad*, 203 Mont. 131, 133, 660 P.2d 95, 97 (1983) (modification by district court in error because property settlement agreement expressly precluded modification); *In re Rintelman*, 115 Wis. 2d 206, 209-10, 339 N.W.2d 612, 614 (1983) (property settlement agreement stating that husband obligated to pay wife alimony for her lifetime not violative of Wisconsin law allowing for termination of alimony when the supported spouse remarries), *aff'd*, 118 Wis. 2d 587, 348 N.W.2d 498 (1984). See also *Freed & Walker*, *supra* note 52, at 409-11.

¹⁵⁴ See, e.g., *Bell v. Bell*, 393 Mass. 20, 23, 468 N.E.2d 859, 860-61 (1984) (although separation agreement provisions expressly stated that husband's obligations to pay alimony terminated when wife "liv[es] together with a member of the opposite sex, so as to give the outward appearance of marriage," husband's obligation terminated because wife lived with a man for three years even though wife and male cohabitant did not hold themselves out as husband and wife), *cert. denied*, 470 U.S. 1027 (1985). But see *Collyer v. Proper*, 109 App. Div. 2d 1010, 1011, 486 N.Y.S.2d 808, 810 (3d Dep't) (husband's motion to terminate alimony payments because wife was cohabitating with another man denied because separation agreement provided for termination only upon wife's remarriage or if she entered into a relationship similar to marriage "within the meaning of the Domestic Relations Law [§ 248]"), *aff'd sub nom. Bliss v. Bliss*, 66 N.Y.2d 382, 488 N.E.2d 90, 497 N.Y.S.2d 344 (1985).

would affect the court's power to modify or terminate the alimony award.¹⁵⁵

VII. ENFORCEMENT OF ALIMONY AWARDS

There are several methods available to enforce a judgment of support against the spouse ordered to make payments. Most enforcement vehicles are designed to operate only after a default has occurred.¹⁵⁶ Enforcement mechanisms include contempt proceedings, execution, appointment of a receiver, attachment of the obligor's property, garnishment, wage assignment, income withholding, sequestration (in rare cases) or a lien on the obligor's property to secure the payment of alimony. Each state provides its own statutory mechanism for alimony enforcement.

Contempt proceedings have traditionally been utilized as an enforcement mechanism.¹⁵⁷ Contempt has been considered "civil" when the court uses this mechanism to coerce the spouse to pay,¹⁵⁸ or "criminal" when the spouse willfully disobeys the order of support.¹⁵⁹ Notwithstanding the ventured distinction between civil and criminal contempt, any power to incarcerate (as punishment or to coerce payment) is at least quasi-criminal, triggering a due process requirement of notice and opportunity to be heard.¹⁶⁰ Most states have statutes which give authorization to find a

¹⁵⁵ See Freed & Walker, *supra* note 52, at 408.

¹⁵⁶ Effron, *Alimony & Maintenance: The Enforcement Struggle*, 8 FAM. ADVOC. 20, 22 (1986).

¹⁵⁷ See, e.g., *Miller v. Superior Court*, 9 Cal. 2d 733, 736, 72 P.2d 868, 871 (1937) (en banc) (courts have power to enforce decrees for alimony by contempt proceedings); *Ex parte Gordon*, 95 Cal. 374, 378, 30 P. 561, 562 (1892) (court has power to imprison for willful contempt); *Gonzales v. District Court*, 629 P.2d 1074, 1075 (Colo. 1981) (en banc) (court may enforce orders entered in dissolution of marriage proceeding by contempt). See also Annotation, *Power of Divorce Court, After Child Attained Majority, to Enforce by Contempt Proceedings Payment of Arrears of Child Support*, 32 A.L.R.3d 888 (1970).

¹⁵⁸ See, e.g., *Johansen v. State*, 491 P.2d 759, 762 (Alaska 1971) ("civil contempt"); *Ex parte Thomas*, 406 So. 2d 939, 941 (Ala. 1981) (object of contempt proceeding is to coerce payment of alimony as decreed, not punishment); *Schroeder v. Schroeder*, 100 Wis. 2d 625, 639, 302 N.W.2d 475, 482 (1981) (same).

¹⁵⁹ See, e.g., *Stone v. Stidham*, 96 Ariz. 235, 237, 393 P.2d 923, 924 (1964) (en banc) ("when one fails, without good cause, to make the support payments for a former wife as ordered in a divorce decree, he may be imprisoned for contempt."); *Ex parte Lazar*, 37 Cal. App. 2d 327, 331-32, 99 P.2d 342, 344 (1940) (order directing payment of alimony, maintenance or support may be enforced by imprisonment); *Thones v. Thones*, 185 Tenn. 124, 132, 203 S.W.2d 597, 600 (1947) (policy of state is to punish spouses, who through willful disobedience refuse to comply with order to pay alimony, even if order is from a sister state). See also H. CLARK, *supra* note 1, § 14.10, at 465.

¹⁶⁰ See Effron, *supra* note 156, at 26. See, e.g., *Vollindras v. Massachusetts Bonding & Ins. Co.*, 42 Cal. 2d 149, 153 n.1, 265 P.2d 907, 910 n.1 (1954) (criminal protections accorded even in contempt proceeding); *Raiden v. Superior Court*, 34 Cal. 2d 83, 86, 206 P.2d 1081, 1902 (1949) (contempt proceedings are criminal in nature with all attendant protections); *In re*

spouse in contempt for contumacious refusal to abide by the court's spousal support order.¹⁶¹ Case law also clearly supports the notion that courts have the authority to hold the defaulting spouse in contempt.¹⁶²

Imprisonment of a willfully defaulting spouse has been held not to violate the constitutional prohibition against imprisonment for debt. Alimony is not considered to be a debt; it is an obligation imposed upon a spouse pursuant to a marriage and its dissolution.¹⁶³ A valid assertion of an *unintentional* inability to pay is a defense which will prevent imprisonment.¹⁶⁴ However, this defense will not generally eliminate the amount owed to date since it would have been necessary to obtain a judicial modification, which is not normally retroactive.¹⁶⁵ In addition, the contemner has at least the burden of producing evidence of this inability to pay.¹⁶⁶

Martin, 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451, 455-56 (1977) (constitutional rights of defendant must be observed in contempt proceeding).

¹⁶¹ ALA. CODE § 30-2-51 (1983) (attachment for contempt); DEL. CODE ANN. tit. 13, § 516 (1981) (contempt or attachment of wages); GA. CODE ANN. § 30-204 (1980) (revision of order, attachment for contempt); KAN. STAT. ANN. § 23-459 (1981) (civil contempt); MINN. STAT. ANN. § 518.24 (West 1969) (security, sequestration and contempt); N.Y. DOM. REL. LAW § 245 (McKinney 1986) (fine or commitment); UTAH CODE ANN. §§ 78-32-10, 30-3-3 (1977) (contempt); WIS. STAT. ANN. §§ 767.29, 767.305 (West 1981) (where wage assignment inapplicable, contempt proceedings available).

¹⁶² See *supra* notes 157-59 and accompanying text. See also *Cole v. Cole*, 67 F. Supp. 134, 136-37 (D.D.C. 1946) (contempt, execution, and sequestration are available to enforce alimony *pendente lite*), *rev'd on other grounds*, 161 F.2d 883 (D.C. Cir. 1947); *Rubin v. Rubin*, 418 So. 2d 1065, 1066 (Fla. Dist. Ct. App. 1982) (where husband found to have willfully failed to make alimony and child support payments despite present ability to pay, can properly be held in contempt); *Fischer v. Fischer*, 24 N.J. Super. 180, 183, 93 A.2d 788, 790 (1952) (contempt proceeding for failure to pay alimony), *rev'd on other grounds*, 13 N.J. 162, 98 A.2d 568 (1953).

¹⁶³ See *Ritchie v. White*, 225 N.C. 450, 453, 35 S.E. 2d 414, 415 (1945) (duty to provide support is not a debt in legal sense, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment); *Smith v. Smith*, 81 W. Va. 761, 762, 95 S.E. 199, 201 (1918) (alimony is not debt). See also 24 AM. JUR. 2d *Divorce and Separation* § 800 (1983) [hereinafter *Divorce And Separation*]; H. CLARK, *supra* note 1, § 14.10, at 467-68.

¹⁶⁴ See, e.g., *Sewell v. Butler*, 375 So. 2d 800, 801-02 (Ala. Civ. App. 1979) (when alleged contemner puts evidence of inability to pay, burden is on complainant to prove beyond a reasonable doubt that accused has ability to pay); *Messenger v. Messenger*, 46 Cal. 2d 619, 629, 297 P.2d 988, 993-94 (1956) (where husband genuinely is without assets, no contempt); *Ex parte Todd*, 119 Cal. 57, 58, 50 P. 1071, 1071-72 (1897) (self-rendered inability pay is generally no defense); *In re Spencer*, 83 Cal. 460, 465-66, 23 P. 395, 396-97 (1890) (same).

¹⁶⁵ See, e.g., *Kaufmann v. Kaufmann*, 246 Ga. 266, 268, 271 S.E.2d 175, 178 (1980) (trial court in contempt proceeding has no authority to modify an alimony decree); *Stanley v. Stanley*, 244 Ga. 417, 417, 260 S.E.2d 328, 329 (1979) (*per curiam*) (same).

¹⁶⁶ See, e.g., *In re Application of Martin*, 76 Idaho 179, 186, 279 P.2d 873, 877 (1955) (court found ample evidence of contemner's "present ability to pay"); *Dalton v. Dalton*, 367 S.W.2d 840, 842 (Ky. Ct. App. 1963) (in child support case, contemner must show inability to pay without fault); *Roper v. Roper*, 47 S.W.2d 517, 519 (Ky. Ct. App. 1932) (contemner

Some jurisdictions require that a spouse seeking enforcement of a support order exhaust other remedies such as execution, a security bond, a lien or withholding from earnings before seeking enforcement by means of a contempt order.¹⁶⁷ Most, however, regard contempt as a remedy to be used in conjunction with or in addition to other remedies.¹⁶⁸ A prima facie case of contempt is established when the obligee spouse files a written petition alleging that a valid support order has been granted and that the obligor has defaulted. The establishment of the prima facie case in this manner triggers the court to issue to the obligor an order to show cause why attachment or contempt should not follow. Other jurisdictions require that the obligee spouse present an affidavit alleging all the facts suggesting contempt. This method will trigger a judicial hearing on the contempt issue.¹⁶⁹ Contempt is established upon proof that: a valid judicial order for payments has been issued against the obligor; the obligor has received legal and appropriate notice; the obligor has had an opportunity to be heard¹⁷⁰ and to assert defenses;¹⁷¹ the obligor has present ability to comply with the order;¹⁷² and the obligor has willfully disobeyed the court order or failed to pay.¹⁷³

must show that inability to pay was not result of own negligence or misconduct); *State ex rel. Casey v. Casey*, 175 Or. 328, 337, 153 P.2d 700, 703-04 (1944) (contemner must show that failure to pay was not willful).

¹⁶⁷ See, e.g., *Flower v. Flower*, 49 A. 158, 159 (N.J. Ch. 1901) (party seeking contempt order must first exhaust all other remedies); *Covello v. Covello*, 68 App. Div. 2d 818, 818, 414 N.Y.S.2d 145, 146 (1st Dep't 1979) (contempt available, but only where it appears presumptively that sequestration, execution or requiring security will fail). See also N.Y. DOM. REL. LAW § 245 (McKinney 1986) ("[where] it appears presumptively, to the satisfaction of the court, that payment cannot be enforced pursuant to section two hundred forty-three or two hundred forty-four of this chapter . . . [Such order to show cause] may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual."); *Divorce and Separation*, *supra* note 163, § 810, at 791.

¹⁶⁸ See, e.g., *Ginsberg v. Ginsberg* 123 So. 2d 57, 59 (Fla. Dist. Ct. App. 1960) (there may be more than one remedy, but only one satisfaction); *Lenett v. Lutz*, 215 Ga. 369, 370, 110 S.E.2d 628, 629 (1959) (execution and contempt may be concurrently pursued to satisfy judgment). See also *Divorce and Separation*, *supra* note 163, § 810, at 791.

¹⁶⁹ See *supra* notes 159-63, 165; *infra* note 170. See also *Divorce and Separation*, *supra* note 163, § 806, at 785. See, e.g., *In re Marriage of Christianson*, 89 Ill. App. 3d 167, 174, 411 N.E.2d 519, 525 (1980) (refusal to grant order to show cause why husband should not be held in contempt was not error when evidence was produced of wife's harassment of husband.)

¹⁷⁰ See *Effron*, *supra* note 156, at 26. See, e.g., cases cited *supra* note 160 and accompanying text (discussing notice and opportunity to be heard).

¹⁷¹ See *supra* notes 160, 164-66.

¹⁷² See cases cited *supra* note 166 and *infra* note 173.

¹⁷³ See *Ex parte Gerber*, 83 Utah 441, 29 P.2d 932 (1934) (in order to convict defendant for failure to make divorce payments, court must first find that he was able to pay, that he willfully refused to pay or that he deprived himself of ability to pay); *Hillyard v. District Court*, 68 Utah 220, 228-29, 249 P. 806, 809 (1926) (in proceedings for contempt for nonpay-

When the obligee spouse is receiving public assistance or risks the need for it, the law may provide that the district attorney or an analogous public official can proceed with the action to enforce the support order.¹⁷⁴ On the other hand, some courts have held that the trial court has no authority to appoint a public defender to represent the alleged contemnor.¹⁷⁵ The statute of limitations,¹⁷⁶ laches¹⁷⁷ and acquiescence by the obligee spouse are additional defenses to enforcement of alimony decrees.¹⁷⁸ Thus, if the statute of limitations has run, or if the obligee spouse has delayed enforcement of payments or has agreed to accept a lower amount, he or she may be barred from recovery.¹⁷⁹ On the other hand, delay in enforcing a decree due to one obligor's absence from the jurisdiction, poverty or illness of the obligee spouse or other reasonable difficulties will not bar enforcement.¹⁸⁰

Execution is another method of enforcement.¹⁸¹ When alimony and child support payable in installments have accrued, some jurisdictions, like California, treat such payments as a judgment for money which al-

ment of alimony, court must find that defendant who was unable to make payments intentionally deprived himself of means of doing so).

¹⁷⁴ See, e.g., CAL. CIV. CODE § 4801.7 (Deering 1987).

¹⁷⁵ See *Shaw v. Provaznic*, 12 Fam. L. Rep. 1308 (BNA) (Mar. 25, 1986).

¹⁷⁶ See, e.g., *Bryant v. Bryant*, 232 Ga. 160, 163, 205 S.E.2d 223, 225 (1974) (alimony judgments, like all civil judgments are controlled by the statute of limitations); *Reffeitt v. Reffeitt*, 419 N.E.2d 999, 1003 (Ind. Ct. App. 1981) (statute of limitations applies to actions for child support). *Contra Morse v. Zatkiewicz*, 5 N.C. App. 242, 245, 168 S.E.2d 219, 222 (1969) (statute of limitations does not apply to an alimony judgment).

¹⁷⁷ See Annotation, *Laches and Acquiescence as a Defense, So as to Bar Recovery of Arrearages of Permanent Alimony or Child Support*, 5 A.L.R.4th 1015 (1981) [hereinafter Annotation, *Acquiescence as a Defense*]. Laches attaches when the obligee spouse forgoes seeking enforcement of an alimony award for an unreasonable time. See *id.* at 1022. See, e.g., *Brandt v. Brandt*, 276 F.2d 488, 490 (D.C. Cir. 1960) (fourteen years).

¹⁷⁸ See Annotation, *Acquiescence as a Defense*, *supra* note 177, at 1042; *Divorce and Separation*, *supra* note 163, § 809, at 791.

¹⁷⁹ See Annotation, *Acquiescence as a Defense*, *supra* note 177, at 1042.

¹⁸⁰ See, e.g., *Burke v. Burke*, 127 Colo. 257, 262, 255 P.2d 740, 742-43 (1953) (en banc) (laches did not obtain, despite delay of seventeen years, when whereabouts of ex-husband were unknown); *Renkoff v. Renkoff*, 285 App. Div. 876, 877, 137 N.Y.S.2d 428, 429 (1st Dep't 1955) ("Mere delay of the wife in entering judgment if due to or contributed to by the absence of the husband from the state would not be sufficient basis for refusing her relief."); *Ross v. Ross*, 592 P.2d 600, 603 (Utah 1979) (no laches when ex-husband was in hiding even though had adopted an assumed name).

¹⁸¹ See, e.g., FLA. STAT. ANN. § 56.29 (West 1987); N.Y. DOM. REL. LAW §§ 236, 244, 245 (McKinney 1986). Generally, a writ of execution is ordered by the jurisdictional court, directing the sheriff or other designated public official to obtain satisfaction of a judgment. See *Bonner v. Superior Court*, 63 Cal. App. 3d 156, 166, 133 Cal. Rptr. 592, 601 (1976) (writ of execution in dissolution case requires court order); *Sutton v. Sutton*, 382 So. 2d 776, 777 (Fla. Dist. Ct. App. 1980) (wife entitled to order requiring husband to appear before court upon sheriff's affidavit showing outstanding, unsatisfied execution of judgment).

lows execution on the amount in arrears to issue without further proceedings and without notice to the obligor.¹⁸² Other jurisdictions, including New York, require the judgment to be docketed for the amount of the arrears. This requires that notice and opportunity to be heard be afforded to the obligor.¹⁸³ Personal service, however, may not be required as this is considered to be the continuation of the original divorce proceeding.¹⁸⁴ After docketing the judgment for arrearage, execution may issue for the amount due and interest at the statutory rate from the date on which the payments accrued.¹⁸⁵ When the support obligation is considered to be a money judgement, the obligee spouse has the status of a judgment creditor and is entitled to all remedies given to such person.¹⁸⁶ Execution will be permitted and will be levied on personal property of the obligor spouse or, if necessary, on his or her real estate,¹⁸⁷ but only after the installments have matured and there has been a default.

Attachment of property is another method of enforcing alimony awards. Some courts require that the property be seized or made subject to court control before an *in rem* decree is ordered.¹⁸⁸ Other jurisdictions do not require attachment of real estate or court control over the property before an alimony judgment is rendered; however, effective notice must be given.¹⁸⁹

Another remedy for enforcement of an alimony decree is garnishment

¹⁸² See *In re Marriage of Sandy*, 113 Cal. App. 3d 724, 728, 169 Cal. Rptr. 747, 750 (1980); *Simonet v. Simonet*, 263 Cal. App. 2d 612, 616, 69 Cal. Rptr. 806, 809 (1968); CAL. CIV. CODE §§ 4380, 4384 (Deering 1984); CAL. CIV. PROC. CODE §§ 699.080, 699.510 (Deering 1983).

¹⁸³ See, e.g., N.Y. DOM. REL. LAW § 236 (McKinney 1986); H. CLARK, *supra* note 1, § 14.10, at 471.

¹⁸⁴ See, e.g., *Gonzales v. District Court*, 629 P.2d 1074, 1075 (Colo. 1981) (a contempt proceeding is considered a continuance of dissolution action); N.Y. DOM. REL. LAW § 244 (McKinney 1986).

¹⁸⁵ H. CLARK, *supra* note 1, § 14.10, at 472; *Divorce and Separation*, *supra* note 163, § 1060, at 1047.

¹⁸⁶ See, e.g., *In re Marriage of Gilmore*, 672 P.2d 228, 230 (Colo. Ct. App. 1983) (judgment for arrearages is collectable like any judgment); *Thacker Constr. Co. v. Williams*, 154 Ga. App. 670, 671, 269 S.E.2d 519, 521 (1980) (alimony and child support judgments are money judgments and may be enforced in same manner as other judgments).

¹⁸⁷ See, e.g., *Kephart v. Kephart*, 193 F.2d 677, 681 (D.C. Cir. 1951) ("an award of alimony is a judgment for money, on which execution may issue"), *cert. denied*, 342 U.S. 944 (1952); *Thompson v. Thompson*, 233 Or. 262, 270-71, 378 P.2d 281, 285 (1963) (divorce decree requiring defendant to pay money is judgment enforceable by execution sale); *Divorce and Separation*, *supra* note 163, § 751, at 737-38. See also H. CLARK, *supra* note 1, § 14.10, at 473 (alimony decrees as creating judgment liens).

¹⁸⁸ See, e.g., *Keen v. Keen*, 191 Md. 31, 40, 60 A.2d 200, 205 (1948) (property must be attached prior to judgment in order to be seized for payment of alimony). See *Divorce and Separation*, *supra* note 163, § 556, at 570.

¹⁸⁹ See, e.g., *Failing v. Failing*, 4 Ill. 2d 11, 122 N.E.2d 167 (1954). See *Divorce and Separation*, *supra* note 163, § 556, at 569.

of the obligor's wages.¹⁹⁰ Garnishment is not appropriate to enforce the payment of permanent alimony where arrearages of alimony are not automatically considered final judgments or have not been reduced to final judgment.¹⁹¹ In addition, there are federally established ceilings limiting the percentage of weekly disposable income that can be garnished.¹⁹²

In extreme cases, the court may order a receiver to take the obligor's property. This is done when there is a showing of necessity, such as the obligor's mismanagement or debt; where there is a risk that the obligor will leave the jurisdiction with the property;¹⁹³ or where the obligor has left the jurisdiction without paying the arrearages.¹⁹⁴ Placing a person's property in a receivership is a harsh remedy because the owner is deprived of the right to custody and management of his property. The imposition of the receivership functions to allow an *in rem* proceeding to render the property subject to a judgment for alimony.

Sequestration is another remedy over which the court has broad discretion. Sequestration allows the court to take possession of the obligor's property to enforce compliance with the alimony decree.¹⁹⁵ This remedy is generally limited to situations in which it has been proved that the defaulting spouse will likely dispose of the property in order to delay or avoid enforcement.¹⁹⁶

¹⁹⁰ See, e.g., MINN. STAT. ANN. § 571.56 (West 1988) (garnishment); MONT. CODE ANN. § 40-4-206 (1987) (payment made to clerk of the district court), § 40-4-207 (assignment of earnings); N.C. GEN. STAT. § 50-16.7 (1985) (security by means of bond, mortgage, deed of trust, assignment of wages, attachment and garnishment); WASH. REV. CODE ANN. § 26.09.130 (1986) (assignment of earnings).

¹⁹¹ See, e.g., *Sturgill v. Sturgill*, 49 N.C. App. 578, 272 S.E.2d 423 (1980) (garnishment not appropriate for prospective earnings). See also *Divorce and Separation*, *supra* note 163, § 749, at 735 (enforcement of judgments, decrees and orders).

¹⁹² See 15 U.S.C. §§ 1671-77 (1982). Section 1673(a) sets the maximum allowable garnishment at the lesser of either twenty-five percent of a spouse's disposable earnings for the week or the amount by which his disposable earnings for that week exceed 30 times the federal minimum hourly wage. *Id.* § 1673(a).

¹⁹³ See, e.g., *Garrelts v. Garrelts*, 101 Mich. App. 71, 77, 300 N.W.2d 454, 456 (1980) (appointment of receiver appropriate where parties consent and there is evidence of misappropriation of funds); *Raskind v. Raskind*, 62 App. Div. 2d 952, 952-53, 404 N.Y.S.2d 17, 18 (1st Dep't 1978) (mem.) (wife may be appointed receiver for sale of husband's medical practice to satisfy alimony and child support arrears); *Divorce and Separation*, *supra* note 163, § 785, at 766, 768 (court's powers to appoint receivers).

¹⁹⁴ See *Divorce and Separation*, *supra* note 163, § 785, at 768.

¹⁹⁵ See, e.g., MINN. STAT. ANN. § 518.24 (West 1988) (sequestration of personal estate, rents and profits of real estate); N.J. STAT. ANN. § 2A:34-23 (West 1987) (sequestration upon refusal to give reasonable security or upon default in complying with support order); N.Y. DOM. REL. LAW § 243 (McKinney 1986) (security for payments, sequestration and appointment of receiver); TENN. CODE ANN. § 36-5-103 (1987) (posting a bond, sequestering rents profits, appointment of a receiver, lien against real and personal property of the obligor); *Divorce and Separation*, *supra* note 163, § 785, at 769.

¹⁹⁶ See, e.g., *Kunzeck v. Kunzeck*, 102 Misc. 2d 607, 608-09, 424 N.Y.S.2d 77, 79 (Sup. Ct.

The obligor may be required to post a bond as security for payment of alimony and child support as it accrues.¹⁹⁷ This remedy is employed where there is a showing that the spouse may make it difficult to enforce the support order by leaving the jurisdiction or by not complying with the order.¹⁹⁸ An injunction may also be issued when a spouse threatens to transfer property.¹⁹⁹

In summary, most states have statutory authority allowing the court to enforce the court order for alimony payments by means of attachment, garnishment, a lien on property of the obligor spouse, execution, assignment of wages and withholding of the obligor's earnings. A further remedy is the Writ of *Ne Exeat* which is "in the nature of civil bail A party seeking to obtain such a restraint upon the liberty of another must make a proper showing of: (1) a threatened departure of the defendant from the jurisdiction; and (2) a resulting defeat of the court's power to give effective in personam relief" ²⁰⁰

The Child Support Enforcement Legislation of 1975²⁰¹ was amended and significantly strengthened in 1984.²⁰² Most states have implemented this type of legislation which often applies to "dependents," including spouses, ex-spouses and children, entitled to payments pursuant to an alimony or support order.²⁰³ Generally, states' laws have implemented the federal legislation to require withholding child support (and alimony) from the paychecks of parents/ex-spouses who were delinquent for a month. If employers do not fully comply with the program, they will be held responsible. This approach is designed to obviate many of the en-

Erie County 1979) (sequestration is a remedy).

¹⁹⁷ See, e.g., FLA. STAT. ANN. § 61.18 (West 1985) (bond); MONT. CODE ANN. § 40-5-127 (1987) (cash deposit or bond); N.C. GEN. STAT. § 50-16.7 (1985) (security by means of bond, mortgage, deed of trust, assignment of wages, attachment and garnishment); TENN. CODE ANN. § 36-5-103 (1987) (posting a bond, sequestering rents profits, appointment of a receiver, lien against real and personal property of obligor).

¹⁹⁸ See, e.g., *Stern v. Stern*, 75 So. 2d 810, 812 (Fla. 1954) (evidence of prior willful default necessary to require ex-husband to post bond or other security for future alimony payments); *Divorce and Separation*, *supra* note 163, § 771, at 754-55.

¹⁹⁹ See, e.g., FLA. STAT. ANN. § 61.11 (West 1985) (injunction ordered when either party is about to remove property from the state or fraudulently convey or conceal it); WYO. STAT. § 20-2-112 (1977) (attachment, commitment, injunction or other means); H. CLARK, *supra* note 1, § 14.10, at 472.

²⁰⁰ See *Gredone v. Gredone*, 361 A.2d 176, 179-80 (D.C. 1976); see also AREEN, CASES AND MATERIALS ON FAMILY LAW 671 (2d ed. 1985).

²⁰¹ See Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2354 (codified as amended at 42 U.S.C. § 654 (1982)).

²⁰² See Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1311 (codified as amended at 42 U.S.C. § 654 (Supp. II 1984)). See also 49 Fed. Reg. 36,780 (1984) (proposal implementing regulations); Comment, *Constitutional Implications of the Child Support Amendments of 1984*, 24 J. FAM. L. 301 (1985-86).

²⁰³ See, e.g., Effron, *supra* note 156, at 27.

forcement mechanisms which are triggered by default. States also have programs for wage deduction to avoid default and measures which are sometimes counter-productive, such as jail for contempt after default. The states are also required to promulgate laws which impose liens on parties' property when they are in default for over \$1000.²⁰⁴ Unpaid support may be deducted from federal and state income tax refunds. Counsel should be aware that some or all of these provisions may apply to alimony, as well as to child support.

An additional boon to enforcement is found in the Domestic Relations Tax Reform Act of 1984 ("DRTRA"). While most parties do not choose to pay alimony in order to receive the tax benefits, attorneys must be aware of the tax consequences of the DRTRA. Significant tax consequences (positive for the obligee, negative for the defaulting obligor) will arise due to defaults on alimony orders entered after January 1, 1985.²⁰⁵ Furthermore, section 311(a) of the 1974 Uniform Marriage and Divorce Act permits a court to order that maintenance payments be made to an officer of the court.²⁰⁶ Section 311(f) provides that when the obligor is beyond the jurisdiction of the court, the prosecutor may institute any other enforcement proceeding available under the laws of the state.²⁰⁷

The principal mechanisms for enforcing out-of-state support obligations are the Uniform Reciprocal Enforcement of Support Act ("URES A") and its statutory revision.²⁰⁸ This Act provides a simplified means to interstate enforcement of support orders. It has been adopted in some form by every state. Therefore, URES A has prompted state legislation which has greatly enhanced the opportunity to enforce alimony and other support judgments against out-of-state obligors. URES A is designed to improve reciprocal enforcement opportunities.²⁰⁹ The courts

²⁰⁴ See KRAUSE, QUESTIONS SUPPLEMENT, *supra* note 107, at 130.

²⁰⁵ See Effron, *supra* note 156, at 27. See also Asimow, *Deducting Alimony and Child Support and Avoiding Recapture Under the DRA*, 63 J. TAX'N 150 (1985) (use of grantor trusts and other available techniques to avoid loss of alimony deduction); Brown, *Sexist Sleepers in Domestic Relations Provisions of the 1984 Tax Reform Act*, 30 N.Y.L. SCH. L. REV. 39 (1985) (discussion of sex bias in regard to tax aspects of alimony); Dragutsky, *Taxation of Separations and Divorces Under the DRA*, 16 TAX ADVISER 209 (1985) (explanation of tax aspects of DRTRA).

²⁰⁶ See UNIFORM ACT, *supra* note 113, § 311, 9A U.L.A. 444-45. This statute was adopted in substantial form in Arizona, Colorado, Georgia, Illinois, Kentucky, Minnesota, Montana (omits § 311(f)) and Washington.

²⁰⁷ *Id.* § 311(f); see *Divorce and Separation*, *supra* note 163, § 751, at 737.

²⁰⁸ See REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381-552 (1987) [hereinafter RURES A]. The revised act was drafted in 1968 to replace the UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT OF 1950, 9A U.L.A. 553-608 (1987) [hereinafter URES A]. See 9B U.L.A. 381, 553.

²⁰⁹ URES A, *supra* note 208, § 1, 9B U.L.A. at 394, 568; see *Gingold v. Gingold*, 161 Cal. App. 3d 1177, 1184, 208 Cal. Rptr. 123, 127 (1984) (although *in personam* jurisdiction over a

of the state of the obligee's residence are empowered by the legislation²¹⁰ to send the complaint and prayer for enforcement to the state in which the obligor resides.²¹¹ The enforcement action takes place in the "responding state."²¹² The responding state has a duty to proceed to judgment and, if appropriate, enforce the judgment²¹³ and send copies of the support order(s) to the initiating court.²¹⁴ Furthermore, the responding state has the power to apply any terms and conditions to assure compliance with its order including: requiring a cash deposit or a bond; requiring periodic payments; punishing for contempt; and miscellaneous remedies available to the courts of the state.²¹⁵ The responding state court has the further obligation to send any payment made by the obligor to the initiating state court.²¹⁶ The initiating court has the duty to disburse all payments made by the obligor to the appropriate person or agency.²¹⁷ RURESA provides a mechanism that is at once more convenient for the obligor as well as the obligee and which is much more efficient than the prior chaotic attempts at enforcement. It allows the defendant to exercise all defenses and have all of the protections expressed in the constitution and the statutes of his state of residence.

The Uniform Enforcement of Foreign Judgments Act, adopted in approximately sixteen states, provides an additional mechanism for enforcement of foreign judgments.²¹⁸ It has been held to allow enforcement of already accrued alimony and child support.²¹⁹ It is further noted that another means of imposing a statutory duty of support and enforcing it is accomplished through the Uniform Civil Liability for Support Act.²²⁰

non-resident defendant is necessary to modify a maintenance order, it is not required to confirm the registration of a support order of a court of another jurisdiction which had jurisdiction over him pursuant to RURESA); *Moffat v. Moffat*, 27 Cal. 3d 645, 652, 612 P.2d 967, 970, 165 Cal. Rptr. 877, 880 (1980) (RURESA enacted to enforce existing duties of support against person legally liable for such support).

²¹⁰ See RURESA, *supra* note 208, § 11(b), 9B U.L.A. at 440-41.

²¹¹ See *id.* § 14, 9B U.L.A. at 450.

²¹² See *id.* § 2(1), 9B U.L.A. at 403 ("state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced").

²¹³ See *id.* § 18, 9B U.L.A. at 461; *id.* § 19, 9B U.L.A. at 467; *id.* § 20, 9B U.L.A. at 469; *id.* § 24, 9B U.L.A. at 487-88.

²¹⁴ See *id.* § 25, 9B U.L.A. at 519.

²¹⁵ See *id.* § 26, 9B U.L.A. at 520.

²¹⁶ See *id.* § 28, 9B U.L.A. at 527.

²¹⁷ See *id.* § 29, 9B U.L.A. at 528.

²¹⁸ See REVISED UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 149 (1987); H. CLARK, *supra* note 1, §14.12, at 480 (act adopted in some sixteen states).

²¹⁹ See H. CLARK, *supra* note 1, § 14.12, at 480.

²²⁰ See, e.g., CAL. CIV. CODE §§ 241-54 (Deering 1983 & Supp. 1988); ME. REV. STAT. ANN. tit. 19, §§ 441-53 (1981 & Supp. 1987); N.H. REV. STAT. ANN. § 546-A:1 to -A:12 (1974); UTAH CODE ANN. §§ 78-45-1 to -13 (1957 & Supp. 1985).

VIII. ENFORCEMENT AND THE FULL FAITH AND CREDIT CLAUSE

Personal jurisdiction over an out-of-state obligor pursuant to an alimony order may be obtained via the state's long-arm legislation, provided that the application of the statute is constitutionally permissible. Once jurisdiction over the person is obtained, an issue which has troubled the courts has been whether one state is obligated under the full faith and credit clause of the United States Constitution²²¹ to enforce the support order of a sister state. The general rule is that states owe full faith and credit to final judgments and judicial orders of their sister states. Thus, as payments accrue, they are generally considered to be final judgments which are owed full faith and credit.²²² However, if an order is not final, it is not subject to the full faith and credit clause. This raises a serious question as to alimony judgments which are generally considered to be legally binding and final in terms of exhaustion of appeals, yet are modifiable. In this sense, alimony decrees are not final for any of their future installments. Many courts have maintained that full faith and credit is not owed to these non-final orders.²²³ This is also true for arrearages in those states which allow retroactive modification.²²⁴ Even these retroactively modifiable arrearages are owed as much credit as they received in the states in which they were rendered.²²⁵ If an alimony obligation is enforced in a state other than the one that originally made the order, the Supreme Court has held that due process requires that the defendant be afforded an opportunity to litigate the question of modification.²²⁶ Moreover, as to either prospective or retroactive enforcement of such obliga-

²²¹ See U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* See also 28 U.S.C. § 1738 (1982). "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.*

²²² See Comment, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 303 (1973).

²²³ See *Lynde v. Lynde*, 181 U.S. 183 (1901); *Divorce and Separation*, *supra* note 163, § 756, at 740.

²²⁴ See, e.g., *Zalek v. Brosseau*, 47 N.J. Super. 521, 136 A.2d 416 (1957), *aff'd*, 26 N.J. 501, 141 A.2d 17 (1958); *Zirkle v. Zirkle*, 304 S.E.2d 664 (W. Va. 1983).

²²⁵ See KRAUSE, QUESTIONS SUPPLEMENT, *supra* note 107, at 228.

²²⁶ See *Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (judgment obtained in violation of procedural due process not entitled to full faith and credit); see also *id.* at 236 (Rutledge, J., dissenting). In *Griffin*, the Court held that if alimony obligations are enforced in a state other than the one that rendered the original decree, at least as to the accrued arrearages, due process requires that the defendant be afforded an opportunity to litigate the question of modification. *Id.* at 233-34.

tions, the enforcing state "has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."²²⁷

In 1901, the United States Supreme Court held that where future alimony payments are modifiable, the decree is not entitled to full faith and credit and equitable remedies do not have extraterritorial effect.²²⁸ However, in 1910, the Supreme Court held that where a right to future alimony is absolute and vested, a judgment for such payment is entitled to full faith and credit in a sister state for the arrearage, even though the judgment might be modified by future orders of the court.²²⁹ Nevertheless, if the arrearages are retroactively modifiable, they are not entitled to full faith and credit unless they have been reduced to judgment. Thus, in those states allowing retroactive modification, the obligee spouse must periodically reduce arrearages to judgment in the original state and then sue on that judgment in the second state.

Some jurisdictions have held that the decree of a court of a sister state for future payments of alimony and child support would be entitled to full faith and credit whether or not the decree was modifiable.²³⁰ The Illinois Supreme Court followed such a course based upon its notion of comity, rather than full faith and credit. The court was not obligated by the full faith and credit clause to enforce a Missouri court's order, but comity, the policies of enforcing important judgments and of not allowing sanctuaries to arise wherein obligors may be shielded from their obligations, strongly influenced the court.²³¹ Thus, some courts will apparently utilize notions of judicial comity to permit a person to enforce an alimony

²²⁷ New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 615 (1947) (regarding full faith and credit in child custody cases). See *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955) (en banc); H. CLARK, *supra* note 1, § 14.11, at 475.

²²⁸ See *Lynde v. Lynde*, 181 U.S. 183 (1901); see also Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 191 (1957) (extra-territorial effect accorded particular traits of equity decrees).

²²⁹ *Sistare v. Sistare*, 218 U.S. 1, 17 (1910). See also *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955) (en banc); *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976); *Guercia v. Guercia*, 239 S.W.2d 169, 173 (Tex. Civ. App. 1951) (follows *Sistare*); H. CLARK, *supra* note 1, § 14.11, at 475.

²³⁰ See, e.g., *Light v. Light*, 12 Ill. 2d 502, 511, 147 N.E.2d 34, 40 (1957) (Missouri divorce decree entitled to full faith and credit as to future payments). See also *Ex parte Barnett*, 600 S.W.2d 252, 255 (Tex. 1980) (Texas courts empowered to enforce sister states' support orders by contempt, when those orders comply with URESA and the Constitution); *Guercia v. Guercia*, 239 S.W.2d 169 (Tex. Civ. App. 1951) (husband held in contempt for failure to pay child support pursuant to foreign divorce decree); *Hill v. Hill*, 153 W. Va. 392, 168 S.E.2d 803 (1969) (court has jurisdiction over action for arrearages in payments pursuant to foreign divorce decree); H. CLARK, *supra* note 1, § 14.11, at 475; Comment, *supra* note 222, at 305.

²³¹ See *Light v. Light*, 12 Ill. 2d 502, 147 N.E.2d 34 (1957).

decree which is retroactively modifiable. Furthermore, the same principle allows those states to permit the obligor spouse to seek modification of the decree in the rendering state or in the enforcing state and to raise defenses in the enforcing state which are available in the rendering state.²³² As noted, comity functions as the principle motivating enforcement of foreign judgments awarding alimony which comport with general notions of due process, even though the Constitution does not require full faith and credit for them.²³³

Therefore, the due process clauses of the United States²³⁴ and state constitutions must be taken into consideration in conjunction with full faith and credit when considering the enforcement of a sister state's alimony decree. When personal jurisdiction has not been obtained over the obligor spouse or when sufficient notice has not been given, enforcement of the rendering state's decree violates due process; the obligor spouse is thereby deemed unable to seek modification or to assert defenses due to lack of notice.²³⁵ When arrearages have automatically become money judgments and are not modifiable, the support decree is owed full faith and credit and is enforceable when personal jurisdiction is obtained.²³⁶ Such an arrangement does not violate due process so long as the defendant has all the protections and defenses available in the sister state. While it appears that some jurisdictions will not give full faith and credit to a decree involving something other than payment of money,²³⁷ others apply principles of comity to enforce sister state and foreign decrees applicable to conveyances of land and payments of future alimony.²³⁸

IX. CONCLUSION

This article presents an overview of the development, purpose, function and measure of alimony. Alimony, although often associated with the breakdown of marriage, may also serve as a social tool designed to protect and compensate loyalty and devotion to the family unit. Coexistent with this purpose is the need to equalize parties to a dissolved marriage. This is the key to understanding alimony. A wholehearted adoption of this view will help to realize the pro-family rhetoric which is often articulated by the courts, the pulpit and the legislative chambers.

²³² Comment, *supra* note 222, at 305.

²³³ See, e.g., *Wolff v. Wolff*, 40 Md. App. 168, 177, 389 A.2d 413, 420 (1978) (comity applicable to decrees of foreign nations), *aff'd*, 285 Md. 185, 401 A.2d 479 (1979).

²³⁴ U.S. CONST. amend. XIV, § 1.

²³⁵ See *Divorce and Separation*, *supra* note 163, § 754, at 739.

²³⁶ H. CLARK, *supra* note 1, § 14.11, at 475-76.

²³⁷ *Fall v. Eastin*, 215 U.S. 1, 12 (1909); see H. CLARK, *supra* note 1, § 14.11, at 476-80.

²³⁸ See *Worthley v. Worthley*, 44 Cal. 2d 465, 472-73, 283 P.2d 19, 24 (1955) (en banc); H. CLARK, *supra* note 1, § 14.11, at 479 & n.33.