1978

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Recommended Citation
Elaine G. Rollins, Alimony Considerations under No-Fault Divorce Laws, 57 Neb. L. Rev. 792 (1978)
Available at: https://digitalcommons.unl.edu/nlr/vol57/iss3/8

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Comment

Alimony Considerations Under No-Fault Divorce Laws

I. INTRODUCTION

In recent years, there has been a trend toward the adoption of no-fault divorce laws. Many states have amended their statutes by abolishing the traditional grounds for divorce such as adultery and cruelty, and adopting the standard of an irretrievably broken marriage. A no-fault standard was employed in the recent revision of Nebraska's divorce laws.¹

The statutory changes reflect society's more liberal attitude toward divorce. When a marriage reaches the point of divorce, it is difficult, if not impossible, to place the fault on one party alone. Although major changes occur when no-fault divorce laws are adopted by a state, there is still a question whether alimony should be awarded on a no-fault basis. The enactment of a no-fault divorce law does not automatically result in the abolition of fault as a consideration in the decision to award alimony. A state-by-state analysis is useful in determining whether alimony should be awarded on a no-fault basis. Factors to be examined are legislative intent, the statutes enacted, and the judicial interpretation of those statutes.

This comment examines policy considerations involved in alimony and no-fault principles. The alimony laws of other states, including Iowa, Maryland, Michigan, Florida, Kentucky, California, Arizona, and Colorado, will be reviewed to determine what effect the no-fault divorce law has had on alimony in Nebraska. These states were chosen because their alimony laws represent a broad spectrum, ranging from states in which alimony is awarded based on fault to states in which fault is not a consideration. This overview will provide some insight into whether or not Nebraska should incorporate a fault standard into its alimony statute.²

The final part of this comment will focus on cases decided

under prior Nebraska law to ascertain previous guidelines for awarding alimony. Cases decided under the new law will then be examined to determine whether the guidelines have been changed with the enactment of the new statute.  

II. POLICY CONSIDERATIONS

Various rationales have been proposed for alimony and divorce. Although the chief purpose of divorce laws is to provide an end to marriage so the parties are legally free to remarry, they also determine when the state will recognize the termination of the marriage and furnish solutions to attendant problems. Alimony can either provide long-term protection for the support of the wife where the marital property is insufficient for this purpose or it can provide short-term relief until she can become self-supporting. The following are among the specific goals of alimony: (1) to prevent the wife from going on welfare, (2) to accomplish the divorce with the least social and financial disruption for both spouses, (3) to maintain the same standard of living that was enjoyed during the marriage, (4) to support the wife, and (5) to compensate the wife for her faithful service during the marriage.

The courts should, and generally do, consider certain factors in determining the amount of the alimony award. First, the wife’s needs— including an assessment of her individual property and income—should be considered. Her contribution to the family and its assets is sometimes a factor, and she is often compensated for the loss of earnings which resulted from marriage cutting off or curtailing her career. Other factors to be weighed include the husband’s ability to pay, without undue hardship, his debts, taxes, and expenses. The husband should be left with enough money after alimony payments to meet his

3. Id.
5. In the interest of simplicity, this comment is written from the perspective that the wife will be awarded alimony. In many states, alimony can be awarded to either the husband or the wife. However, statutes awarding alimony only to a wife have not been held unconstitutional. See Williams v. Williams, 331 So. 2d 438 (La. 1976); Saraceno v. Saraceno, —Mass.—, 341 N.E.2d 261 (1976); Hendricks v. Hendricks, 535 S.W.2d 668 (Tex. Civ. App. 1976). Where applicable, an award of alimony to the husband is based on the same considerations as an award of alimony to the wife. See NEB. REV. STAT. § 42-365 (Cum. Supp. 1976).
6. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION 153 (Special Comm. on Divorce, Nat’l Conf. of Comm’rs on Uniform State Laws 1968) [hereinafter cited as UNIFORM MARRIAGE AND DIVORCE LEGISLATION].
7. Id. at 140-42.
8. Id. at 151.
own expenses and maintain a standard of living similar to that of the former wife.

The final element, which still enters into the alimony decision in a number of states, is fault. The rationale for using fault as a factor in alimony awards is cogently discussed in the dissent in *In re Marriage of Williams,* a leading Iowa case. The issue underlying the inclusion of a fault factor in alimony decisions is whether a wife who is at fault in a marriage should be paid the same amount of alimony as a wife who is not at fault, assuming all other factors are equal. An equitable result may not be achievable unless fault is considered. The following rationale underlies the consideration of fault in awarding alimony: "If a woman has been a tramp, why reward her? By the same token, if a man is alley-catting around town, shouldn't his wife get all the benefits she had as a married woman?"

Perhaps a system in which fault is considered provides more justice and equity than does a no-fault system. However, the benefits of the no-fault system are that accusations of fault and the lengthy fault finding process are eliminated. The accompanying hostility is also reduced. In deciding which system is preferable, one must consider whether the possible benefits of the no-fault system outweigh the possible sense of justice embodied in a system which considers fault.

When fault is considered in the alimony award, there is usually a strong moral element involved. When the wife is considered to be at fault, she may receive little, if any, alimony. If the husband is at fault, he may have to pay a greater sum in alimony as compensation for certain wrongs, or as punishment. Traditionally, the treatment of fault in awarding alimony has varied. In some states, fault is a complete bar to alimony. Other states examine the type of fault involved and hold that only certain types of conduct, such as adultery, will be a bar; other misconduct is simply a factor to be taken into account. Finally, some states consider fault only in determining the amount of the award, but not in determining whether alimony should be awarded.

Alimony awards which consider fault only encourage suspicion. If both parties want the marriage to end, the wife may obtain more alimony if she can find evidence of the husband's misconduct. Furthermore, such a system is inconsistent with

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12. *Uniform Marriage and Divorce Legislation*, *supra* note 6, at 149.
the goals underlying alimony because a person can receive a financial gain for reasons that have no relation to his or her situation. The trial judge's discretion is limited under the no-fault system because evidence of fault is completely excluded. The exclusion of evidence of fault also lessens the degree to which the judge's personal prejudices may influence the alimony award. This prejudice might operate to the detriment of either party, depending on the judge, and should not be a factor in alimony awards.

Each court must decide what factors it will consider in alimony awards. The court must look at what has been included in the state statute, what has been omitted from the statute, legislative intent, and the overall purpose of alimony. Although most courts consider factors similar to those outlined above, each must decide what role fault will play in alimony awards.

III. THE DETERMINATION OF ALIMONY AWARDS IN VARIOUS STATES

State statutes and decisions on alimony are far from uniform. In this section, various state laws and cases will be examined to identify the options available to the Nebraska courts.

A. States Which Consider Fault to Some Degree

1. Maryland

Under the recently revised Maryland divorce statute, a di-

14. UNIFORM MARRIAGE AND DIVORCE LEGISLATION, supra note 6, at 150. See id. at 140-42.
16. MD. ANN. CODE art. 16, § 24 (Supp. 1977):

Upon a hearing of any bill for a divorce, the court may decree a divorce a vinculo matrimonii for the following causes, to wit: first, the impotence of either party at the time of the marriage; secondly, for any cause which by the laws of this State, render a marriage null and void ab initio; thirdly, for adultery; fourthly, when the court shall be satisfied by competent testimony that the party complained against has abandoned the party complaining, and that such abandonment has continued uninterruptedly for at least twelve months, and is deliberate and final, and the separation of the parties beyond any reasonable expectation of reconciliation; fifthly, when the husband and wife shall have voluntarily lived separate and apart, without any cohabitation, for twelve consecutive months prior to the filing of the bill of complaint, and such separation is beyond any reasonable expectation of reconciliation; sixthly, when the party complained against has been convicted of a felony or misdemeanor under the laws of this State or of any other state in the United States, or the United States and has been sentenced to serve at least three years or an indeterminate sentence in
A divorce will be granted on the basis of either fault or no-fault. The no-fault grounds provide that a divorce will be granted if a husband and wife voluntarily live separate and apart for one year and there is no reasonable expectation of reconciliation, or if they live apart for any reason for three years. These provisions were added to the previous fault-based grounds for divorce and the old law was not repealed. The change in the statute merely added the two situations in which a divorce would be granted on no-fault grounds.

The question left to the Maryland courts after this change in the divorce statute was what effect it would have on alimony awards. The statute states that alimony may be awarded when a divorce is decreed but the standards for deciding on the amount of the award were left to be developed by the courts.

In a case which arose under the prior law, the Maryland Court of Appeals stated:

It is a general rule that a court, before determining the amount of alimony, should consider the maintenance of the wife in accordance with the husband's duty to support her suitably, together with the husband's wealth and earning capacity. In addition to the financial circumstances of the parties, the court should also usually consider their station in life; their age and physical condition, ability to work, the length of time they lived together, the circumstances leading up to the separation, the fault which destroyed the home, and their respective responsibilities for the care and support of the children.

Fault was a consideration in alimony awards, including fault occurring both before and after the separation. There seems to be a paradox, however, in that even though the Maryland courts considered the fault leading to the divorce, they maintained that the alimony award was not a punitive measure although the husband was found to be an adulterer. It seems inconsistent to say that alimony is not to be used as a punitive measure but that the husband's fault will be considered in making the award. Although the award could be explained as

17. Id.
18. Md. ANN. CODE art. 16, § 3 (Supp. 1977) ("In cases where a divorce is decreed, alimony may be awarded to either spouse.").
compensation to the wife for the husband’s acts, it would still appear to be punishment for the husband. Another way to interpret the view that the alimony award was not punitive is to view it from the perspective of the equities of the situation. If, for example, the husband destroyed the marriage, it could be argued that this factor should be weighed in an equitable adjustment so that the wife would not be harmed as a result of his fault. Even using this reasoning, it is not altogether clear that no element of punishment was involved.

With the advent of the new law, the Maryland court decided that fault should still be considered a factor in alimony even when the divorce followed the statutory separation period.\textsuperscript{22} The new statute states that alimony should be awarded only if financial considerations warrant it.\textsuperscript{23} The court recognized this and the fact that alimony is not punitive, but held that fault should be considered in determining the amount of the award.\textsuperscript{24} So the greater the wife’s fault, the greater the need she must show to be entitled to an appropriate amount of alimony. If the fault which exists is the wife’s adultery or abandonment, no alimony will be awarded to her except where there are extreme extenuating circumstances\textsuperscript{25} because the legislature, in specifying these acts as grounds for divorce, considered them the more heinous reasons. Other misconduct will not be a bar to alimony but will be considered a factor even though the divorce is obtained on no-fault grounds.\textsuperscript{26}

If both parties are at fault in the divorce, then the fault of each should be balanced in the alimony award.\textsuperscript{27} For example, where the husband’s adultery was found to be the fault which destroyed the marriage but the wife committed adultery after the separation, she was held to be entitled to alimony.\textsuperscript{28} Since the wife was unable to work, the public policy of keeping her off welfare was also considered by the court.\textsuperscript{29}

\begin{enumerate}
\item Md. ANN. CODE art. 16, § 5 (Supp. 1977):
\begin{enumerate}
\item In all cases where alimony or alimony pendente lite and counsel fees are claimed, the court may not award alimony, alimony pendente lite, or counsel fees unless it appears from the evidence that the spouse’s income is insufficient to care for his or her needs.
\item Id. at 405, 330 A.2d at 721.
\end{enumerate}
\end{enumerate}
Even though the Maryland statute includes no-fault provisions and states that recrimination will not be a bar to a divorce granted after a three-year separation, fault still plays a part in alimony. The Maryland court felt justified in continuing to weigh fault in alimony in a no-fault divorce because the legislature had simply added no-fault options to a predominately fault-oriented system. The court interpreted legislative intent to include a desire to maintain fault considerations even though no-fault provisions were also enacted. Alimony continues to be based on the same factors whether the divorce is obtained on fault or no-fault grounds. This system which allows for a consideration of fault in awarding alimony will result in a great deal of discretion on the part of the trial judge and will necessarily be very subjective.

2. Florida

The Florida divorce law grants a couple a divorce if the marriage is irretrievably broken or if one spouse is mentally incompetent. The alimony statute states that adultery and any other factors necessary to do equity and justice may be considered in the alimony award. Before the enactment of this law, the Florida courts considered fault and reached equitable decisions based on the facts. The statute makes economic equity a factor and provides for a distinction between rehabilitative and permanent alimony. Rehabilitative alimony is provided to help the wife re-establish herself and become self-supporting while permanent alimony is awarded to a woman who is not capable of supporting herself.

33. Id. § 61.08:
   (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.
   (2) In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.
34. Brunner v. Brunner, 159 Fla. 762, 32 So. 2d 736 (1947); Cowan v. Cowan, 147 Fla. 473, 3 So. 2d 869 (1941); Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941); Mathews v. Mathews, 117 Fla. 60, 157 So. 195 (1934).
Adultery was a complete bar to alimony under the old law.37 Under the new law, the Florida courts are unclear as to exactly what consideration should be given adultery. One area of confusion is whether consideration of the alimony-seeking spouse's adultery is mandatory. One Florida case held that the court, in its discretion, may refuse to hear evidence of adultery.38 A subsequent case from the same court held that the court cannot prevent the introduction of evidence of adultery, but the court can assign any weight it desires to this evidence.39 The two cases do not provide a clear basis for distinction and commentators have regarded them as being in conflict.40

There is also a conflict of authority as to whether the paying spouse's, as well as the recipient spouse's, adultery can be considered. One line of cases holds that the adultery of both spouses should be considered.41 Such an inquiry can be made within reasonable bounds so that an equitable financial arrangement can be achieved.42 Since the legislature specified that equity should be considered, perhaps adultery of both spouses should be a factor. The other line of cases holds that only the adultery of the alimony-seeking spouse should be considered because of its interpretation of the statutory language: "The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse..."43

Although adultery is specifically mentioned in the statute as a possible factor to be considered, there is no clear statement of whether other misconduct should be considered in the alimony award. There have been no decisions which explicitly hold that fault may not be considered and one commentator asserts that this question is still undecided.44 However, in Oliver v. Oliver,45 a Florida district court held that evidence of the wife's misconduct should be a factor in determining alimony. The court held that the language of the statute which allowed the court to consider the misconduct of the parties. In Oliver, the misconduct

37. Cowan v. Cowan, 147 Fla. 473, 2 So. 2d 869 (1941).
44. Commentary, supra note 40, at 529.
included the wife's intoxication and threats to kill the husband. The fact that Oliver involved such extreme conduct was considered to be important in a recent case in which the court urged that evidence of misconduct be limited to cases of gross misconduct. The court acknowledged that misconduct could be considered but did so reluctantly because it did not want to regress to an alimony system which considered fault as a factor.46

Florida now stands in the position of being a no-fault divorce state with a retained discretionary rule allowing inquiry into conduct. The specific mention of adultery in the statute indicates that it is at least to be considered, but it is unclear whether the consideration is mandatory and what weight the adultery should be given. Some Florida courts, however, do ignore fault and reach a decision based on equitable factors.

3. Michigan

In Michigan, cases which were decided before the enactment of the new divorce and alimony statutes examined the circumstances of the parties, the sources of the marital property, the contribution of each spouse towards acquisition, the length of the marriage, the earning ability of each spouse, and the cause of divorce in determining alimony.49 The new statute provides for no-fault divorce, but the alimony statute was left unchanged. The statute did not specify that fault was to be eliminated as a consideration in alimony awards. In interpreting this provision, one Michigan court has held that the same factors are

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46. McAllister v. McAllister, 345 So. 2d 352, 354 (Fla. Dist. Ct. App. 1977). The court's discussion of fault factors is dicta since the wife was not found to be at fault.
47. MICH. COMP. LAWS ANN. § 552.6 (Supp. 1977).
48. Id. § 552.23:
   (1) Upon every divorce from the bond of matrimony and also upon every divorce from bed and board if the estate and effects awarded to either party shall be insufficient for the suitable support and maintenance of either party and such children of the marriage as shall be committed to the care and custody of either party, the court may further award to either party such part of the real and personal estate of either party and such alimony out of the estate real and personal, to be paid to either party in gross or otherwise as it shall deem just and reasonable, having regard to the ability of either party and the character and situation of the parties, and all other circumstances of the case.
to be considered regardless of the change in the divorce statute.\textsuperscript{50}

When the report to the legislature was made by the Michigan Law Revision Commission, it recommended a no-fault divorce statute and a revision of the alimony statute. The report suggested that the alimony statute be amended to read, "the court may award such alimony . . . as shall be fair and equitable under the circumstances."\textsuperscript{51} This language was not adopted. This language would not have clearly resulted in the elimination of fault from alimony, but the fact that the legislature did not change the statute was interpreted as an intent to reject a modification of the existing alimony laws. Under this interpretation of the statute, the Michigan Court of Appeals concluded it should continue to consider fault in determining alimony.\textsuperscript{52}

The Michigan statute specifically refers to alimony awards which are just and reasonable, the ability and character of the parties, and "all other circumstances of the case."\textsuperscript{53} Using these guidelines, the courts have considered several different factors, but the emphasis given to each factor varied even under the prior law. The contribution of each party to the assets of the marriage was emphasized in several cases.\textsuperscript{54} Other cases have focused on the wife's needs, the husband's duty to support, the husband's ability to pay, and equity.\textsuperscript{55}

Even though it is clear in Michigan that fault can be considered in awarding alimony, the courts often seem to ignore or give little weight to this factor. This is true of cases which were decided both before and after the enactment of the no-fault divorce law. For example, \textit{Hollway v. Hollway}\textsuperscript{56} focused more on the standard of living of the parties and the fact that they both worked than on the husband's cruelty, a factor which was given little weight.

In \textit{Hutchins v. Hutchins},\textsuperscript{57} the court discussed the causes to

\textsuperscript{51} \textit{Id.} at 288 n.3, 210 N.W.2d at 357 n.3.
\textsuperscript{52} \textit{Id.} at 289, 210 N.W.2d at 357.
\textsuperscript{53} MICH. COMP. LAWS ANN. § 552.23 (Supp. 1977).
\textsuperscript{56} 344 Mich. 304, 73 N.W.2d 833 (1955).
\textsuperscript{57} 36 Mich. App. 875, 194 N.W.2d 6 (1971).
determine whether the divorce should have been granted, but it is not clear whether fault was considered in deciding on the division of property and alimony. The court seemed to attempt to arrive at a fair division of the assets without taking fault into account.

Adultery is no longer a complete bar to alimony under the new law as it was under the old law, but if there is extensive marital misconduct, it may result in a denial of alimony. In reaching a decision on alimony, the length of the marriage and the age of the parties is also considered.

Most Michigan cases do not rely principally on fault, and fault often is not considered expressly even though a poll of judges showed that a majority believed that conduct and marital fault should be considered in awarding alimony. It is arguable that considering fault in alimony and not in divorce is inconsistent but since fault is not a primary consideration, perhaps the inconsistency is not as great. Even though fault can be a consideration, the result may not be very different from that achieved in a no-fault alimony state.

4. Kentucky

The Kentucky alimony statute specifically sets out the fac-

59. Id.
61. KY. REV. STAT. ANN. § 403.200 (Baldwin Supp. 1976):

Maintenance—Court may grant order for either spouse.

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if the court finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
tors to be considered in deciding whether alimony should be awarded and if so, in what amount. The court in *Chapman v. Chapman*\(^{62}\) noted that the words "without regard to misconduct" were deleted from the alimony statute before it was enacted.\(^{63}\) The Kentucky alimony law is almost identical to the Uniform Marriage and Divorce Act\(^{64}\) but the Kentucky legislature deleted the words referring to the amount of the alimony award. The deletion of these words is a clear indication that the legislature expressly meant to vary from the no-fault principles of the Uniform Act and retain fault as a consideration in alimony awards.

Since the stated purpose of the law is to “mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage,”\(^{65}\) this would seem to indicate that fault should not be considered at all. If fault is not considered, the spouses would not have to try to prove that the other party was at fault and, as a result, at least some of the hostility would be removed from the divorce and alimony proceedings. This would seem to fit into the statutory purpose of mitigating the potential harm to the parties. However, the court in *Chapman* held otherwise:

Fault is not to be considered in determining whether a spouse is entitled to maintenance but it may be considered insofar as the amount is concerned. There are so many elements entering into a determination of what is a just amount, however, that we shall not enumerate them. The Act itself names some of the elements but the list is not exclusive. It is only after the chancellor has considered all elements, including fault, that he can get the "feel" of a just award.\(^{66}\)

An interpretation of the statute supports the court’s rationale in considering fault in determining the amount of alimony, but not in the initial determination of whether or not to make the award. The first section of the statute specifies that alimony may be awarded only in narrowly defined circumstances: when the spouse does not have sufficient property to support herself and is unable to work.\(^{67}\) There is no mention of fault, and it is

\[\begin{align*}
(c) & \text{ The standard of living established during the marriage;} \\
(d) & \text{ The duration of the marriage;} \\
(e) & \text{ The age, and the physical and emotional condition of the spouse seeking maintenance; and} \\
(f) & \text{ The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.}
\end{align*}\]

\(^{62}\) 498 S.W.2d 134 (Ky. 1973).
\(^{63}\) Id. at 137.
\(^{64}\) *Uniform Marriage and Divorce Act* § 308(b) (1970).
\(^{66}\) 498 S.W.2d at 138.
very doubtful that the wife's misconduct should cut her off completely from an alimony award when she is in such dire circumstances.

The second section of the statute deals with the determination of the amount of the award and states that alimony shall be awarded in an amount that is just, considering all relevant factors. This section of the statute is more vague than the first section. This vagueness, together with the fact that the words "without regard to misconduct" were omitted from the section dealing with the amount of the award, allows the court discretion to decide whether and to what extent fault should be considered in determining the amount of the award. The two-tier approach enables the Kentucky court to continue to use fault as a criteria in determining the amount of alimony awards.

B. States Which Do Not Consider Fault

1. California

California's divorce and alimony statutes are similar to

68. Id. § 403.200(2).
69. Cal. Civ. Code § 4506 (West 1970): "A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally: (1) Irreconcilable differences, which have caused the irremediable breakdown of the marriage. (2) Incurable insanity."
70. Id. § 4801:

(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable. In making the award, the court shall consider the following circumstances of the respective parties:

(1) The earning capacity and needs of each spouse.
(2) The obligations and assets, including the separate property, of each.
(3) The duration of the marriage.
(4) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
(5) The time required for the supported spouse to acquire appropriate education, training and employment.
(6) The age and health of the parties.
(7) The standard of living of the parties.
(8) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate findings with respect to the circumstances. The court may order the party required to make such payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification
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those of Kentucky\(^7\)\(^1\) and Michigan.\(^7\)\(^2\) The California alimony statute does not mention fault, which has been eliminated as a factor in divorce. The legislative history clearly indicated how the statute should be interpreted:

The Family Law Act was unquestionably a product of extensive in-
quity into the public policy considerations and practical conse-
quences of prior divorce law, which had been predicated primarily
upon concepts of fault or guilt. The California Assembly made specif-
ic reference to the issues of fault and guilt in commenting upon the
Family Law Act.\(^7\)\(^3\)

The legislative history indicated that "[f]irst in priority, then, in
any divorce reform was the elimination of the artificial fault
standard. That is the premise of the Family Law Act."\(^7\)\(^4\)

Specific evidence of this intent is present in a section of the
statute which provides that fault shall not be considered in
dissolution proceedings.\(^7\)\(^5\) The statute's specific provision that
evidence of misconduct is "improper and inadmissible" except
in child custody decisions is a clear directive that fault should
not be considered in awarding alimony.

An analysis of the factors considered in making alimony
awards before the Family Law Act was enacted is helpful to an
understanding of its effect. "It is true that comparative guilt of
the parties . . . [was] one of the considerations that [was] im-
portant in determining whether alimony should be granted
. . . . But once the determination whether alimony should be
granted was made, comparative guilt played no part in fixing
the amount or duration of the award."\(^7\)\(^6\) The Family Law Act
provides for consideration of "factors which are just and equit-
able" in fixing the amount of the award.\(^7\)\(^7\) In any other context,
this could be read to include fault, but in light of the cases under
the prior law in California and the legislative intent, it is clear
that the phrase is not meant to include fault. Now, fault will not

\(^7\)2. MICH. COMP. LAWS ANN. § 552.23 (Supp. 1977).
\(^7\)3. Note, In Re Marriage of Cary: Equitable Rights Granted to the Meretri-
\(^7\)4. Id. at 195 n.54.
\(^7\)5. CAL. CIV. CODE § 4509 (West Supp. 1977): "In any pleadings or proceedings
for legal separation or dissolution of marriage under this part, including
dispositions and discovery proceedings, evidence of specific acts of mis-
conduct shall be improper and inadmissible, except where child custody is
in issue and such evidence is relevant to that issue."
\(^7\)7. CAL. CIV. CODE § 4801(a)(8) (West Supp. 1977). Subsection 8 was added to
the statute when it was amended in 1976.
be considered in deciding whether to award alimony or in determining the amount of the award.\textsuperscript{78}

Although fault is not considered in California in making alimony awards, the factors which should be considered are similar to those considered in other states. These include the financial position of the parties, the wife's ability to work, her needs and estate, the community property involved, the husband's needs, and his ability to pay.\textsuperscript{79}

Attacks have been made on the California Family Law Act, alleging that it is unconstitutional because of the lack of specific guidelines for alimony and because of the large degree of discretion which is vested in the trial judge. In rejecting this argument, the court in \textit{In re Marriage of Cosgrave}\textsuperscript{80} affirmed the constitutionality of the Act and said that under the old law where fault was considered, there was an even greater degree of discretion vested in the trial judge.\textsuperscript{81}

Thus, abolishing fault in all levels of the divorce and alimony proceedings has helped to achieve the purpose of the Act which was to reduce the amount of court litigation involved in settling the rights of the parties on the dissolution of a marriage.\textsuperscript{82}

2. Iowa

As in California, Iowa's change to a no-fault divorce law was interpreted to include a change in the alimony law. Under the prior law in Iowa, the court was to determine an alimony order "as should be right."\textsuperscript{83} The case law supplemented the statute and set out specific criteria for the court to consider.\textsuperscript{84} Since

\textsuperscript{79} \textit{In re Marriage of Lopez}, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974).
\textsuperscript{80} 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (1972).
\textsuperscript{81} Id. at 433-34, 103 Cal. Rptr. at 738-39.
\textsuperscript{82} \textit{In re Marriage of Potrino}, 36 Cal. App. 3d 186, 111 Cal. Rptr. 367 (1973).
\textsuperscript{84} Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968):

A. PREMARITAL CRITERIA:
1. Social Position and living standards of each party.
2. Their respective ages.
3. Their respective mental or physical condition.
4. What each sacrificed or contributed, financially or otherwise, to the marriage.
5. The training, education and abilities of each party.
B. POSTMARITAL CRITERIA:
1. Duration of the marriage.
2. Number of children, their respective ages, physical or mental conditions, and relative parental as opposed to financial needs.
fault was important under the old law, the conduct of the spouses, especially that of the guilty party, was to be considered.

The new alimony statute in Iowa included only a slight change in the wording so that alimony is to be awarded "as shall be justified." The variation in the statute involved changing the word "right" to "justified." In interpreting this minor change, the Iowa Supreme Court could have held that fault was still a factor, but it did not. The landmark case, *In re Marriage of Williams*, interpreted the alimony law to be a reflection of legislative intent to completely abolish fault considerations. With the exception of fault, the other criteria set forth in *Schantz v. Schantz* would still be employed:

1. Net worth of property acquired, contributions of each party thereto by labor or otherwise, net worth and present income of each party.
2. Conduct of the spouses and particularly that of the guilty party.
3. Present physical and mental health of each party.
4. Earning capacity of each party.
5. Life expectancy of each party.
6. Any extraordinary sacrifice, devotion or care by either spouse in furtherance of a happy marriage or in preservation of the marital relationship.
7. Present standards of living and ability of one party to pay balanced against relative needs of the other.
8. Any other relevant factors which will aid in reaching a fair and equitable determination as to respective rights and obligations of the parties.

85. IOWA CODE ANN. § 598.21 (West Supp. 1977).
86. *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972).
87. *Id.*
88. *Id.* at 345.
89. 163 N.W.2d at 405.
92. 199 N.W.2d 351 (Iowa 1972).
have been an attempt to make an equal division of the marital assets based on what each spouse contributed. The latter view would be more consistent with the no-fault position adopted in Iowa.

The change in the wording in the Iowa alimony law was minor, but no-fault considerations were held to prevail in alimony. The court could have found that there was no substantive change in the alimony provision but did not because of its perception of the legislative intent. The complete removal of fault from the system would also eliminate the hypocrisy, bitterness, and emotional stress involved in a system in which fault is considered.93

3. Arizona, Colorado, and Oregon

The Oregon statute provides that fault may not be considered in property divisions or alimony awards.94 The statute contains another section which refers to the factors which should be considered in arriving at an alimony award.95 The statute states that alimony must be just and equitable and that the court may consider all relevant factors in arriving at its award. If this section were read alone, one interpretation could include allowing the consideration of fault in alimony. This section, however, must be read in conjunction with the more general introductory section which specifies that fault is not to be considered. The Oregon State Court of Appeals has stated that the rationale for no-fault is to put the parties in approximately the same financial position as if the marriage had not

93. In re Marriage of Williams, 199 N.W.2d 339, 343 (Iowa 1972).
94. OR. REV. STAT. § 107.036(3) (1977):
In dividing, awarding and distributing the real and personal property (or both) of the parties (or either of them) between the parties, or in making such property or any of it subject to a trust, and in fixing the amount and duration of the contribution one party is to make to the support of the other, the court shall not consider the fault, if any, of either of the parties in causing grounds for the annulment or dissolution of the marriage or for separation.
95. Id. § 107.105(1):
[The court may provide]
(c) for the support of a party . . . such amount of money for such period of time as it may be just and equitable for the other party to contribute. . . . In making such support order, the court shall consider the following matters:
(A) The duration of the marriage;
(B) The ages of the parties;
(C) Their health and condition;
(D) Their work experience and earning capacities;
(E) Their financial conditions, resources and property rights;
. . . . .
(I) Such other matters as the court shall deem relevant.
been dissolved. Since fault was eliminated from consideration by statute, the Oregon courts have awarded alimony on the basis of other factors enumerated in the statute.

In Colorado and Arizona, the legislatures explicitly abolished fault considerations from alimony: "The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors . . . ." In determining alimony awards under these statutes, the focus is on the accumulation of assets and all other factors. In Carlson v. Carlson, the Colorado Supreme Court said it would consider the conduct of the parties, but in view of the statutory language, this is most likely to be interpreted to mean conduct with regard to financial contributions. The no-fault-in-alimony rule in Colorado and Arizona is a matter of statutory decree.

IV. FAULT AND ALIMONY IN NEBRASKA

The statutes discussed thus far have presented a spectrum ranging from fault to no-fault systems. In analyzing the Nebraska situation, it is most important to consider the other states in which no-fault divorce laws were passed with no corresponding change in the alimony statutes. The statutes in other states were interpreted in various ways when the courts tried to discern the legislature's intent. Thus, statutes which on their face appear to be similar, have had widely differing interpretations.

The changes which occurred in the Nebraska statutes with the advent of no-fault divorce are similar to those which occurred in the statutes of Iowa and Michigan. In those states, the divorce statutes were changed drastically, but there was no real mention in the statute of what effect this would have on the alimony law. Other state courts have recognized this problem and settled it in one way or another, but Nebraska has never squarely faced the issue. This portion of the comment will focus on the factors which were considered for alimony under the prior law, and then focus on the new statute and the corresponding case law to determine whether or not fault is still a factor to be considered in alimony awards.

98. ARIZ. REV. STAT. ANN. § 25-319 (West 1976); COLO. REV. STAT. § 14-10-114 (1973).
100. 178 Colo. 283, 497 P.2d 1006 (1972).
A. Alimony Awards Under the Prior Law

The former Nebraska statute on alimony provided for an award which was "just and reasonable," considering the ability of the husband to support the wife, the character and situation of the parties, and all other circumstances of the case. The circumstances to be considered included fault; alimony was not to be awarded to an adulterous spouse. The case law filled in the meaning of the statutory language and added factors similar to those considered by other state courts: the age and earning abilities of the parties, the duration of the marriage, the conduct of the parties during the marriage, the standard of living, the health and physical condition of the parties, the financial circumstances and any other relevant factors.

Most Nebraska cases focused on these factors but also gave consideration to the fault factor. In Prosser v. Prosser, the court considered the husband's earnings and his ability to pay and said that alimony should not be awarded out of sympathy for the wife or as a penalty for the husband's misconduct. The court, however, seemed to emphasize the fault of the husband, recognizing that he treated the marriage as a matter of convenience. In the past it has been considered important in Nebraska to examine the husband's fault, his conduct, and whether his acts brought about the separation. For example, where the husband was habitually drunk and used his wife's money to pay his own debts, fault was considered; the alimony exceeded the value of the husband's assets.

Where the wife was deemed to be at fault in the breakdown of the marriage, her fault did not seem to be given as much weight as the husband's. For example, where both spouses were at fault, the court played down the wife's alleged adultery and said the husband had condoned her acts. The court also emphasized the husband's abuse of the wife and subsequently increased her alimony.

102. Id.
104. 156 Neb. 629, 57 N.W.2d 173 (1953).
wife is supported by the fact that even if the wife alone were at fault, she could still be awarded alimony except where the divorce was granted to the husband on the ground of the wife's adultery. This may result from the fact that alimony has its basis in the husband's duty to support. The rationale for emphasizing the husband's fault, while playing down that of the wife, could be that the husband is being punished or that the wife should be given added compensation for the fact that the husband caused the divorce.

Under prior case law the wife's contributions to the marriage were usually considered and given great weight. The cases varied on how much weight should be given to fault in the determination of the alimony award but it is clear that fault was definitely a factor in alimony decisions.

B. Alimony Awards Under the New Law

The new alimony law provides, as did the prior law, that alimony must be reasonable and that the circumstances of the parties should be considered. The language of the new statute is somewhat more specific in that it mentions several factors to be considered, including the ability of the supported spouse to work and the duration of the marriage. The major change in the law dealt with the adoption of a no-fault standard as the basis for divorce. The alimony law did not state whether fault was specifically abolished. The fact that fault is not mentioned in the alimony statute is not conclusive proof that fault is not to be

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

(Note that this statute does not bar an adulterous wife from receiving alimony as did the old law.)
111. NEB. REV. STAT. § 42-361 (Reissue 1974).
considered because the old law did not specifically mention it either.

There was no clear-cut legislative history that the Nebraska Supreme Court could look to as a guideline for determining legislative intent.\textsuperscript{112} Given the legislative scheme, the supreme court could have followed Iowa's lead and held that the no-fault intent of the statutory scheme prevailed.\textsuperscript{113} The alternative was to follow the Kentucky\textsuperscript{114} and Michigan\textsuperscript{115} cases which held that since the alimony statute was not specifically changed, fault could still be considered.

The first Nebraska case which dealt with fault and alimony under the new statute was \textit{Magruder v. Magruder}.\textsuperscript{116} Unfortunately, the court did not come to a definitive conclusion in that case and did not specifically state whether fault was to be considered in making alimony awards. The court said that the wife did not want a divorce and that the husband had stated that other women looked good to him;\textsuperscript{117} however, the relationship between these "fault" factors and alimony was not discussed. The fact that the wife had put the husband through school was mentioned. It is not clear, though, whether the court considered the husband's fault as well as the fact that the wife should have received a return on her contribution to the assets of the marriage.

The dissent in \textit{Magruder} accused the majority of silently applying punitive considerations because of the unusually large amount awarded. The dissent claimed that the award, which provided for alimony of $833.33 per month for ten years and two months, was unconscionable.\textsuperscript{118} Under the new statute, the dissent felt that fault should not be a factor. While the wife should be compensated for her investment in the marriage, her ability to work should also be a factor considered. One commentator has agreed with the dissent's view of the majority decision in \textit{Magruder} and said that as a result of the husband's fault, the wife has been given "tort-like awards... best explained in terms of punishment."\textsuperscript{119} Certainly it is possible to view \textit{Magruder}...
er as being decided on fault principles even though they were not specifically articulated. However, it is still possible to read the case as a no-fault alimony decision.

The cases subsequent to Magruder have not specifically settled the issue and no definitive statement by the Nebraska Supreme Court has been articulated, although it does appear that in most cases a no-fault principle has been applied. However, there are two cases under the new Nebraska law which could be interpreted to be fault oriented—Seybold v. Seybold121 and Reisig v. Reisig.122 In Seybold the court recognized that the wife had planned to leave home several years before the divorce and that she even had notes regarding her prospective divorce. As a result, it appears that the court considered the wife's acts in the alimony award. In Reisig, the husband had not contributed to, and had even depleted, the marital assets. The award, therefore, was not really based on marital fault but was intended as financial compensation—the husband was required to replace through alimony what he had taken from the assets.

In 1978 the court decided Theye v. Theye.123 The majority opinion in Theye stated that the record "established that unilateral acts of the petitioner were responsible for the irretrievable breakdown of the marriage and that the respondent made all reasonable efforts to save the marriage. Under the facts of this case we find that the grant of alimony to petitioner was excessive."124 By including this statement, the majority opinion implied that fault had been considered in making the alimony award. One of the two concurring opinions in Theye also implied that fault should be taken into consideration in awarding alimony.125 This concurrence, which expressed the view of two of the justices, when read in conjunction with the

121. 191 Neb. 480, 216 N.W.2d 179 (1974).
124. Id. at 208, 263 N.W.2d at 94.
125. In making an award of alimony and a division of property the court should consider more than just the circumstances of the parties at the time of the dissolution of the marriage. Not only the length of the marriage but the property of the parties at the time of the marriage, the income during the marriage, and how it was spent are important factors which should be considered. It would be totally unrealistic to disregard the circumstances of the parties during the marriage and assume that a fair and just division of property could be made without regard to what happened during the marriage.
Id. at 209, 263 N.W.2d at 95 (Boslaugh, J., concurring; joined by Spencer, J.) (emphasis added).
majority opinion indicates that three of the justices\textsuperscript{126} on the
court are of the opinion that fault should be taken into con-
sideration. However, the other concurring opinion, which ex-
pressed the view of four of the justices,\textsuperscript{127} indicated that fault
should not be considered when awarding alimony:

\begin{quote}
[We] agree with the majority in the result. [We] disagree with any
implications in the opinion that the result somehow follows a deter-
mination of responsibility for the initial breakdown of the marriage.
The award of alimony and the division of property are determined by
the circumstances of the parties at the time of dissolution of the
marriage, the length of the marriage, the health, relative earning pow-
er, and education of the parties, and whether there are unemancipated
children. . . . No case has said that the granting, denial, or reduction
of alimony nor the division of property are to be considered punitive.
[we] would not engraft any such provision on the law of this state.\textsuperscript{128}
\end{quote}

Although this concurrence stated that fault should not be con-
sidered, it did not articulate why it agreed with the majority that
the alimony award should be reduced. It, therefore, appears
that there is a four-three split on the court, the majority being of
the opinion that fault should not be considered when awarding
alimony.

In awarding alimony most Nebraska cases have tried to
make a fairly equal division of the marital assets,\textsuperscript{129} looked at
the contribution\textsuperscript{130} or lack of contribution\textsuperscript{131} by both parties to
the assets, and at the ability of each to work,\textsuperscript{132} all without
regard to fault. In justifying its no-fault position, the court has
stated that the primary reason for alimony is to provide sup-
port.\textsuperscript{133} The statutes were primarily designed to protect women
and in this regard the court should look at the ability of each
party to work. A marriage does not necessarily create a lifetime
lien on the husband for support.\textsuperscript{134} The focus should be on the
support and fairness aspects of alimony.

\begin{footnotes}
\footnote{126}{The majority opinion was authored by Justice Clinton. The concurring
opinion was authored by Justice Boslaugh and was joined by Justice
Spencer.}
\footnote{127}{This concurrence was authored by Justice White. Chief Justice White and
Justices McCown and Brodkey joined in the concurrence.}
\footnote{128}{200 Neb. at 209, 263 N.W.2d at 94 (White, J., concurring in the result; joined
by White, C.J., and McCown and Brodkey, J.J.).}
\footnote{129}{Bodberg v. Bodberg, 193 Neb. 844, 229 N.W.2d 552 (1975); Young v. Young,
192 Neb. 735, 224 N.W.2d 361 (1974).}
\footnote{130}{Sommers v. Sommers, 191 Neb. 361, 215 N.W.2d 94 (1974).}
\footnote{131}{Tavlin v. Tavlin, 194 Neb. 98, 230 N.W.2d 108 (1975).}
\footnote{132}{Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975); Tuttle v. Tuttle, 193
Neb. 397, 227 N.W.2d 27 (1975); Braeman v. Braeman, 192 Neb. 510, 222
N.W.2d 811 (1975); Peery v. Peery, 191 Neb. 782, 217 N.W.2d 837 (1974);
Casselman v. Casselman, 191 Neb. 138, 214 N.W.2d 278 (1974); Albrecht v.
Albrecht, 190 Neb. 393, 208 N.W.2d 669 (1973).}
\footnote{133}{Essex v. Essex, 195 Neb. 385, 238 N.W.2d 235 (1976).}
\footnote{134}{Buchholz v. Buchholz, 197 Neb. 180, 248 N.W.2d 21 (1976).}
\end{footnotes}
The Nebraska Supreme Court has repeatedly said that it will not disturb an award of alimony unless it is clearly unfair. In most cases, the court has found the awards to be reasonable even if high. Only occasionally have awards been modified. If fault were still to be considered, it would be a matter for the discretion of the trial judge and it would be more difficult for the reviewing court to hold that an award was unfair.

V. CONCLUSION

The new law in Nebraska has not specifically stated that alimony is no-fault but a review of the cases indicates that with one exception the cases have not considered fault as a factor in awarding alimony. Instead, the focus has been on the financial equities of the situation. It would appear that the Nebraska Supreme Court has followed the lead taken by the Iowa and California courts which hold that no-fault principles should prevail in alimony.

The basic premise behind alimony is to provide adequate support for the wife. It is not designed as punishment for a spouse who has been at fault. The goal of alimony is to achieve a just and equitable distribution of the assets so that each spouse will be capable of maintaining a standard of living similar to that enjoyed during the marriage. The emphasis should be on economic equity between the spouses after considering each spouse's assets and financial situation.

The question is whether a determination of fault is necessary to arrive at an equitable and just alimony award. With the introduction of fault as a factor, moral decisions are usually involved which may unfairly overshadow the economic realities of the situation. Further, the discretion of the trial judge is increased when fault is considered and an award may be based unduly on the personal morals of the judge.

Removing fault from the determination of the alimony award eliminates the fault finding process and would help reduce the resultant hostility involved in such a system. After

viewing the policy reasons behind removing fault as a consideration in alimony awards, it is apparent that fault need not be considered to achieve a just award and that the Nebraska court has arrived at the best result by no longer considering fault in alimony awards.

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