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Arlyss Welch Spence

*University of Nebraska College of Law*

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Comments

## COUNSEL FEES IN MATRIMONIAL ACTIONS

### I. INTRODUCTION

The practice of allowing counsel fees to the wife in matrimonial actions stemmed initially from the common law position of the husband as controller of all the property and finances of the marriage. Wives ordinarily had no independent resources and lacked the money both to secure counsel to institute divorce or separation proceedings and to defend against matrimonial actions brought against them by their husbands.<sup>1</sup> The courts early attempted to equalize husband and wife by requiring the husband to pay his wife's counsel fees. Currently authority to award counsel fees to the wife is in some jurisdictions judicially assumed as an "incident" of the divorce court's "general jurisdiction" while others provide for it specifically by statute.<sup>2</sup> Whatever the source of judicial power may be, broad judicial discretion over counsel fees in matrimonial actions is everywhere the rule.<sup>3</sup>

Presently the traditional practice of awarding counsel fees to the wife is under attack, the most famous perhaps consisting in the report of the 1956 Royal Commission on Marriage and Divorce.<sup>4</sup> The legal and social status of wives, it is claimed, has materially been improved and they are today in a position to pay their own lawyers. The reason for the traditional practice or much of it has ceased to exist and so therefore should the practice.<sup>5</sup> In general, however, such arguments have carried little

<sup>1</sup> Morland, *Keezer on the Law of Marriage and Divorce* §§ 601, 610 (3rd ed. 1946).

<sup>2</sup> *O'Dea v. O'Dea*, 31 Hun. (N.Y.) 441 (1884); *Kiel v. Kiel*, 146 Misc. 333, 261 N.Y.S. 162 (1932); *Hunt v. Hunt*, 23 Okla. 490, 100 Pac. 541 (1909). And see *Ariz. Rev. Stat. Ann.* § 25-315 (1956); *Colo. Rev. Stat.* 46-1-5 (1953); *Rev. Stat. of Maine* c. 166 § 59 (1954).

<sup>3</sup> *Neb. Rev. Stat.* § 42-308 (Reissue 1952); *Code of Laws of So. Carolina* § 20-112, (1952); *Jeffords v. Jeffords*, 216 S.C. 451, 58 S.E.2d 731 (1950); *Klekamp v. Klekamp*, 275 Ill. 98, 113 N.E. 852 (1916); 4 A.L.R. 926; 143 A.L.R. 799; 56 A.L.R.2d 120.

<sup>4</sup> *Royal Commission on Marriage and Divorce*, Report 1951-1955, cmd. 9678 (1956).

<sup>5</sup> *Ibid.*

weight with the courts. Wives are still generally entitled to counsel fees in matrimonial actions.<sup>6</sup>

There are, however, various distinctions and exceptions and it is the purpose here to review them critically. Counsel fee problems common to all matrimonial actions are first discussed followed by a consideration of problems peculiar to particular kinds of matrimonial actions. A final section reviews the wisdom of traditional practice in the light of contemporary social conditions.

## II. IN GENERAL

The first general problem concerns the drafting of the motion or application for counsel fees. Although a few statutes provide that the allowance be made directly to the attorney or made either to the wife or her attorney,<sup>7</sup> the general rule is that the motion or application must be in the name of the wife and the order made to her and not to her attorney.<sup>8</sup> While Nebraska statutes do not specifically describe to whom payment shall be made, the usual procedure in Nebraska follows the general rule in allowing attorney's fees to the wife for her attorney.<sup>9</sup> *Chambers v. Chambers* raised the question of the trial court's right to grant the attorney's fees directly to the attorney and held that it was formal error only and would not afford just ground for complaint.<sup>10</sup>

<sup>6</sup> *Tanner v. Tanner*, 229 La. 399, 86 So.2d 80 (1956); *Eals v. Swan*, 221 La. 329, 59 So.2d 409 (1952); *Zatavern v. Zatavern*, 155 Neb. 395, 52 N.W.2d 254 (1952).

<sup>7</sup> Ind. Stat. Ann. 1933 § 3-1216 (Reissue 1946); Minn. Stat. Ann. § 518.14 (1957 Supp.). The Minnesota statutes provide also that an award of attorney's fees made by the court during the pendency of the action or in the final judgment survives the action and if not paid by the party directed to pay the same may be enforced as above provided or by a separate civil action brought by the attorney in his own name. If the action is dismissed or abandoned prior to determination and award of the attorney's fees the court may nevertheless award attorney's fees upon the attorney's motion and such award also survives the action and may be enforced in the same manner as last above provided. Also Rev. Stat. of Maine c. 166 §§ 59, 64 (1954); Ann. Laws of Mass. c. 208 § 38 (1955).

<sup>8</sup> *Parker v. Parker*, 71 Miss. 164, 14 So. 459 (1893); 118 A.L.R. 1134.

<sup>9</sup> *Willits v. Willits*, 76 Neb. 228, 107 N.W. 379 (1906); *Zatavern v. Zatavern*, 155 Neb. 395, 52 N.W.2d 254 (1952); *Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554 (1956); *Zych v. Zych*, 165 Neb. 586, 86 N.W.2d 611 (1957).

<sup>10</sup> *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906).

Another problem is the time in which the fees will be allowed. Counsel fees may be allowed at any time and from time to time while the action is pending.<sup>11</sup> It is usual to allow them at the beginning of the action, upon the appearance of the defendant or on the return day of the summons.<sup>12</sup> In Nebraska, the court may order them at any stage of the action until the rendition of the final decree and provisions for the same may even be and often are included in the final decree.<sup>13</sup> In other jurisdictions, however, counsel fees incurred during the trial cannot be awarded in the final judgment unless the right to do so has previously been reserved.<sup>14</sup>

A third question concerns the amount of the allowance. The wife must ask that the allowance be made to her to prosecute or defend the action and it is wholly immaterial in some states whether or not she has independent means.<sup>15</sup> A number of recent cases, however, have held that counsel fees will not be allowed to a wife who has ample means of her own.<sup>16</sup> But in all states the predominant theme of the case law is the sound discretion of the trial court, and it is only when such discretion is abused that an appellate court will disturb the allowance.<sup>17</sup> The judge may determine from his own experience, having in mind the character of the services to be performed, the ability

<sup>11</sup> Moreland, *Keezer on the Law of Marriage and Divorce* § 612 (3rd ed. 1946); *Rose v. Rose*, 109 Cal. 544, 42 Pac. 452 (1895).

<sup>12</sup> *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171 (1857).

<sup>13</sup> *Kiddle v. Kiddle*, 90 Neb. 248, 133 N.W. 181 (1911); *Willits v. Willits*, 76 Neb. 228, 107 N.W. 379 (1906).

<sup>14</sup> *Morland*, *Keezer on the Law of Marriage and Divorce* § 612 (3rd ed. 1946); *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056 (1895); *Newman v. Newman*, 69 Ill. 167 (1873); *Wagner v. Wagner*, 34 Minn. 441, 26 N.W. 450 (1886); *Baier v. Baier*, 91 Minn. 165, 97 N.W. 671 (1903).

<sup>15</sup> *Larsen v. Larsen*, 226 P.2d 650 (1951); *Dietrich v. Dietrich*, 209 S.W.2d 540 (1948); *Klekamp v. Klekamp*, 275 Ill. 98, 113 N.E. 852 (1916); 35 A.L.R. 1107.

<sup>16</sup> *Stibbs v. Stibbs*, 231 P.2d 310 (1951); *McFarlin v. McFarlin*, 75 So.2d 580 (1954). Cf. *Friederich v. Friederich*, 6 N.J.Super. 102, 70 A.2d 177 (1950), where the court allowed the wife attorney's fees even though she had money in the bank. The money had accumulated by checks sent to her because her first husband was killed in the service and the money was placed in the bank for the benefit for her child and the child of her first husband. These circumstances justified it not being used by her for attorney's fees in an action against her second husband.

<sup>17</sup> *Willits v. Willits*, 76 Neb. 225, 107 N.W. 379 (1906); *Klekamp v. Klekamp*, 275 Ill. 98, 113 N.E. 852 (1916); 143 A.L.R. 799; 56 A.L.R.2d 120.

of the husband to pay, and the necessity of a litigation in accordance with the policy and practice of the particular jurisdiction, whether such allowance should be made, and if so the amount.<sup>18</sup> On a hearing to determine the value of the services, the court may hear expert witnesses but is not bound by their testimony.<sup>19</sup> The Nebraska cases reflect this general decisional pattern. The Nebraska Supreme Court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient.<sup>20</sup> The fee may be fixed either with or without the aid of expert testimony as to value, although neither the trial nor appellate court can, in assessing such fees, arbitrarily ignore the undisputed evidence and findings based thereon.<sup>21</sup> The Nebraska Court has said it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required properly to conduct the case, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.<sup>22</sup>

In addition to counsel fee allowances in the trial court, the wife in most states also may have such allowance on appeal though a few states deny it where the lower court decree was in favor of the husband and the wife was unsuccessful on appeal.<sup>23</sup> The test in Nebraska, however, is not whether the wife won or lost in the lower court or on appeal but whether or not a reasonable justification for the appeal appears.<sup>24</sup>

### III. TYPES OF ACTIONS

For present purposes matrimonial actions may be classified under four major headings: existence of the marriage in doubt and being challenged; existence of the marriage established but an action instead to dissolve the marriage or separate; actions

<sup>18</sup> Morland, Keezer on the Law of Marriage and Divorce § 613 (3rd ed. 1946).

<sup>19</sup> Sweat v. Sweat, 123 Ga. 801, 51 S.E. 716 (1905).

<sup>20</sup> Shoemaker v. Shoemaker, 166 Neb. 164, 88 N.W.2d 221 (1958).

<sup>21</sup> Lippincott v. Lippincott, 152 Neb. 374, 41 N.W.2d 232 (1950).

<sup>22</sup> Allen v. City of Omaha, 136 Neb. 620, 286 N.W. 916 (1939); Lippincott v. Lippincott, 152 Neb. 374, 41 N.W.2d 232 (1950).

<sup>23</sup> Buehler v. Buehler, 300 Ill.App. 607, 21 N.E.2d 56 (1939); 143 A.L.R. 799, Contra: Wald v. Wald, 124 Iowa 183, 99 N.W. 720 (1904).

<sup>24</sup> Smallcomb v. Smallcomb, 165 Neb. 191, 84 N.W.2d 217 (1957).

modifying previous decrees or affecting the issue of the marriage; and actions to enjoin conduct affecting the marriage. Since the actions within each of these categories are generally approached in the same manner by the courts, they are here considered together in order to avoid repetition.

#### A. EXISTENCE OF THE MARRIAGE IN DOUBT AND BEING CHALLENGED

Two types of actions fall within this category—annulment and declaration of nullity. The predominant theme is the simple one of whether or not a marriage relation exists.<sup>25</sup>

##### 1. *Action for Annulment*

Many statutes expressly provide for counsel fees to the wife in annulment actions, leaving the question of whether such fees should be awarded in an individual case to the court's discretion.<sup>26</sup> Under such a statute the award will be made even if the wife is the one seeking the dissolution.<sup>27</sup> In the absence of statutes the courts draw a distinction according to whether the husband or wife seeks the annulment. Where the husband petitions and the wife seeks to uphold the marriage the wife is entitled to counsel fees if she makes a prima facie showing of the validity of the marriage.<sup>28</sup> In *Zatavern v. Zatavern*, for example, a leading Nebraska case, the wife brought a divorce action and the husband cross-petitioned for annulment alleging the marriage was procured by fraud. The trial court granted a decree of annulment to the husband though requiring the husband to pay his wife's attorney.<sup>29</sup> Notwithstanding that the annulment decree was affirmed on appeal the trial court's order allowing counsel fees to the wife was approved and an additional sum was awarded the wife for services of her counsel on appeal.<sup>30</sup> The

<sup>25</sup> *Colbert v. Colbert*, 169 P.2d 633 (1946); *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269 (1953); *Brinkley v. Brinkley*, 50 N.Y. 184 (1872); *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956); 4 A.L.R. 926; 110 A.L.R. 128.

<sup>26</sup> *Ariz. Rev. Stat. Ann.* § 25-371 (1956); *West's Ann. Cal. Code, Civil Code* § 137.5.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269 (1953); *Bancroft v. Bancroft*, 9 Cal.App.2d 464, 50 P.2d 465 (1935); 4 A.L.R. 926; 110 A.L.R. 128.

<sup>29</sup> *Zatavern v. Zatavern*, 155 Neb. 395, 52 N.W.2d 254 (1952).

<sup>30</sup> *Ibid.*

fact that Nebraska has no statute authorizing counsel fee awards in annulment action was regarded as immaterial.

The result is different, however, where the wife is the plaintiff, as she therefore admits no legal obligation upon the part of her reputed husband.<sup>31</sup> She may not be allowed the award because she is repudiating the relation which is the basis of her right to such award.<sup>32</sup>

## 2. Declaration of Nullity

Annulment cases, of course, involve voidable marriages, marriages valid until set aside by a judicial decree.<sup>33</sup> Declaration of nullity actions, on the other hand, deal with void marriages and are brought to clarify the marital status.<sup>34</sup> Only a few statutes expressly provide for counsel fees in declaration of nullity actions, and then only under certain circumstances; for example, only where the suit is brought by the husband and the wife asserts the validity of the marriage.<sup>35</sup> As noted above, such conditions are not found in the statutes authorizing counsel fees in annulment actions.<sup>36</sup>

Where no statutes are involved, many declaration of nullity cases turn on the same considerations as do the annulment cases, viz., according to which spouse brings the suit and whether the validity of the marriage is in dispute.<sup>37</sup> Some jurisdictions, however, apparently refuse to allow counsel fees to an unsuccessful wife in a nullity case even though she in good faith seeks to uphold the marriage. *Abramson v. Abramson*, though not strictly

<sup>31</sup> *Heafey v. Heafey*, 142 Misc. 147, 254 N.Y.S. 82 (1931); 4 A.L.R. 932.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Herron v. Herron*, 28 Misc. 323, 59 N.Y.Supp. 861 (1899), where a wife sought to have her marriage annulled for the reason that she was under the legal age of consent at the time of the marriage the court would allow her nothing for alimony or counsel fees. If after she had reached the age of consent she had affirmed her marriage it would have remained valid.

<sup>34</sup> *Lapp v. Lapp*, 43 Mich. 287, 5 N.W. 317 (1880), where the husband had a wife living apart from him under separation when he married the second wife. The second marriage was void and incapable of being valid under those circumstances.

<sup>35</sup> Oregon Rev. Stat. 107.090; District of Columbia § 16-410 (14:70).

<sup>36</sup> District of Columbia § 16-410 (14:70).

<sup>37</sup> *Friedenwald v. Friedenwald*, 57 App.D.C. 13, 16 F.2d 509 (1926), writ of certiorari denied 273 U.S. 763, 71 L.Ed. 879, 47 S.Ct. 476 (1927).

a nullity case, may serve to illustrate the point.<sup>38</sup> The wife brought suit for divorce alleging a common law marriage in Iowa. The husband claimed that no such marriage was ever contracted. Judgment went for the wife in the trial court and she secured a portion of the property accumulated while the parties were living together and attorney's fees. On appeal, however, the Nebraska Supreme Court found no common law marriage and accordingly reversed not only the property settlement award but the counsel fee order as well:

An allowance for counsel fees and suit money is, like an award of alimony, dependent upon the existence of the marriage relation; and if this is denied and the wife fails to refute such denial, her application must be refused owing to her failure to make out a prima facie case.<sup>39</sup>

The Michigan case of *Lapp v. Lapp* is also noteworthy in this connection.<sup>40</sup> The wife brought suit for divorce and it appeared that she knew at the time of her marriage to the defendant that he had a wife living apart from him. It was held that the marriage was void and that the wife was not entitled to counsel fees.<sup>41</sup>

#### B. EXISTENCE OF MARRIAGE ESTABLISHED; ACTION TO DISSOLVE MARRIAGE, OR SEPARATE

The actions here of course are those for divorce and separate maintenance. The parties do not deny the existence of the marriage but want to sever or alter it. Counsel fees and suit money are as a general rule allowed to the wife in both kinds of actions and under the same rules and principles.<sup>42</sup>

Most states have statutes specifically allowing counsel fees to the wife in divorce and separation actions and under most of them the wife is allowed fees whether she is prosecuting or defending.<sup>43</sup> In a few states the court is likewise empowered to award counsel fees to the husband should justice require it but

<sup>38</sup> *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956).

<sup>39</sup> *Ibid.*

<sup>40</sup> *Lapp v. Lapp*, 43 Mich. 287, 5 N. W. 317 (1880).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Morland*, op. cit. supra note 1, § 610.

<sup>43</sup> Neb. Rev. Stat. § 42-308 (Reissue 1952); Ariz. Rev. Stat. Ann. § 25-371 (1956); Minn. Stat. Ann. § 518.14 (1957 Supp.); Nev. Rev. Stat. §§ 125.040, 125.200 (1957).



such statutes are exceptional and counsel fee awards to the husband are nowhere allowed in the absence of statute.<sup>44</sup>

Some of the statutes expressly say "counsel fees" or "attorney's fees."<sup>45</sup> Others do not grant the fees expressly, but phrases such as "any money necessary to enable the wife" and "expenses of the suit" have been construed to include attorney's fees.<sup>46</sup> In North Carolina and Kentucky the word "costs" has been construed to include reasonable attorney's fees.<sup>47</sup> Nebraska's statute on the subject provides that in every suit brought either for divorce or separation, the court in its discretion may require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency, and such sum is taxed as costs to the husband.<sup>48</sup> The Nebraska Supreme Court has given a liberal construction to the statute and has sustained counsel fee awards in many matrimonial actions not specifically mentioned in the statute.<sup>49</sup>

Since the courts are ordinarily restricted to awarding counsel fees only where a marriage relationship exists, what kind of proof is necessary in order to establish the marriage for the purpose of an application for counsel fees? The New York case of *Brinkley v. Brinkley* illustrates the majority position in holding that in addition to the allegations of the complaint and denial, the court may use affidavits and other papers to decide the existence of the marriage for the purposes of the application.<sup>50</sup> If

<sup>44</sup> Iowa Code Ann. § 598.11 (1946); Ann. Laws of Mass c. 208 § 38 (1953); Utah Code Ann. § 30-3-3 (1955); Minn. Stat. Ann. § 518.14 (1957 Supp.). *O'Neill v. O'Neill*, 164 Neb. 674, 83 N.W.2d 92.

<sup>45</sup> Ariz. Rev. Stat. Ann. § 25-371 (1956); Minn. Stat. Ann. § 518.14 (1957 Supp.); Nev. Rev. Stat. § 125.440 (1957); Colo. Rev. Stat. § 46-1-5 (1953).

<sup>46</sup> Neb. Rev. Stat. § 42-308 (Reissue 1952); Idaho § 32-704 (1948); Okla. St. Ann. § 1276 (1931); New Mexico Stat. Ann. § 22-7-6 (1953).

<sup>47</sup> Gen. Stat. of N. Car. § 6-21 (Recompiled 1953); Kentucky Rev. Stat. § 453.120 (1959).

<sup>48</sup> Neb. Rev. Stat. § 42-308 (Reissue 1952), In every suit brought either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

<sup>49</sup> *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906).

<sup>50</sup> *Brinkley v. Brinkley*, 50 N.Y. 184 (1872); *Dietrich v. Dietrich*, 41 Cal. 2d 497, 261 P.2d 269 (1953); 4 A.L.R. 934.

then the court is tentatively satisfied of the fact of marriage, it has the power to grant counsel fees. Although such order implies a finding of the existence of the marriage, the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues and the order does not determine those issues nor affect the final judgment.<sup>51</sup> The prima facie existence of the marriage is the controlling factor and if the wife makes out a reasonably plain case showing the marriage she should be furnished with means of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case.<sup>52</sup> *Abramson v. Abramson*, discussed above, is apparently contrary to the above rule because in the lower court the wife was successful and evidently had established to the court's satisfaction the existence of the marriage. Despite this however the Nebraska Supreme Court reversed the award of counsel fees on finding that no common law marriage existed.<sup>53</sup>

Several other problems likewise deserve mention. The first is whether it makes any difference if the wife is prosecuting or defending. Most of the statutes provide for counsel fees in either case and Nebraska follows this pattern in a statute which provides "to carry on or defend".<sup>54</sup> Even without the statutes, however, most courts allow attorneys fees to the wife whether she prosecutes or defends.<sup>55</sup>

The second question is whether the wife will be granted counsel fees if she has sufficient independent means to conduct the suit. At times the wife has been entitled to counsel fees despite her possession of independent means.<sup>56</sup> However, generally the courts, in their discretion, will examine the financial situation of the parties and if the wife has sufficient means of her own to conduct the case will refuse the award.<sup>57</sup> One court held that the wife need not pauperize herself by selling her assets to make the cash outlay necessary for litigation and that she could not

<sup>51</sup> Ibid.

<sup>52</sup> *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269 (1953).

<sup>53</sup> Supra note 38.

<sup>54</sup> Neb. Rev. Stat. § 42-308 (Reissue 1952); District of Columbia § 16-410 (14-70); Idaho Code § 32-704 (1948).

<sup>55</sup> 4 A.L.R. 926.

<sup>56</sup> *Dietrich v. Dietrich*, Mo. 209 S.W.2d 540 (1948); *Friederich v. Friederich*, 6 N.J.Super. 102, 70 A.2d 177 (1950).

<sup>57</sup> *Stibbs v. Stibbs*, 231 P.2d 310 (1951); *Tilley v. Tilley*, 210 Ark. 350, 198 S.W.2d 168 (1946); *McFarlin v. McFarlin*, 75 So.2d 580 (1954).

be put to the election of spending her money for living expenses or the preparation of her case but that she is not entitled to the award when she has ample funds for both.<sup>58</sup> In *Stibbs v. Stibbs* the court held:

The purpose of the statute is not to excuse the wife from spending her own money, but to provide for the efficient presentation of her case when she is unable to do so from her own resources without hardship.<sup>59</sup>

A third question is whether the wife's misconduct will bar her award. The discretion over the allowance that most courts in the United States possess has been exercised to deny an allowance where the wife has been guilty of matrimonial misconduct.<sup>60</sup> Consequently, where the wife is charged with misconduct her application in many states must either deny it or show a valid defense.<sup>61</sup> The courts have denied counsel fees to the wife for acts such as her voluntary abandonment of her husband and adultery.<sup>62</sup> One case even talks of the court's "duty" to deny attorney's fees if the testimony establishes without dispute that the wife abandoned her husband without just cause.<sup>63</sup> In other cases the courts weigh the relative guilt of the husband and wife in determining whether the wife should be allowed fees.<sup>64</sup>

Does it make any difference if the wife is successful or unsuccessful in prosecuting or defending? Though few cases have been found discussing this question explicitly, all cases examined seem to assume that it make no difference providing that the wife is not guilty of severe matrimonial misconduct and there was some probability of success. And one recent case expressly so states.<sup>65</sup>

<sup>58</sup> *Stibbs v. Stibbs*, 231 P.2d 310 (1951).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Reece v. Reece*, 232 N.C. 95, 59 S.E.2d 363 (1950); *Acree v. Acree*, 40 S.E.2d (1946); *Tilley v. Tilley*, 210 Ark. 856, 198 S.W.2d 168 (1946), deals with voluntary abandonment by the wife. For cases which discuss adultery see *Abbe v. Abbe*, 68 So.2d 565 (1953); *Williams v. Williams*, 230 N.C. 660, 55 S.E.2d 195 (1949); *Simmons v. Simmons*, 135 S.E. 350 (1926).

<sup>61</sup> *Williams v. Williams*, 230 N.C. 660, 55 S.E.2d 195 (1949).

<sup>62</sup> *Supra* note 60.

<sup>63</sup> *Acree v. Acree*, 40 S.E.2d 54 (1946).

<sup>64</sup> *Eals v. Swan*, 221 La. 329, 59 So.2d 409 (1952).

<sup>65</sup> *Tanner v. Tanner*, 229 La. 399, 86 So.2d 80 (1956), held: According to those principles it makes no difference whether the wife, in bringing the suit and obligating the community assets for her attorney's

### 1. *Action for Divorce*

The Nebraska rule is well stated in *Brasch v. Brasch*: it is within the power of the court to order the husband to pay a certain sum of money to his wife during the pendency of a divorce suit for her expenses in prosecuting or defending the action.<sup>66</sup> *Brasch* further holds that the amount allowed is a matter within the trial court's discretion.<sup>67</sup> An interesting Nebraska case on a method used by the court to force a husband to pay counsel fees to his wife is *Reed v. Reed*.<sup>68</sup> Plaintiff had refused to comply with the court's order to pay his wife's attorneys fees to defend his divorce action. The court would not allow the husband to proceed with his action until he complied with the order. The Supreme Court of Nebraska rejected the husband's contention that such action was unconstitutional and held that it was entirely within the discretion of the district court to require the husband to pay the money allowed the wife to enable her to make a proper defense as a condition precedent to the right to further prosecute his action.<sup>69</sup>

The award is for the wife exclusively, a principle perhaps best illustrated by the recent case of *Sechser v. Sechser* in which a district court order requiring the wife who was the successful litigant in a divorce suit to pay \$750 to her husband's attorney was summarily reversed.<sup>70</sup>

### 2. *Action for Separate Maintenance or Bed and Board*

These actions require an additional introductory word. Some statutes provide for counsel fees in actions for "separate maintenance" or "bed and board",<sup>71</sup> where as others do not specify

fees, is successful or unsuccessful in prosecuting her demand. Similarly, it should be immaterial (and we hold that it is) whether she is successful or unsuccessful in defending the husband's action, particularly where a dissolution and settlement of the community is involved. See also: *Isserman v. Isserman*, 11 N.J. 106, 93 A.2d 571 (1952); *Brown v. Brown*, 24 N.J.Super. 198, 93 A.2d 616 (1952); *Sharp v. Sharp*, 230 Ala. 539, 161 So. 709 (1935).

<sup>66</sup> *Brasch v. Brasch*, 50 Neb. 73, 69 N.W. 392 (1896).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Reed v. Reed*, 70 Neb. 779, 98 N.W. 73 (1904).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Sechser v. Sechser*, 162 Neb. 486, 76 N.W.2d 412 (1956).

<sup>71</sup> *West's Ann. Calif. Code*, Civil Code § 137.5; *Minn. Stat. Ann.* § 518.14 (1958 Supp.); *Oregon Rev. Stat.* § 23.020.

directly the type of actions but refer to them as "similar proceedings".<sup>72</sup> Even without a statute, however, the award will be granted where the marriage status is shown.<sup>73</sup>

Nebraska's statutes provide for "separation" specifically.<sup>74</sup> In *Goings v. Goings*, the Nebraska Court held the wife who was allowed a divorce from bed and board should be allowed attorney's fees and the husband should pay such fees into court for the use of her attorneys.<sup>75</sup> In one of the most recent cases, for example, *Shoemaker v. Shoemaker*, the wife brought an action against her husband for divorce from bed and board and sought an attorneys fee allowance.<sup>76</sup> The wife prevailed and all costs were taxed to the husband including the wife's counsel fees.<sup>77</sup>

#### C. ACTIONS MODIFYING PREVIOUS DECREES OR AFFECTING THE ISSUE OF MARRIAGE

Discussed here are actions to modify a divorce or separation decree, custody, and child support actions. The modification might be an increase or decrease in alimony payments or an attempt by the wife to modify the original support amount or to change custody.

There is first of all the question of whether the wife who seeks to have her alimony increased is entitled to fees. While the cases examined uniformly denied them, all were cases where the wife was unsuccessful.<sup>78</sup> Presumably, however, a successful wife is entitled to counsel fees.

<sup>72</sup> Fla. Stat. § 65:17 (1957).

<sup>73</sup> *Dietrich v. Dietrich*, 41 Cal.2d 497, 261 P.2d 269 (1953).

<sup>74</sup> *Supra* note 48.

<sup>75</sup> *Goings v. Goings*, 90 Neb. 148, 133 N.W. 199 (1911).

<sup>76</sup> *Shoemaker v. Shoemaker*, 166 Neb. 164, 88 N.W.2d 221 (1958).

<sup>77</sup> *Ibid* Compare: *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953), an action brought by the wife in equity against her husband for suitable maintenance and support money, and for costs and attorney's fees. The trial court rendered a decree in her favor, however the Supreme Court reversed and remanded the case holding that in an action such as this one the parties must be separated or living apart from each other and since they were still living together there was no legal basis for the plaintiff's action, and an allowance of attorney's fees was erroneous and not authorized.

<sup>78</sup> *Baumgarten v. Baumgarten*, N.J., 151 Atl. 606 (1930); *Densten v. Densten*, 280 Mass. 48, 181 N.E. 714 (1932). There are statutes which specifically provide for counsel fees for such modifications, Tenn. Code. Ann., Domestic Relations § 36-820.

The cases are conflicting on the question of counsel fees incurred by the wife in modifications of custody and child support decrees when no statutes are involved.<sup>79</sup> Some jurisdictions refuse to make any award on the theory that the parties are strangers, and if children are involved they ignore the father's duty to the child.<sup>80</sup> Other courts hold they have inherent power apart from any statute to hold the father liable for all reasonable expenses, stressing that the parental duty of the father to his children continues although the marital relation is at an end and the welfare of the child is in litigation.<sup>81</sup> Still other courts award counsel fees without discussion of the question of power or on the ground that the award is entirely within the discretion of the court.<sup>82</sup>

The results are also conflicting where statutes are involved, though where counsel fees are allowed nothing is made to depend on whether the wife is successful or unsuccessful in obtaining a modification or defending, etc.<sup>83</sup> While most courts will allow counsel fees on the theory that "pendency" in a divorce action includes any modification of that action<sup>84</sup> a few courts hold to the contrary.<sup>85</sup> Where the statute provides for counsel fees to the wife "during pending action" or in order "to prosecute or defend" most courts have held these provisions to be broad enough to include cases where one party has petitioned for modification after the decree became final on the theory that it is merely a continuation of the original action.<sup>86</sup> Some statutes, however, clearly deny attorneys fees to the wife after the final

<sup>79</sup> *Robinson v. Robinson*, 112 Miss. 224, 72 So. 923 (1916). Compare *Carter v. Carter*, 156 Md. 500, 144 Atl. 490 (1928); 15 A.L.R.2d 1270; Also see *Walters v. Walters*, 180 M. 268, 177 So. 507 (1937).

<sup>80</sup> *Robinson v. Robinson*, 112 Miss. 224, 72 So. 923 (1916); 15 A.L.R.2d 1270.

<sup>81</sup> *Carter v. Carter*, 156 Md. 500, 144 Atl. 490 (1928); 15 A.L.R.2d 1270.

<sup>82</sup> *Walters v. Walters*, 180 M. 268, 177 So. 507 (1937); 15 A.L.R.2d 1270.

<sup>83</sup> Ind. Stat. Ann. § 3-1220 (1946).

<sup>84</sup> *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906).

<sup>85</sup> *Wilson v. Wilson*, 128 Mt. 511, 278 P.2d 219, overruling *McDonald v. McDonald*, 124 Mt. 26, 218 P.2d 929. The *Wilson* case held that § 21-137 of the Rev. Code of Montana does not authorize attorney's fees in an action to modify the custody provisions of a decree after the divorce decree becomes final.

<sup>86</sup> Mississippi Code Ann. § 2743 (1952), *Walters v. Walters*, 180 M. 268, 177 So. 507 (1937); Idaho Code § 32-704 (1948), *Gifford v. Gifford*, 50 Idaho 517, 297 Pac. 1100 (1931).

determination of the divorce decree and thus no allowance can be made for modification or setting aside a decree.<sup>87</sup>

### 1. *Alimony Modifications*

In *O'Brien v. O'Brien*, the Nebraska Supreme Court upheld an order requiring the husband to pay into court a reasonable sum to enable the wife to prosecute the action where she sought modification of the divorce decree alleged to have been obtained by fraud of the husband.<sup>88</sup> *Bowman v. Bowman* is also of interest.<sup>89</sup> This was a proceeding brought by a divorced husband for modification of a divorce decree. The trial court rendered judgment modifying the decree thus relieving the husband from any alimony obligation and the wife appealed. The judgment was reversed as no valid ground for modification was shown and the wife was given an allowance for counsel fees.<sup>90</sup> It is interesting to note that even in cases where the court affirmed a reduction of alimony and support, the wife has still been given an allowance for her attorneys.<sup>91</sup>

### 2. *Custody*

Some states leave no doubt as to the allowance in custody actions because the legislature has specifically provided for them.<sup>92</sup> But even where no specific mention is made in the statute, as in Nebraska, the courts often construe the statute to allow the awards on the theory that the custody action is a mere continuation of a former divorce or separation action.<sup>93</sup> The leading Nebraska case is *Chambers v. Chambers* in which the former wife petitioned for custody of her minor child, for alimony, and for attorney's fees.<sup>94</sup> In the previous divorce action the question of custody was not decided. The trial court found for the wife in the custody suit and allowed counsel fees. The father appealed alleging error because the mother had ceased to be his wife. The

<sup>87</sup> Rev. Codes of Montana § 21-137 (1947).

<sup>88</sup> *O'Brien v. O'Brien*, 19 Neb. 584, 27 N.W. 640 (1886).

<sup>89</sup> *Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554 (1956).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Schrader v. Schrader*, 148 Neb. 162, 26 N.W.2d 617 (1947).

<sup>92</sup> Colo. Rev. Stat. § 46-1-5 (1953); Rev. Stat. of Maine c. 166 § 59 (1954).

<sup>93</sup> Neb. Rev. Stat. § 42-308 (Reissue 1952), *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906).

<sup>94</sup> *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906).

judgment was affirmed however on the theory that the Nebraska statute authorizing an award of fees "during the pendency" of a divorce suit authorizes counsel fees until all aspects of the divorce are finally settled and determined.<sup>95</sup>

### 3. *Child Support*

The child support cases are similar to the custody cases and indeed both support and custody questions are typically involved in the same litigation. Nebraska law concerning counsel fees to the wife appears to be identical in the two cases.<sup>96</sup> In *Bize v. Bize*, for example, the wife successfully petitioned for increased child support and was also allowed counsel fees. The Supreme Court upheld the district court judgment and allowed additional counsel fees on appeal.<sup>97</sup> If the wife were unsuccessful in this action the determining factor would probably be the prima facie merit of her claim.<sup>98</sup>

### 4. *Attorney's fees in bastardy proceedings*

The cases in this area afford an interesting contrast to those previously discussed and which assume a broad equitable power over the award. The common law affords no remedy to compel a putative father to contribute to the support of his illegitimate offspring.<sup>99</sup> Therefore such proceedings must comply strictly with the statute governing them.<sup>100</sup> Statutory provisions stipulating merely that the putative father shall be liable for costs of the bastardy proceeding have been construed as not authorizing the charging of complainant's attorneys fees to the father since they are not regarded as part of the costs.<sup>101</sup> By California statute, the allowance may be made provided that a preliminary hearing is held finding the defendant's paternity. Without such finding the trial court is without jurisdiction to award the plaintiff's

<sup>95</sup> Ibid.

<sup>96</sup> *Bize v. Bize*, 154 Neb. 520, 48 N.W.2d 649 (1951); *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906). *Ruehle v. Ruehle*, 161 Neb. 691, 74 N.W.2d 689 (1956).

<sup>97</sup> *Bize v. Bize*, 154 Neb. 520, 48 N.W.2d 649 (1951).

<sup>98</sup> Supra note 24.

<sup>99</sup> *State ex rel. Beebe v. Cowley*, Ohio, 156 N.E. 214 (1927); *Cederquist v. Archuleta et al.* Colo., 253 P.2d 431 (1953). 40 A.L.R.2d 961.

<sup>100</sup> 40 A.L.R. 961.

<sup>101</sup> Ibid.



counsel any fees.<sup>102</sup> New York also has a statute specifically providing for counsel fees in such actions.<sup>103</sup> Nebraska has no statute specifically allowing counsel fees in bastardy actions and whether they are allowable has not yet been judicially determined.

#### D. ACTIONS FOR ENFORCEMENT

##### 1. *Enforcement*

Where the wife sues for unpaid alimony most states, including Nebraska, allow her a reasonable counsel fee.<sup>104</sup> In *Miller v. Miller*, for example, the court allowed the wife fees for her counsel's services in collecting past due alimony without court action.<sup>105</sup> The court held:

If a defendant in a divorce case fails to satisfy a judgment for alimony rendered therein in favor of the plaintiff according to its terms, and the plaintiff employs counsel to enforce it and this is accomplished with or without court proceedings, the court in which the judgment was rendered has discretionary power by virtue of sections 42-307 R.R.S. 1943, to require the defendant to pay to the plaintiff a reasonable sum as compensation for the services of her counsel in obtaining satisfaction of the judgment.<sup>106</sup>

The Court held that the divorce decree did not terminate the trial court's authority to allow attorney's fees. A divorce action is pending continuously and indefinitely until all matters involved therein or incidental thereto are satisfied and terminated by section 42-324.<sup>107</sup>

##### 2. *Contempt proceedings*

The contempt cases are merely a separate branch of the enforcement cases and are decided on the same basis. *Bowman v.*

<sup>102</sup> *Carbone v. Superior Ct.*, 18 Cal.2d 768, 117 P.2d 872 (1941); *Hall v. Hall*, 95 Cal.App.2d 541, 213 P.2d 58 (1950).

<sup>103</sup> McKinney's Consolidated Laws of the New York Ann. § 120 Col 14, Domestic Relations Law. "The parents of a child born out of wedlock are liable for the necessary support and education of the child. They are also liable for the child's funeral expenses. The father is liable to pay the expenses of the mother's confinement and recovery, and is also liable to pay such expenses, including counsel fees, in connection with her pregnancy as the court in its discretion may deem proper. . ."

<sup>104</sup> Tenn. Code Ann., Domestic Relations § 36-822 as amended in 1957 by Public Acts of Tenn.; Ark. Stat. § 34-1210 (1948).

<sup>105</sup> *Miller v. Miller*, 160 Neb. 766, 71 N.W.2d 478 (1955).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

*Bowman* involved a problem of enforcement in addition to the attempted modification of a decree.<sup>108</sup> The allowance was made for work done by the wife's attorney in filing a praecipe for execution, enforcement of collection of delinquent alimony payments, filing a praecipe for execution to collect delinquent installments, and showing that the husband was in contempt of court because of his default. In the case of *Lippincott v. Lippincott*, the former wife was called upon to defend a contempt proceeding brought against her in regard to real estate awarded her as alimony.<sup>109</sup> The marital dispute involved many other actions, but the contempt proceeding is the one of particular concern here. The court awarded attorney's fees to the wife for all actions she was forced to defend and prosecute. The attorney's fees were held to be taxable as costs upon application and therefore not to require the opening or modification of the judgment for divorce or alimony.<sup>110</sup>

#### E. ACTION TO ENJOIN

The issuance of an injunction by one state court to affect a marital proceeding in another state has been used only in recent years and then under strict conditions.<sup>111</sup> It is not surprising then that few cases discuss the question of counsel fees. Most of the cases found however allowed the fees without discussion.<sup>112</sup> In the cases where they were not mentioned, the petitioning spouse may not have made application for them.

The New Jersey Court of Errors and Appeals in 1942, affirmed the lower court's interlocutory order providing for counsel fees and restraining the defendant from proceeding with his action for a divorce against the petitioner in Pennsylvania.<sup>113</sup> Two years later, the case of *Peff v. Peff* the New Jersey court again allowed counsel fees of \$1,000 to the wife in an injunction to restrain her husband from instituting suit in another state for dissolution of the marriage because of the wife's insanity.<sup>114</sup>

<sup>108</sup> *Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554 (1956).

<sup>109</sup> *Lippincott v. Lippincott*, 152 Neb. 374, 41 N.W.2d 232 (1950).

<sup>110</sup> *Ibid.*

<sup>111</sup> 54 A.L.R.2d 1244.

<sup>112</sup> *Peff v. Peff*, 134 N.J.Eq. 506, 36 A.2d 203 (1944); *Glacken v. Glacken*, 132 N.J.Eq. 304, 28 A.2d 213 (1942).

<sup>113</sup> *Glacken v. Glacken*, 132 N.J.Eq. 304, 28 A.2d 213 (1942).

<sup>114</sup> *Peff v. Peff*, 134 N.J.Eq. 506, 36 A.2d 203 (1944).

The Supreme Court of New York also allowed counsel fees in an injunction proceeding in the case of *Maloney v. Maloney* where the wife brought suit against her husband for separate maintenance.<sup>115</sup> The wife successfully prayed for an injunction restraining her husband from procuring a Nevada divorce and was also awarded counsel fees and disbursements of \$400. This Court dealt with the problem specifically:

Husbands who seek to flout the laws of our State and their marital status here existing, resorting to foreign jurisdictions in pursuit of such intention, should expect to pay adequately, by way of counsel fees, in the litigation in this State which follows and is made necessary by such action.<sup>116</sup>

Research failed to reveal any Nebraska cases dealing with counsel fees in injunctions against out-of-state divorces. Since Nebraska has been so liberal to the wife in the other areas, however, it is probable that the Court would allow counsel fees in these cases also.<sup>117</sup>

#### IV. ANALYSIS OF THE CRITICISM LEVIED AGAINST COUNSEL FEES

The Royal Commission Report on Marriage and Divorce was a study of the legal-marital problems of England and Scotland and recommendations were made in reference to counsel fees.<sup>118</sup> Before analyzing the criticisms made, it would be well to examine the English and Scottish method of handling counsel fee problems to see if there are any substantial differences between these countries and the United States which might make the recommendations inapplicable to the United States.

In England, the wife has been, and to a lessening degree still is, a privileged suitor against her husband. Whether petitioning or defending, she may apply for security for her costs of the suit and in appropriate circumstances the court will order the husband to pay a sum of money into court, or give security, in respect of part or the whole of her estimated costs. If she is unsuccessful at the trial she will seldom be ordered to pay her husband's costs and she will often be awarded her own costs up

<sup>115</sup> *Maloney v. Maloney*, 51 N.Y.S.2d 4 (1944).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Supra* note 49.

<sup>118</sup> Royal Commission on Marriage and Divorce, Report 1951-1955, cmd. 9678 (1956).

to, or sometimes beyond, the sum paid to the court as security.<sup>119</sup> In 1950 a new factor was introduced, Legal Aid, whereby a wife with little or no independent means was assured of obtaining a lawyer in matrimonial actions.<sup>120</sup> Her attorney is reimbursed for eighty-five per cent of his costs out of the legal aid fund, whether the wife is successful or not. However, the Act expressly retains the rights and liabilities of the parties. This entitles the legal aid fund to the protection previously given the wife by an order against the husband for security for the wife's costs.<sup>121</sup>

In Scotland, as in England, a wife is a privileged suitor against her husband in matrimonial actions to the extent that if she has no separate means her husband is usually required to pay her expenses, whatever the result of the action, and will not be given his expenses against her if she is unsuccessful.<sup>122</sup>

The original reasons for favoring the wife in marital actions were the same in all three countries. The Commission's Report takes the position that the reason for the rule has ceased to exist because wives presently have the means to obtain adequate counsel. In the first place, wives have for a long time been free from any disability with regard to ownership of property and may well have means sufficient to pay counsel fees.<sup>123</sup> The Commission does concede, however, that there are many married women who are financially dependent on their husbands, either wholly or partly. But the Commission deals with this by saying that Legal Aid now insures the wife professional counsel.<sup>124</sup> Here is one of the major differences between the United States and these countries because the United States has no such plan for the wife as such. Of course, it has Legal Aid Bureaus where the wife could obtain legal assistance if she has need, but even so it is not the same as being able to choose her own attorney or being able to meet the costs of the action. In this respect there could still be a great deal of inequality.

The Report recommends that the court should continue to have wide discretion in determining the liability for costs in matrimonial proceedings. In the exercise of this discretion the Commission contemplated that as a general rule the husband

<sup>119</sup> Ibid, § 438.

<sup>120</sup> Supra note 118, § 444.

<sup>121</sup> Ibid.

<sup>122</sup> Supra note 118, § 448.

<sup>123</sup> Supra note 118, § 456.

<sup>124</sup> Ibid.

would not be made liable for the costs of an unsuccessful wife nor would it be necessary for him to prove that she has sufficient means before he can obtain an order for his costs against her.<sup>125</sup> In other words, the husband and wife would be treated on exactly the same footing.<sup>126</sup>

The argument that women generally are in a better position is as true in America as it is in England or Scotland. We also have Married Women's Property Acts which give the wife the right to her own separate property and place her in a better position to provide for her counsel in marital actions. However, the recommendations would be inequitable if applied in the United States because unlike England's welfare system which provides a Legal Aid system, the United States would have no adequate substitute to offer the wife who is unable to raise the money for an attorney. The English plan assures the wife's counsel at least eighty-five per cent of his fee. While it may be true that many women today have funds, it is also true, as conceded by the Royal Commission's Report, that there are still many women who are dependent on their husbands wholly or partly.

The most equitable answer lies in the present system. It is not without its weaknesses, however, and some states have sought to cure them by statutes.<sup>127</sup> As an example, the wife should be denied counsel fees if she has adequate means of her own to conduct the case. The allowance was created for the purpose of equalizing the parties, not to penalize the husband.

The general pattern of the cases examined illustrated first, that the court determines if *prima facie* a marriage exists. This was the main concern of the annulment and nullity actions. If the marriage was not shown, generally the award would be denied. But even this rule has been tempered at times when the court felt the good faith of the parties warranted an allowance. If the wife seeks to declare the marriage invalid she will be denied the award because she is seeking to repudiate the relation which is the very basis of the right. When the marriage is established as in the cases of divorce and separation, the court is usually willing to grant the award unless the wife has been guilty of marital misconduct. Perhaps the courts should place greater stress on this last condition because the husband should not be

<sup>125</sup> *Supra* note 118, § 460.

<sup>126</sup> *Supra* note 118, § 458.

<sup>127</sup> Ann. Code of Maryland Art. 16 § 5 (1957); *Waters v. Waters* 191 Md. 436, 62 A.2d 250 (1948).

forced to pay the wife's counsel when her own conduct has made the suit necessary. When the suit concerns only the husband and wife the courts should take a critical attitude toward the position of both parties, but a more liberal view should be taken in allowing fees in cases involving children. The courts take divergent views in this area. One theory maintains the ex-wife should not be given the fees because her former husband is then a stranger. However, the better view followed in Nebraska and many other states stresses the welfare of the child and holds that the parental duty of the father to his children continues despite any change in the marital relationship. One area where the courts are very reluctant to award counsel fees is in bastardy proceedings. Certainly counsel fees should be allowed to the mother when she successfully shows the defendant's paternity.

Throughout one theme has been dominant: "discretion of the court".<sup>128</sup> It would seem that what most of the courts have attempted is to make the husband give the wife her part of the marriage funds so that she could protect her own interests in either prosecuting or defending marital actions. In the case of *Chestnut v. Chestnut*, the judge was writing about alimony but his remarks would also apply to counsel fees.<sup>129</sup> He summed up the theory very well:

It is awarded on the theory that marriage is a partnership to which the wife has contributed and when she withdraws from it she is entitled to reimbursement that she may not become a public charge.<sup>130</sup>

This theory that each partner should be allowed a portion of the marriage assets to protect his interests is in agreement with statutes like the one in Washington which allow attorney's fees and costs to either party upon a showing of need.<sup>131</sup> The underlying theory is that a party should not be deprived of his or her day in court by reason of poverty.<sup>132</sup>

The advantage of our system is that the decision to award or to deny counsel fees is left with the court which hears the case and can determine from all the circumstances whether an allowance should be made.

*Arlyss Welch Spence '59*

<sup>128</sup> Supra note 3.

<sup>129</sup> *Chesnut v. Chesnut*, 33 So.2d 730 (1948).

<sup>130</sup> Id., at p. 731.

<sup>131</sup> Rev. Code of Washington § 26.08.190 (Rem. Supp. 1949 § 997-19); *Gibson v. Von Olnhausen*, 263 P.2d 954 (1953).

<sup>132</sup> *Gibson v. Von Olnhausen*, 263 P.2d 954 (1953).