Nebraska Law Review

Volume 38 | Issue 4 Article 5

1959

Res Judicata in the Divorce Courts as Affects the Modification of Alimony Awards

Doris M. Yendes
Ross and Wells, Kansas City, Kansas

RES JUDICATA IN THE DIVORCE COURTS AS AFFECTS THE MODIFICATION OF ALIMONY AWARDS

Doris M. Yendes *

I. DIVORCE AND ALIMONY

The statistics tell the dramatic story of the disappearing permanence of American marriages. They tend to make a mockery of the sacramental phrases which are traditionally used to tie the bonds of matrimony. In the United States the number of divorces per 100 marriages occurring in the same year was estimated in 1867 to be 2.8; in 1890, 5.8; in 1910, 8.8; in 1930, 17.4; in 1949, 25.1; and in 1950, 23.1.[1]

Each year in the United States 400,000 divorces and annulments are granted.[2] There are about 7,000,000 divorced spouses in our country at any one time. On the basis of these present trends, almost one out of every three marriages entered into in this country in the past ten years will end in divorce.

Out of this rising amount of divorce litigation there also arises the problem of alimony. It must be agreed that few subjects in the law are capable of kindling so much emotion as that of alimony.

In order to understand this established pattern in which men are to provide for women and women are to be provided for, we must go back to the common law. For it is the common law which created the unity between husband and wife and made the husband the dominant partner in that unity. A married man under

* B.A., 1953, University of Kansas City; LL.B., 1956; LL.M., 1957; co-author with Judge Harry G. Miller, Jr. of "Kansas Civil Procedure" casebook, 1957; Teaching Associate, University of Nebraska College of Law, 1958; member of Kansas, Nebraska and Missouri Bar Associations; presently associated with Ross and Wells, Kansas City, Kansas.

1 Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 Vand. L. Rev. 633 (1956). See generally Cahen, Statistical Analysis of American Divorce, p. 27; Ireland and de Gelindey, Divorce in the Americas, p. 7 (1947); Oglurn, The Family and Its Functions, 1 Recent Social Trends 13 (1933): "One marriage in six in the United States results in divorce."

2 Pilpel and Zavin, Your Marriage and The Law, p. 297 (1952).

the common law held virtually complete control and management of his wife's real and personal property. If a husband had solid privileges in his wife's property and estate, he also had corresponding obligations. The wife was the housekeeper, rendering her services in childbearing and in home duties, without compensation. Obviously, it must fall to the husband to support the family. It was in this era of total wife dependency and nonenity at law that the equitable rule of alimony sprang up.

The courts generally fail to recognize the tremendous change that has taken place in the social and economic status of women in the United States. Too often it still seems evident that the alimony award is based on the Victorian attitude toward women.[3] It has been only recently that judges, in determining the alimony award, have taken into consideration that women compete on an equal basis with men for economic opportunities. It would appear that it would be far better for a woman's morale, her self-respect, and her personal and social well-being, to be financially dependent only upon her own efforts.

This paper represents an attempt to appraise the aspects of one small section of the alimony law that allows the modification of alimony awards. Two issues are to be considered. They are: what factors are taken into consideration by the courts when making the original alimony awards and what is the effect of res judicata as to the original award, or when may the alimony award be modified up or down. Preliminarily, as a necessary backdrop to a discussion of res judicata, it is necessary to discuss the factors which are originally taken into consideration when the courts grant the original decree of alimony.

A. Considerations When Awarding Alimony

As was stated previously, the basic purpose of alimony is founded upon the natural and legal duty of the husband to support his wife. Alimony is not intended as a penalty against him, nor as a reward for her virtue.[4] Alimony awards are supposed to be

[3] Borchers v. Borchers, 254 Wisc. 302, 36 N.W.2d 79 (1949); Christiano v. Christiano, 131 Conn. 589, 41 A.2d 779 (1945); Cary v. Cary, 112 Conn. 256, 152 A. 302 (1930); Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905); Romaine v. Chauncey, 129 N.Y. 566, 29 N.E. 826, 14 L.R.A. 712 (1892).

[4] Noel v. Noel, 206 Okl. 16, 240 P.2d 739 (1952); Cecil v. Cecil, 179 Va. 274, 19 S.E.2d 64 (1942); Hulcher v. Hulcher, 177 Va. 12, 12 S.E.2d 767 (1941); Haskell v. Haskell, 119 Minn. 484, 138 N.W. 787 (1912).

based on the husband's ability to pay and on the wife's needs. There are a number of elements properly cognizable in determining the right to and the amount of alimony.

1. *Ability of Husband to Pay*

The financial position of the husband, his ability to pay an award, is perhaps the most vital factor in determining the amount of alimony. This ability of the husband to pay will be determined by a consideration of all his economic resources and potential. The principle was stated by the New Jersey Court as follows in *Hess v. Hess:*[5]

> The rule is well settled . . . that while the husband's current income is the primary fund looked to for his wife's support where they are separated, nevertheless, the husband's property and capital assets and his capacity to earn the support awarded by diligent attention to business—his earning capacity or prospective earnings —are all proper elements for the court's consideration in fixing the amount of the award.

The amount of alimony which is set must be within the capacity of the husband to pay; otherwise an award of alimony becomes a futile gesture. Courts therefore recognize that a lesser amount awarded which is collectible, is a sounder award than a larger one of doubtful collectibility.

A good example of this reasoning is found in *Commonwealth ex rel Layarou v. Layarou.*[6] In this case at the time of the divorce action the husband had just graduated from medical school and was to begin his internship at a hospital where he would earn $75 a month. The wife was a school teacher earning $2800 a year. After the hearing the lower court entered an order for alimony of $100 per month. On appeal the Pennsylvania Superior Court reduced the alimony to $15 a month stating that when the husband has completed his training and becomes a qualified physician his financial situation of course will be greatly improved and this will enure to the benefit of his wife. Until that time, however, he has only limited resources and his wife must bear this hardship which she would have borne had they not separated.

It must be remembered, however, that the ability of the husband to pay is just one of the considerations and that the amount of alimony allowed is affected by other considerations.

[5] 134 N.J.Eq. 360, 35 A.2d 677 (1944).

[6] 180 Pa. Super. 342, 119 A.2d 605 (1956).

2. *Needs of the Wife*

Permanent alimony,[7] the courts believe, must necessarily be measured by the needs of the wife. A wife who is young, vigorous and healthy, who has worked in the past and who obviously can work in the future, should not be granted the same alimony as a wife who is considerably older, in poor health, and unable to work.

Unfortunately, courts frequently make alimony awards to women who are well able to take care of themselves, because they feel that the primary obligation to support an ex-wife falls upon the husband.[8] Wives may, therefore, be awarded alimony who by no stretch of the imagination can be said to be in necessitous circumstances.

In *Kittle v. Kittle*,[9] it was held that the husband is bound to support his wife, according to his financial ability, out of his income, which is the proper basis of any decree against him, and the wife's capacity to earn a living, or her ownership of a separate estate cannot be properly taken into consideration.

There are, fortunately, some courts that do take into account the wife's earnings and separate estate or income when setting the amount to be provided by an order for alimony.[10]

3. *Duration of Marriage*

The duration of the marriage is another important element which courts take into account in awarding alimony. The feeling seems to be the longer a woman has lived with a man and per-

[7] Permanent alimony is defined by the Florida Court: "Permanent alimony is not a sum of money or specific portion of the husband's estate given absolutely to the wife but is a continuous allotment of a sum payable at regular periods for her support from year to year." Welsh v. Welsh, 160 Fla. 380, 35 So.2d 6 (1948).

[8] Waldrop v. Waldrop, 222 Ala. 625, 134 So. 1 (1931) the court stated: "We would make it plain that a husband in Alabama cannot cast off his wife and relieve himself of the duty to support because she is able to take care of herself by her work."

[9] 86 W. Va. 46, 102 S.E. 799 (1920). See also: Bamboschek v. Bamboschek, 150 Misc. 885, 270 N.Y.S. 741, Mod. 271 N.Y.S. 1097 (1934); Williams v. Williams, 146 Tenn. 38, 236 S.W. 938 (1922).

[10] Kaufman v. Kaufman, 211 Fla.2d 779, 63 So.2d 196 (1953); Spalding v. Spalding, 280 App. Div. 836, 114 N.Y.S.2d 19 (1952); Wilkins v. Wilkins, 84 Neb. 206, 120 N.W. 907 (1909).

formed the functions which one normally expects from a wife, the greater is her claim against him.[11]

4. *Guilt of Parties*

The conduct of the parties is more than a factor which is taken into account by the courts in setting the amount of alimony to award. Success in the divorce action is almost an indispensable prerequisite to alimony in most states. This concept of the guilty party or of rewarding the innocent and punishing the guilty is derived from the ecclesiastical court. The theory as applied to the wife by some courts seems to be to the effect that there can be no award of alimony to a guilty wife. There seems to be a failure to realize that a guilty wife may starve just as easily as an innocent one.

Many courts share the view of the Montana Supreme Court as expressed in *Grush v. Grush*[12] when it stated:

> Where the divorce is granted for an offense of the wife, the court is without authority to make an award to her of permanent alimony. An attempted award under such circumstances is without jurisdiction and void, subject to direct or collateral attack at any time and is unaffected by the consent of the parties.

While most courts subscribe to the view that the allowance or the amount of alimony should not be used as a punitive measure or as a penalty against the husband when the divorce is decreed against him, there can be little doubt that the nature of the husband's misconduct as compared with that of the wife, influences the amount of alimony that is granted.

This was bluntly expressed by the New Jersey Court in *Weigand v. Weigand*[13] which stated that, while:

> The court can give nothing by way of punishment, . . . where the conduct of the wife has been blameless and that of the husband has been almost atrociously cruel and grossly indecent and his means are ample, it ought in awarding alimony to exercise a just liberality.

[11] Collins v. Collins, 182 Okl. 246, 77 P.2d 74 (1938).

[12] 90 Mont. 381, 386, 3 P.2d 402, 403 (1931); See also: Leach v. Leach, 261 Wis. 350, 52 N.W.2d 896 (1952); Ex parte McKenna, 116 Cal. App. 232, 2 P.2d 429 (1931); Hulman v. Hulman, 155 Ky. 493, 159 S.W. 937 (1931); Friend v. Friend, 65 Wis. 412, 27 N.W. 34 (1886).

[13] 41 N.J.Eq. 202, 210, 3 A. 699, 704 (1886).

B. JUDICIAL DISCRETION

An examination of the law and practice relating to alimony indicates that judicial discretion plays a very important role in the making of alimony awards and their amounts. The question of if and how much alimony will be awarded in any given case is difficult to answer. In the majority of the jurisdictions this problem is left to the discretion of the judge.

There are few legal criteria to guide the exercise of this discretion. Terms used in alimony statutes such as "just", "reasonable" and "as justice requires" are notorious for their flexibility and for their vagueness.

There is also the fact that judgments may vary with the personality of the judge. There are no doubt judges who are generous with another man's money and property, just as there are no doubt judges who regard alimony with disfavor.

Some states in an attempt to overcome this vagueness and the influence of the personality of the judges entering into the amount of the awards have set maximum limits on the amount which a court can decree. For example, in Minnesota,[14] and Maine,[15] a wife cannot be awarded more than one-third of her husband's income. In Georgia[16] the amount to be awarded the wife is fixed by a jury. If the jury specifies it is to be permanent alimony, then it is not subject to later modification.

II. ALIMONY AWARD SUBSEQUENT TO DIVORCE DECREE

It is the general rule that when a decree of divorce has been entered and becomes final with no mention of alimony, and in the absence of a statute authorizing the allowance of alimony subsequent to the entry of a decree, the court is without power, in the divorce proceeding or proceedings supplementary thereto, to modify, by inserting an award for alimony, no matter how drastic a change of circumstances occurred after the entry of the decree. Especially is this true where alimony was in issue on the hearing in the divorce suit and then omitted from the decree without fraud or mistake and the decree was rendered on personal service or its equivalent.

[14] Minn. Stat. Ann. § 518.22 (1945).

[15] Me. Rev. Stat. c. 166, § 63 (1954).

[16] Ga. Code Ann. §§ 30-207, 30-209 (1952).

The granting of alimony subsequent to a divorce decree is generally refused for one of the following reasons. First, that the court has no jurisdiction to award alimony since the marital status on which the power to award alimony depends no longer exists. This was stated by the Iowa Supreme Court[17] as follows:

> The general ground upon which these holdings are based was that alimony is an incident of the marriage relation; that it may be allowed as a part of the decree of divorce; that the severance of the marriage relation by absolute decree without alimony, terminates the right to alimony....

The Nebraska Supreme Court in *Eldred v. Eldred*[18] to the same effect said:

> The marriage relation that existed between the present plaintiff and defendant has been dissolved. . . . They are no longer husband and wife. The duty and obligation that once existed to support and maintain the plaintiff does not now rest upon the defendant. He is no longer her husband, and no legal obligation is imposed upon him to provide for her maintenance; hence there exists no right to alimony.

Second, the final decree adjudicates the entire matter; and a decree silent on the subject of alimony is res judicata on that question. The wife is held to have waived the legal right to ask that alimony be granted, either expressly or by failing to ask for the same in the petition for divorce.[19] A party's opportunity to raise an issue is often treated as the equivalent to raising the issue.

The Ohio Appeals Court in *Whitaker v. Whitaker*[20] said:

> When both parties have had their day in court in the divorce proceedings and permit the marriage contract to be severed without at the same time having their support and maintenance rights growing out of the same relation adjusted, it is held that they have conclusively waived and withdrawn the consideration of that question from the court. The courts will leave the parties where they have placed themselves.

[17] McCoy v. McCoy, 191 Iowa 973, 975, 183 N.W. 377, 378 (1921).

[18] 62 Neb. 613, 615, 87 N.W. 340, 341 (1901). See generally: Staub v. Staub, 170 Md. 202, 183 A. 605 (1936); Heckert v. Heckert, 57 Ohio App. 421, 14 N.E.2d 428 (1936); Watson v. Watson, 168 Ga. 530, 148 S.E. 386 (1929); Hughes v. Hughes, 211 Ky. 799, 278 S.W. 121 (1925); Spain v. Spain, 177 Iowa 249, 158 N.W. 529 (1916).

[19] Lee v. Palmer, 75 Ga. App. 752, 44 S.E.2d 516 (1947).

[20] 52 Ohio App. 223, 3 N.E.2d 667 (1936). See also: Allen v. Baker, 188 Ga. 696, 4 S.E.2d 642 (1939); Doeksen v. Doeksen, 202 Iowa 489, 210 N.W. 545 (1926); Cameron v. Cameron, 31 S.D. 335, 140 N.W. 700 (1913); Weidman v. Weidman, 57 Ohio St. 101, 48 N.E. 506 (1897).

Some wives have tried to get an award of alimony subsequent to the decree of divorce under the statutes in various states which provides for the modification of alimony decrees. The Michigan Supreme Court answered this problem in *Mack v. Mack*[21] as follows:

> Under a statute governing amendments of decree for alimony, where original decree did not provide for alimony to wife or reserve right to make such provision, the court could not modify decree so as to award wife alimony.

To the same effect it was stated in *Plummer v. Plummer*[22] by the Maine Supreme Court as follows:

> Furthermore statutes which authorize modifications of decrees as to alimony or support do not apply where no alimony is granted in the decree.

There are exceptions to the general rules as stated above, as where a statute expressly authorizes an application for alimony after the final decree of divorce, or where the court in its divorce decree reserved for future adjudication the question of the right of the wife to alimony. For example in *Farris v. Kiriayis*[23] the Illinois Appeals Court said:

> Where final decree of divorce contained provision reserving question of alimony . . . 'until further order of the court', the reservation prevented the trial court's jurisdiction from being exhausted upon entry of the decree, and hence the trial court had jurisdiction to award alimony.

This case may be compared with the case of *O'Brien v. O'Brien*[24] where the court did not reserve the question of alimony. The California Supreme Court held:

> Where a final decree was entered without mentioning alimony . . . or reserving jurisdiction . . . the court had no authority to award alimony . . . since it lost jurisdiction of both the parties and the subject-matter.

Such a reservation is the only way by which a wife may make it possible for the court to grant her alimony if and when there

[21] 283 Mich. 365, 278 N.W. 99 (1938).

[22] 137 Me. 39, 41, 14 A.2d 705, 706 (1940). See also: McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 127 (1935); Bacigalupi v. Bacigalupi, 75 Cal. App. 654, 238 P. 93 (1925); Kelley v. Kelley, 317 Ill. 104, 147 N.E. 659 (1925); Bassett v. Bassett, 99 Wis. 344, 74 N.W. 780, 67 Am. St. Rep. 863 (1898).

[23] 329 Ill. App. 225, 67 N.E.2d 701 (1946). Doerle v. Doerle, 96 Misc. 72, 159 N.Y.S. 637 (1916).

[24] 130 Cal. 409, 62 P. 598 (1900).

is a change in the husband's financial condition where the husband at the time of the entry of the divorce decree, is without means to support his wife.

As stated above some jurisdictions have changed by statute the general rule that a divorce decree rendered upon personal service or its equivalent and silent on the question of alimony precludes a later award of alimony. Four states[25] expressly provide for an award of alimony after decree. In nearly all the other states the language is such that it seems to refer to the time of the decree only.

III. MODIFICATION OF ALIMONY AWARDS

Courts invested with jurisdiction and power to grant divorce and to award alimony payable periodically or in installments are usually deemed to have power to change or modify the amount to be currently paid whenever the circumstances of the parties have materially changed. Power to make such changes is expressly conferred by statute in many of the states. Where power is so conferred, it is not necessary that it be reserved by the court in making the award. But even in the absence of statutes granting such power, it is recognized that the court can reserve jurisdiction over its awards, and that such reservation is effective to assure the court's continued control. Such a reservation can effectively be made even though the decree provisions are in accordance with an agreement of the parties.

The Washington Supreme Court in the case of *Ruge v. Ruge*[26] after a careful analysis of the power of the court to modify the amount of alimony concluded that the cases seem naturally to arrange themselves into six well-defined and distinct classes, each class being based upon sound fundamental principles and the rule pertaining to it being the result of clear logic. They are as follows:

(1) Decree for separate maintenance. The continued existence of the status of marriage upon which the power to grant a decree of alimony depends carried with it the continuing power to modify or alter the allowance of alimony to meet new conditions.

(2) Alimony pendente lite or temporary alimony. The court has the same power to modify its orders with respect to temporary

[25] Ill. Ann. Stat. c. 40, § 19 (1956); Mass. Laws Ann. c. 208; § 34 (1952); N.J. Stat. Ann. tit. 2A:34-23 (1952); R.I. Gen Laws § 15-5-6 (1956).

[26] 97 Wash. 51, 165 P. 1063 (1917).

alimony that it has to make any other appropriate order in a case pending in court.

(3) Where there are minor children. The courts of all the states are as one upon the proposition that, so far as the decree of alimony is for the benefit of the minor children of the spouses, the power to modify the decree continues.

(4) Where the court by express provision in its decree reserves to itself either all or a portion of its power to provide alimony for the wife. In such cases the decree is not final and conclusive as a matter of law.

(5) Where by statute in the particular jurisdiction power is expressly conferred upon the court to from time to time, on petition of either party, revise or alter its judgment or decree respecting the amount of alimony.

(6) In all other cases no modification.

The court stated further; "When the question of alimony is in fact actually litigated and finally determined in the divorce action, a judgment or degree in the action operates as res judicata upon the question of alimony."

A. Statutes Governing

There are thirty-four[27] states with statutes giving the courts authority to alter decrees for alimony after the initial award. In nearly all of these states revision of the award is usually left within the discretion of the court. In these states where statutes make revision of alimony discretionary with the court, specific circumstances are rarely mentioned. Here again arises the prob-

[27] Ariz. Rev. Stat. Ann. § 25-321 (1956); Ark. Stat. Ann. § 34-1213 (1947); Cal. Civ. Code § 139 (1957); Conn. Gen. Stat. § 7335 (1949); Fla. Stat. Ann. § 65-15 (1943); Idaho Code tit. 32-706 (1947); Ill. Stat. Ann. c. 40, § 19 (1956); Iowa Code Ann. § 598.14 (1946); Me. Rev. Stat. c. 166, § 63 (1954); Mass. Laws Ann. c. 208, § 37 (1952); Mich. Stat. Ann. § 25.106 (1957); Minn. Stat. Ann. § 518.23 (1945); Miss. Code § 2743 (1942); Mo. Stat. Ann. § 452.070 (1949); Mont. Rev. Code tit. 21-139 (1947); Neb. Rev. Stat. § 42-324 (1943); Nev. Rev. Stat. § 125.150 (1955); N. Hamp. Rev. Stat. Ann. c. 458.19 (1955); N.J. Stat. Ann. tit. 2A:34-23 (1952); N. Mex. Stat. c. 22-7-6 (1953); N.Y. Civ Prac. Act § 1155 (1955); N. Dak. Rev. Code c. 14-0524 (1943); Or. Rev. Stat. c. 107.130 (1957); R.I. Gen. Laws tit. 15-5-6 (1956); S. Car. Code of Laws § 20-116 (1952); S. Dak. Code § 14-0725 (1939); Tenn. Code Ann. § 36-820 (1956); Utah Code Ann. § 30-3-5 (1953); Ver. Stat. § 3249 (1947); Va. Code § 20-109 (1950); Wash. Rev. Code § 26.08, 110 (1952); W. Va. Code § 4715 (1955); Wis. Stat. Ann. c. 247.32 (1957); Wyo. Comp. Stat. § 3-5922 (1945).

lem of the proper exercise of judicial discretion which was discussed previously in this article.

B. Considerations When Modifying an Alimony Decree

As discussed previously in this paper, there are a number of elements properly cognizable in determining the right to and the amount of alimony in the original divorce decree. They are again, briefly, such things as ages of the parties, their condition of health, the property and income of the husband, separate property and income of the wife, if any, the station in life of the parties as they have heretofore lived and the duration of the marriage. In the ideal situation, on an application by either party for the modification of a decree for alimony, the judge should again take into consideration the above elements and then determine from the evidence if there has been a substantial and material change in any of them to justify either an increase or decrease, as the case may be, in the original alimony award.

The original decree fixing alimony is an adjudication of the courts as to what is right and proper at the time it is entered. To obtain any change in it, a change in the circumstances of the parties must be shown making a continuance of the original provision improper and unfair. If there is such a change of circumstances whether by reason of reduced ability of the husband to pay or increased needs of the ex-wife, the court has the power to change the amount to be paid. This basic formula was stated in *McLead v. McLead*[28] in this way:

> The amount of permanent alimony to be awarded depends upon the necessity of the wife in her station of life and the ability of the husband to pay. To increase the amount of alimony already awarded a wife there must appear a necessity for the increased allowance, and the ability of the husband to pay such an increase.

If there is no change in the situation of the parties, the court has no power to act.[29]

The required changed conditions or circumstances to allow modification must be substantial and material.[30]

[28] 131 N.J.Eq. 44, 23 A.2d 545, 547 (1942).

[29] Felton v. Felton, 326 Ill. App. 444, 62 N.E.2d 39 (1945); Smith v. Smith, 299 Ky. 715, 187 S.W.2d 271 (1945); Pledger v. Pledger, 199 Ark. 604, 135 S.W.2d 851 (1940).

[30] Quist v. Quist, 207 Minn. 257, 290 N.W. 561 (1940). The court said: "To warrant a modification of an allowance fixed by a divorce decree there must be proof of such substantial change in the situation of the parties from that in which they were when the decree was rendered as to justify a modification."

The courts have considerable range of power and discretion and should exercise it cautiously. In *Vert v. Vert*[31] it was said:

> To justify the court in modifying its former judgment, it should undoubtedly be satisfied that it is passing upon a different state of facts than those already adjudicated upon; but what degree of change is essential to constitute a different state of facts must in general be addressed to the judicial discretion and judgment of the trial court, the inquiry being whether sufficient cause has intervened since its former judgment to authorize or require the court applying equitable rules and principles to change the allowance.

The power of the court to change the decree is not power to grant a new trial or to retry the issues in the original hearing, but only to adapt the decree to some distinct and definite change in the circumstances or conditions of the parties.[32] The Nebraska Supreme Court[33] had this to say: ". . . an application for a change in the amount of alimony, after divorce, must be founded upon new facts which have occurred since the decree was entered, and, that in the absence of such facts, the matter is deemed to be res adjudicata between the parties."

There seems to be no time limitation operating against a party who seeks revision of an alimony decree and no restriction on the number of times a petition may be brought.[34] One thing the courts are wary of, however, is attempts by parties to use a motion to modify as an appeal.[35] In this manner the parties are attempting to appeal from the part of the decree with which they are dissatisfied without complying with the statutes and rules governing appeals.

[31] 3 S.D. 619, 622, 54 N.W. 655 (1893). In Hagen v. Hagen, 212 Minn. 488, 4 N.W.2d 100 (1942) the Minnesota Court had this to say about the judicial discretion: "This authority is to be exercised cautiously and only upon new facts occuring after the judgment, or facts existing before the judgment of which a party was excusably ignorant at the time when judgment was rendered. . . ."

[32] Nash v. Nash, 77 Ohio App. 156, 65 N.E.2d 728 (1945); Ellenstein v. Ellenstein, 210 Minn. 265, 297 N.W. 848 (1941); Hill v. Hill, 266 Mich. 402, 254 N.W. 145 (1934).

[33] Chambers v. Chambers, 75 Neb. 850, 106 N.W. 993 (1906).

[34] McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931, 33 L.R.A., N.S., 1074 (1911). See also: Desverine, Grounds for the Modification of Alimony Awards, 6 Law and Contemp. Prob. 236 (1939).

[35] Hein v. Hein, 127 Conn. 503, 18 A.2d 374 (1941); Glad v. Glad, 51 S.D. 574, 215 N.W. 931 (1927).

1. *Station in Life Rule*

Many courts in awarding or in modifying alimony decrees make some reference to the duty of the husband to support and maintain his former wife in conformity with his condition and station in life. The station in life rule seems to be equally an important factor to be considered when modifying an alimony award as when granting the original award. Few courts bother to define what they mean by this term or what is their standard of measuring what is the parties station in life. The case that comes nearest to a definition is *Commonwealth v. Whiston*[36] where it was stated:

> The 'pecuniary resources of the husband,' . . . have a bearing upon the 'condition in life of the parties' and thus upon the 'necessities of the wife,' for has been recognized in considering the liabilities of a husband for 'necessaries' supplied to his wife, the term necessaries in this connection is not confined to articles of food or clothing required to sustain life, but has a much broader meaning and includes such articles for use by a wife as are suitable to maintain her according to the property and conditions in life of her husband.'

It is all very well to speak of the wife's right to support according to the husband's station in life but, except for the very rich, that standard is impossibly high; particularly when the husband may have a former wife and a present new family to support. One of the aspects of divorce is the economic catastrophe which it brings. In rejecting the notion that a former wife is entitled to exactly the same style of life as her husband the Supreme Court of Delaware[37] recently said: "Any such absurd general holding on our part would constantly fly in the face of the fundamentals of economics. . . ."

Obviously then, one of the most important considerations in determining what constitutes support equal to the husband's station in life is the ability of the husband to pay. In *Hill v. Hill*[38] the Ohio Appeals Court stated it in this manner: "The station in life of the parties and their accustomed manner of living are pertinent but the financial ability of the husband to provide this station in life . . . must in the last analysis control. . . ." This factor has been regarded as more important than the parties' usual

[36] 306 Mass. 65, 27 N.E.2d 703 (1940). Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939); Commonwealth v. McClelland, 109 Pa. Super. 211, 167 A. 367 (1933).

[37] Du Pont v. Du Pont, 32 Del. Ch. 56, 103 A.2d 234 (1954).

[38] 94 Ohio App. 463, 115 N.E.2d 399 (1953).

style of living in cases where the style of living was far beyond the husband's means. The court should not modify a decree to provide the wife with alimony for a station in life which is far beyond the means of the husband. The modification must be based on the husband's property, income and earning capacity at the time of the hearing, not what they might have been in the past.[39]

It seems the station in life rule had led the courts into a position where a wife may be literally supported by both a husband and an ex-husband. Since the weight of authority supports the conclusion of those cases which hold that remarriage of a divorced wife does not of itself terminate the obligation of the former husband to pay alimony, it is only necessary for her to show that her second husband will be unable to support her in anything like the station in life of the man whom she divorced.[40] If she succeeds in establishing the inadequacy of the second husband's support, the former husband's alimony payments are not terminated.

2. *Change in Financial Conditions or Circumstances*

Another common ground for the modification of a decree for alimony is that there has been a substantial change in the financial condition of the husband and wife since the decree was entered. Unfortunately, there is no general rule which can be stated as to the amount of change in the financial conditions which is necessary to require or permit a modification of a decree of alimony on this ground. There is agreement, however, on the fact that the change in financial circumstances necessary to justify a modification of a decree for alimony must be material and substantial.

(a) *Earning Capacity of Husband*

The ability of the husband, from the viewpoint of his personal earnings or his earning capacity, is certainly an element to be considered by the court in determining whether the original alimony decree should be modified. The husband may not escape the obligations of an alimony decree by spending more than his income especially where the income is a fair one.[41] Nor, may he do so by deliberately refusing to work or failing to take advantage

[39] Jones v. Jones, 348 Pa. 411, 35 A.2d 270 (1944).

[40] Fisch v. Marler, 1 Wash.2d 698, 97 P.2d 147 (1939); Dietrich v. Dietrich, 99 N.J.Eq. 711, 134 A. 338 (1926); Morgan v. Morgan, 203 Ala. 516, 84 So. 754 (1919).

[41] Moore v. Moore, 163 Miss. 15, 140 So. 526 (1932).

of his earning capacity. The court may take into consideration his capacity to earn money by personal attention to business.[42] If he will not exert himself, his capacity for earning will be estimated by the court. If it were otherwise, a husband, by deliberate intent or disinclination to work, might defeat or avoid his marital obligation of support.

The court in determining earning capacity may consider the husband's intelligence, education, refinement and experience.[43] Where the husband is young, able-bodied, vigorous and in good health the court may consider these things as evidence to show the earning capacity of the husband and may increase the alimony of the wife.[44] For example, in a case where the husband was in the service at the time of the divorce and his salary was $2,000 a year, and when he was released his earnings were $10,000 a year, this increase in earning capacity was held to justify an increase in the alimony for the divorced wife.[45]

(b) *Increase or Reduction in Husband's Income*

The fact that the husband's salary or income has been increased or decreased does not in itself automatically entitle the wife to an increase in the amount of alimony nor the husband a reduction in alimony. The courts have held that every case should be determined on its own facts with the aim of doing justice between the parties in view of all the conditions.[46]

In *Burr v. Burr*[47] the wife petitioned for an increase in alimony after the showing of a somewhat substantial increase in the husband's income. The court failed to increase her alimony on the grounds that an increase of the husband's income is not sufficient reason for modifying the provision for permanent alimony since she made no showing of a change in her needs or circumstances.

[42] Robins v. Robins, 106 N.J.Eq. 198, 150 A. 340 (1930). In this case the husband, a physician, had an established practice and was earning about $40,000 a year. He voluntarily abandoned it and took a position where he earned $3100 a year. He sought a reduction of the alimony decree. The court refused to modify the decree on the grounds he had the capacity to earn enough money to satisfy the alimony decree. See also: Faye v. Faye, 131 Misc. 388, 226 N.Y.S. 729 (1928).

[43] Farlee v. Farlee, 101 N.J.Eq. 111, 137 A. 648 (1927).

[44] Rasberry v. Rasberry, 189 Ky. 502, 225 S.W. 148 (1920).

[45] Humbird v. Humbird, 42 Idaho 29, 243 P. 827 (1926).

[46] Strickland v. Strickland, 183 Or. 297, 192 P.2d 986 (1948); Bahlman v. Bahlman, 218 Ala. 519, 119 So. 210 (1928).

[47] 313 Mich. 330, 21 N.W.2d 150 (1946).

The fact of a substantial reduction in or cessation of the husband's income alone does not necessarily entitle him to a reduction in alimony. If the husband is able to make the payments as originally ordered notwithstanding the reduction in his income, and the other facts of the case make it proper to continue the payments, the court may refuse to modify the decree.[48]

The Alabama Court in *Culton v. Culton*[49] had this comment to make:

> Modification . . . can only be ordered on proof of change of conditions of the parties, one or both, as the decree is final as to the conditions existing at the time, since existing conditions are presumed to have been considered upon the rendition of the decree. . . . We must proceed on the assumption that the decree rendered was equitable and fair. Any anticipated increase in income on the part of the husband at that time, which may not have materialized, cannot be considered as a ground for reducing alimony payments to the former wife.

(c) *Unemployment of the Husband*

It is recognized that the husband's unemployment may justify a reduction in or suspension of alimony if he is not able to make the payments.[50] That "one cannot get blood out of a turnip" is a truism particularly applicable to an improvident husband.

The court may hold that the husband's application for relief is premature where, although he is unemployed, there is a reasonable prospect that he will soon be able to secure employment and be able to comply with the decree at present.[51]

Where the husband's unemployment is self-inflicted and he is able to work, the court may hold that there is no substantial change in circumstances, or that the husband's plight does not entitle him to relief.[52]

[48] Seigfreid v. Seigfreid, 187 S.W.2d 768 (Mo. App. 1945); Heard v. Heard, 116 A. 67 (1933); Primrose v. Primrose, 217 Miss. 316, 97 So. 418 (1923).

[49] 252 Ala. 442, 444, 41 So.2d 398, 399 (1949).

[50] Warner v. Warner, 145 Or. 541, 28 P.2d 625 (1934). The husband was incapacitated and in the hospital and was receiving only $72 a month as a pension. The court reduced the former wife's alimony from $50 per month to $35.

[51] Tidmore v. Tidmore, 248 Ala. 150, 26 So.2d 905 (1946). Here the divorce decree was rendered on September 8, 1945, and evidence was taken early in January, 1946, on husband's application for reduction of alimony allowed in divorce decree. Application denied on grounds husband had not waited long enough to fix a permanent change.

[52] Note 42 supra.

(d) *Business Fluctuations*

Where a husband is engaged in a business which, like most enterprises, is subject to fluctuations, the fact that his business has had a poor season will not require a reduction in alimony if he is able to continue the payments without seriously impairing his ability to conduct his business. This situation is one which permits the application of another general rule that the court will not grant a modification of a decree on grounds of an occurrence which was probably foreseen and taken into account when the original decree was entered.[53]

(e) *Acquisition of Property*

In some jurisdictions it is held that in determining the amount which the husband is able to pay at the time of his application for a reduction of alimony, the fact that the husband has some hopes of gifts from his father or others who have assisted him financially cannot be considered in determining what the husband is able to pay.[54] The wife is entitled to demand from the husband only such support as he is reasonably able to furnish from his own property.[55] The other view seems to be that a husband's acquisition of a substantial amount of property after the entry of the decree for alimony may be a factor to be considered in determining whether to increase the payments on an application by the wife for modification of the alimony decree.

3. *Change in Needs of Parties*

Attention is now turned from the first variable, the husband's aiblity to pay, to the consideration of the second major component of the basic alimony equation, the needs of the wife. A substantial change in the requirements of the divorced wife for her support is held by many courts as furnishing the basis for modification of the alimony order. The ability of the wife to earn her own living is a factor which enters into the computation of the original award, and also, in some jurisdictions in determining whether that award should be modified.

It should be noted however that even where the courts reduce alimony because the wife has secured employment, the reduction is not ordinarily equal to the amount of her earnings. The courts

[53] Bailes v. Bailes, 220 Ala. 177, 124 So. 214 (1929).

[54] Merritt v. Merritt, 220 Cal. 85, 29 P.2d 190 (1934).

[55] Lonabaugh v. Lonabaugh, 46 Wyo. 23, 22 P.2d 199 (1933).

seem to feel the wife should be encouraged to seek employment, but if her alimony were reduced in the exact sum of her earnings she would have little incentive to work. One court[56] stated that if allowed, the effect would be to deprive the wife of part of her alimony and to discourage her from making any attempt to regain her position as a useful member of society. Therefore, the courts tend to reduce alimony by a fraction of the wife's earnings, the amount of the fraction varying with the facts of each case.[57]

It has been held that if the wife is able to work and there is no good reason why she should not do so but she had made little or no effort to secure employment the court may take this factor into consideration when determining whether to reduce alimony. The California Supreme Court[58] in affirming an order reducing alimony said:

> ... a trial court, in awarding alimony, should not do so in a sum inducing idleness on the part of the ex-wife. . . .
>
> Thousands of women and girls are now employed, where formerly men and boys were once found. The employment of women in all lines of work is now so general that it may almost be said to be a mark of distinction for a woman to be self-supporting.

In the writer's opinion a more preferable way of handling the situation where women are capable of earning their own living but prefer to live off their alimony, is to make an award of alimony for only a short period, such as one year, so as to give the wife the means of support when she needs it and terminate the payments when she should be working. In jurisdictions where this is done the decree usually does not preclude the wife from applying within the time period for a continuance of the alimony payments if needed.[59] The New Hampshire Legislature has enacted a statute[60] which provides for the awarding of alimony for three years ". . . such order may be renewed, modified or extended if justice requires for periods of not more than three years at a time. . . ."

The courts seem to be in agreement that where the wife has become seriously ill or her physical condition is such as to require increased expenditures for medical or personal care this may justify an increase in alimony. Even if a husband's salary or in-

[56] Curry v. Curry, 102 Colo. 381, 79 P.2d 653 (1938).

[57] Fisher v. Fisher, 237 Ky. 823, 36 S.W.2d 635 (1931).

[58] Lamborn v. Lamborn, 80 Cal. App. 494, 251 P. 943, 944 (1926).

[59] Williamson v. Williamson, 154 Fla. 200, 17 So.2d 78 (1944).

[60] N. Hamp. Rev. Stat. Ann. § 458.19 (1955).

come does not increase, if there is a material increase in his ex-wife's needs, the ex-husband may be required to pay more alimony. In *Tome v. Tome*[61] the court rescinded a previous order reducing the amount of permanent alimony which the husband had been required to pay and again ordered the husband to pay the original sum which had been required at the time the divorce was decreed. This was done upon the showing by the former wife that she was ill, in need of medical attention and unable to work and despite the fact that the husband's financial condition had not improved and he had married again.

Illness or a change in capacity of the husband to earn a livelihood may be grounds for reducing alimony payments. His ill health is not ground for obtaining a reduction, however, unless it represents a development subsequent to the original order and thus something the court did not have before it for consideration when the original order was made.[62]

It is obvious from what has been presented above that the modification of alimony awards, like their granting in the first instance, cannot be reduced to any rigid legal formulas. Many different factors which vary in each case must be taken into account. Judges must exercise a broad, wise discretion based on knowledge of all facts.

4. *Remarriage of the Parties*

One of the most shocking things about alimony is that a woman can be supported by two husband's and that a woman's remarriage does not in the majority of states necessarily terminate the obligation of the first husband to pay the amounts decreed by the court.

There are only seven states[63] by statute that make termination of alimony mandatory on a showing that the wife has remarried. In the majority of states the first husband must apply to the court for the elimination of his obligation to pay alimony to his former wife and usually must show a change of conditions which justify termination. If he delays in making the request, he may find that he has to pay alimony up to the date of his petition and cannot have alimony terminated as of the date of the wife's remarriage.

[61] 180 Md. 31, 22 A.2d 549 (1941).

[62] Altenbach v. Altenbach, 162 S.W.2d 361 (Mo. App. 1942).

[63] Cal. Civ. Code § 139 (1957); Colo. Rev. Stat. c. 46-1-5 (1953); Ill. Ann. Stat. c. 40, § 19 (1956); Mont. Rev. Code tit. 21-139 (1947); Nev. Rev. Stat. § 125.150 (1955); N.J. Stat. Ann. tit. 2A:34-24 (1952); Va. Code § 20-110 (1950).

Where it is the ex-husband who remarries, this fact usually has no effect on the alimony he must pay to his former wife. The courts are apparently committed to the view that a husband's remarriage and its attendant financial burden may not be successfully urged in support of a petition for modification.[64] Voluntary assumption of new family obligations which diminish the husband's ability to comply with the terms of the decree should not, it is thought, avail him in avoiding the duty to support his former wife which is embodied in the alimony order.

The courts seem to take the view that the husband's primary obligation is to his first wife and he must therefore continue to pay her the full amount of alimony that was decreed.[65] The Nebraska Supreme Court[66] stated they realized that duties of support are owed to the second wife as well as to the first but pointed out: "The first wife has first consideration and her necessities will not be unreasonably curtailed, or her wants ignored."

It appears that the first wife must therefore be preferred, even though the husband's interest and desires are bound up with the second wife and any children that he may have by her. In refusing to take into account the needs of the second wife and of his second family, the courts may simply promote the breakup of the second marriage. This policy is doubtless intended to discourage future marital alliances on the part of those whose financial means are inadequate for the support of both families.

C. Alimony in Gross

An allowance of permanent alimony, where payable in money, is either a lump sum payable on or near the rendition of the decree of divorce, a lump sum payable in installments, or an allowance of periodical payments without limitation as to time for a fixed period without designation of the total amount to be paid.[67] The award of alimony in a lump sum is often referred to as alimony in gross.

As a general proposition, an award of alimony in gross is final and binding. These matters are adjudications of the court as to

[64] Simpson v. Simpson, 51 Idaho 99, 4 P.2d 345 (1931); Stone v. Stone, 212 Iowa 1344, 235 N.W. 492 (1931); Aiken v. Aiken, 221 Ala. 67, 127 So. 819 (1930).

[65] Rodgers v. Rodgers, 102 Colo. 94, 76 P.2d 1104 (1938).

[66] McIlwain v. McIlwain, 135 Neb. 705, 283 N.W. 845 (1939).

[67] 2 Nelson, Divorce and Annulment 14.23 2d Ed. (1945).

the rights of those involved in the suit, and hence they are binding the same as any other adjudication and are not subject to modification.[68]

The Nebraska Supreme Court in *Ziegenbein v. Damme*[69] had this to say: "An unqualified allowance of alimony in gross . . . is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Such an allowance is not subject to modification."

The Illinois Appellate Court[70] after a detailed review of the cases on alimony in gross arrived at these conclusions:

> . . . Alimony in gross or gross alimony is always for a definite amount of money; the payment is always for a definite length of time; it is always a charge upon the husband's estate. . . .
>
> That the award may be payable in installments is not determinative of the question as to whether it is gross alimony or periodic alimony. Gross alimony may be payable in installments—whether all cash or all or partly on credit does not affect the essential nature of the transaction. The principle involved is that gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect. . . . It would favor the affluent over the one less fortiutously circumstanced. . . .
>
> The gross sum, when paid, will operate as a discharge and satisfaction in full for all claim for future support of the wife. . . .

There are seventeen states[71] in which the courts, by statute, may award alimony in gross instead of requiring that regular, continuing payments be made for support.

[68] Fitch v. Fitch, 229 Iowa 344, 294 N.W. 577 (1940); Magginis v. Magginis, 323 Ill. 113, 153 N.E. 654 (1926); Booth v. Booth, 114 Kan. 377, 219 P. 513 (1923); Kraft v. Kraft, 193 Iowa 602, 187 N.W. 449 (1922).

[69] 138 Neb. 320, 292 N.W. 921 (1940).

[70] Walters v. Walters, 341 Ill. App. 561, 568, 94 N.E.2d 726, 729 (1950).

[71] Ariz. Rev. Stat. § 25-319 (1956); Conn. Gen. Stat. § 7335 (1949); Del. Code Ann. c. 13, § 1531 (1953); Ill. Ann. Stat. c. 40, § 19 (1956); Ind. Stat. Ann. § 3-1218 (1957); Kan. Gen. Stat. c. 60, § 1511 (1949); Me. Rev. Stat. c. 166, § 63 (1954); Mich. Stat. Ann. c. 25.103 (1957); Mo. Ann. Stat. § 452.080 (1949); N. Mex. Stat. § 22-7-6 (1953); Ohio Gen. Code § 11992 (1938); Okl. Stat. Ann. § 12:1278 (1937); Or. Rev. Stat. c. 107.100 (1957); R. I. Gen. Laws, § 15-5-6 (1956); S. Car. Code of Laws § 20-113 (1952); Tenn. Code Ann. § 36-820 (1956); Vt. Stat. § 3244 (1947).

E. RES JUDICATA[72]

The doctrine of res judicata is based upon the public policy of finality of litigation. Its purpose is to prevent an attempt to relitigate in some way. Because res judicata occupies a place of such major importance, there is a great need for clarity and sharp distinction among the various concepts embodied in this doctrine and a more precise system of terminology to furnish a sound guide for decision.

The principle that an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action, although not formally put in issue therein, applies to divorce actions and the modification of alimony decrees as well as to other kinds of actions. Since the establishment of changed conditions is generally a condition precedent to relief, it becomes pertient to inquire what new circumstances will warrant a modification of the alimony order. As discussed above, this is left to the discretion of the trial judge. There is no basic standard. He determines, in his own discretion, in each case whether there is a changed condition or whether the issue was or should have been determined in the original action. It is not inconceivable that he could be swayed by personal feelings. The decisions of the trial judge with respect to this issue will not be overruled on appeal unless his action constitutes a clear abuse of discretion. There is great difficulty encountered in estimating what amounts to such an abuse of discretion.

The courts seem to have difficulty in applying the doctrine of res judicata to modification of alimony cases. These cases seem to present the problem of determining just what alimony is res judicata of. There is also the problem of two standards, one for the wife and another for the husband, used in determining when and what constitutes changed conditions or circumstances which will warrant a modification of the alimony award.

An example of one pattern which the courts seem to follow is in cases where the original alimony award is unconscionably

[72] See generally: 17 Am. Jur. § 719 (1957); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1952); Williams, Res Judicata in Recent Cases, 13 Modern L. Rev. 307 (1950); Bouer, The Doctrine of Res Judicata (1924); Doctrine of Res Judicata in Divorce Proceedings, 40 Am. and Eng. Ann. Cases 878, 1916B.

low because that is all the money the husband can pay as compared with the situation where the original award is adequate to sustain the wife. Then add the factor in both situations where the husband has a sudden increase in earnings or an inheritance. In the first situation where the original award was unconscionably low the courts do and should modify the award. In the second situation the courts do not always and should not modify the original award.

The requirement of showing a material change of circumstances in connection with an application to modify alimony rests not only upon the doctrine of res judicata but also upon the general principle underlying that doctrine that there must be an end to litigation. A court, having performed its function of ruling upon a controversy, cannot be taken over by a particular set of litigants for the continued readjudication and reconsideration of their affairs. Besides wasting the time of the courts and litigants, to permit the multiple actions leaves an undesirable uncertainty in the economic affairs of those subject to them.

IV. SEPARATION AGREEMENTS

Where a marriage breaks up, then the problem of who is entitled to what or who gets what property, is a matter of vital importance. Although a husband and wife cannot change their marital status by contract, they may contract with each other as to the status of their property. This division of the property may be accomplished either by an actual apportionment of the property itself or by periodic or lump sum payments. These payments, although they may be made for the purpose of support and maintenance, are not alimony since they are part of the property settlement and are in lieu of property rights.[73] Or the agreement may be one in which the payments for the support and maintenance of the wife are in the form of alimony.

[73] Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265 (1947). The court held there are three general categories into which fall agreements entered into by husband and wife: "(1) . . . contracts in which the support and maintenance provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. (2) . . . contracts in which support and maintenance provisions are not in nature of alimony but are part of the division of property; also, includes contracts that provide solely for the payment of monthly or lump sums in lieu of community property. (3) . . . contracts in which wife waives all support and maintenance, except as provided in the agreement, in consideration of a more favorable division of community property."

Under the common law, separation agreements were wholly unenforceable. Today however, the agreements are not only enforceable if they conform with the customary requirements for a valid contract, are fair, and are not made primarily to facilitate the procurement of a divorce, but they are to be commended.[74]

It seems that where the husband and wife cannot agree to a property settlement, they are creating trouble for themselves in the future. In the first place, the statutes of many states do not give the divorce courts the complete control of the real and personal property of both spouses which is necessary for an equitable division of the property and a liquidation of the marriage.[75] Secondly, many of the property distribution statutes penalize the guilty spouse in a divorce action,[76] even though this is giving the court the right to punish for misconduct without specifying in any way the nature and extent of such punishment.

Ordinarily, assuming the agreement is otherwise valid, the court in an action for divorce will usually approve and adopt such an agreement in the divorce decree if properly presented for the consideration of the court.[77] The agreement may be strengthened by a decree which has adopted or approved it.

[74] Allen v. Allen, 196 Okla. 36, 162 P.2d 193 (1945). The court said: "Contracts between spouses for the settlement of their property rights in contemplation of divorce have a recognized part in our legal structure. . . ." In Hensley v. Hensley, 179 Cal. 284, 183 P. 445 (1918) the court said: "Property settlements . . . when there is no fraud, are highly favored in the law."

[75] Report of Minn. Comm. on Demestic Relations Problems (1951), p. 15: "Judges who have had an occasion to attempt to divide the property of the parties in a divorce action realize that the present statutes are not adequate . . . in a situation where the wife has been able to get the property in her name. If she gets the divorce, the court can do nothing about it. We propose that the judge who bears the divorce action can make such distribution of the property of the parties acquired during marriage, held either in joint tenancy or in separate estates, as shall appear just and equitable. This will make it possible to bring about a more just result and also to avoid subsequent unnecessary and expensive litigation."

[76] Ark. Stat. Ann. c. 34, § 1214 (1947); Cal. Civ. Code, § 146 (1957); Del. Code Ann. tit. 12, § 1531 (1953); Idaho Code § 32-712 (1947); Ill. Ann. Stat. c. 40, § 18 (1956); Me. Rev. Stat. c. 166, § 65 (1954); Mass. Ann. Laws c. 208, § 27 (1952); Nev. Rev. Stat. § 125.150 (1955). See also: Tobin v. Tobin, 89 Okl. 12, 213 P. 884 (1923).

[77] Cahill v. Cahill, 316 Ill. App. 324, 45 N.E.2d 69 (1942); Makzoume v. Makzoume, 50 Cal. App.2d 229, 123 P.2d 72 (1942); Wheeler v. Wheeler, 167 Okl. 598, 32 P.2d 305 (1934).

If husband and wife have agreed upon a distribution of property and have not made any provisions for a periodic allowance, the court rarely alters the agreement.[78] To add alimony to an adopted agreement usually alters the agreement itself. The court would be changing the obligation of the parties. It is submitted that the court should not act differently toward a contract merely because it calls for an allowance. Such a contract is calculated to make a property settlement just as much as an agreement which provides for an exchange of property without an allowance.

Unfortunately, this is not the case in the majority of jurisdictions. The general rule seems to be that if the agreement of the parties is incorporated into the divorce decree, the rights of the parties are governed by the decree and not by the agreement, and the terms thereof may thereafter be modified by the court.[79] The feeling of the courts seems to be where a court has the general power to modify a decree for alimony or support, the exercise of that power is not affected by the fact that the decree is based on an agreement entered into by the parties to the action.

V. CONCLUSION

It is the writer's opinion that the position of the woman in the marriage relation has been so altered as to render a change advisable in our legal attitude toward alimony. In the period when the law of alimony was largely shaped and fixed, the wife had very little property apart from her husband and had no means of help if she left him or called him to a legal accounting. Today she has her separate property and ways and opportunities of earning a livelihood outside of the home and independently of her husband. It is inevitable that this rise toward parity should alter the old justification for alimony.

Alimony maintains a distasteful link with the dissolved partnership. When the marriage has reached the stage of divorce it is bankrupt. It should be liquidated as quickly and conveniently as possible. When the liquidation is complete, both the husband

[78] Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15 (1945); Bishop v. Bishop, 354 Mo. 741, 162 S.W.2d 332 (1942); Shankland v. Shankland, 301 Ill. 524, 134 N.E. 67 (1922); Murray v. Murray, 28 Cal. App. 533, 153 P. 248 (1915).

[79] Perry v. Perry, 183 Tenn. 362, 192 S.W.2d 830 (1946); Miller v. Miller, 317 Ill. App. 447, 46 N.E.2d 102 (1943); Innes v. McColgan, 47 Cal. App.2d 781, 118 P.2d 855 (1941); McHan v. McHan, 59 Idaho 496, 84 P.2d 984 (1938); Warrington v. Warrington, 160 Or. 77, 83 P.2d 479 (1938); Shoop v. Shoop, 58 S.D. 593, 237 N.W. 904 (1931).

and wife should be able to start life anew. They should not be compelled to try to make a new life while hampered and encumbered by legal ties and obligations to a dissolved marriage.

Where there are children, the idea of complete discharge from the obligations of a former marriage should not apply. Someone must support the children until they can support themselves, or until they have reached their majority. A man who has gone through a divorce cannot and should not escape the necessity of supporting his children. He will therefore be required to make payments for many years after the divorce.

But, in about half of the divorces, the man and woman involved have no children; only they are concerned with what happens subsequent to the divorce. It should be possible then to liquidate their marriage so that each can start a new life free from the encumberances of the old.

There is a great deal to be said in support of the lump sum settlement or alimony in gross idea. The amount should depend on such factors as the length of marriage, the size of the husband's income and estate, her age, health, ability to work, her own income and estate and the standard of living formerly maintained by the parties. The amount allotted to the wife should be sufficient to enable her to make the transition from her former position to that of a single woman who must stand on her own feet. Where men do not have all the money at one time, it can be paid in installments.

Once this sum fixed by the court is paid, the matter of alimony should be finished. The parties should in all respects then be considered as single individuals. The wife should no longer have any claim on her former husband for support. The courts would not continually be bothered by applications to modify alimony where conditions between husband and wife change, nor would they be used as a collection agency every time husbands fall into arrears. Both the husband and wife would be able to plan their futures more intelligently. The wife would know exactly how much money she could count on and the husband would know how much money he must provide her with before he would be free to start a new life.

As discussed earlier in the article, there are a few states that have understood that a lump sum alimony payment, of a fixed amount which would confine and limit a man's obligation to his former wife, is preferable to the usual type of decree which provides alimony in a fixed amount for an indefinite period which

may extend through a lifetime and may be constantly altered. In general, however, the courts have been hostile to lump sum payments.

Also, in our alimony statutes economic realities have gotten confused with the guilt principle underlying our entire divorce structure. The amount of alimony awarded and the modification of that award is greatly influenced by the courts decision as to who is the guilty party and who is the innocent party. Couples should not be compelled to stay together for financial reasons.

It seems as if much agitation for the alteration of a decree could be avoided by the framing of the original award with a view to reasonable and ordinary changes that may likely occur in the relations of the parties. Where factors which are reasonably certain to affect the circumstances of the parties can be anticipated, allowance therefore in the decree would preserve its essential soundness in the face of these changes. An agreement, between the parties, could be drafted with an "escalator clause." In other civil actions and transactions parties contract as to probable future consequences. They are not then allowed to constantly come into court for a modification of their contract everytime there is a change or fluctuation in conditions or circumstances. The same principle should apply to alimony awards and their modification.

Some states have attempted by statute to alter this situation of never ending litigation as to amount of alimony. New Hampshire[80] has a rule which prohibits a court from granting to a wife more than three years alimony where there are no children of the marriage. At the end of the three year period, the husband may be ordered to pay for an additional three year period if there is a good reason. Unless the wife is physically or mentally incapacited, however, it is not likely that she will be awarded alimony for longer than the first period which gives her a chance to make whatever adjustments are necessary for her to make before she starts earning her own living.

In North Carolina,[81] Pennsylvania,[82] except for an insane wife, and Texas[83] permanent alimony has been abolished. These legislatures have taken the position that the duty to support is an

[80] N. Hamp. Rev. Stat. Ann. c. 458.19 (1955).

[81] N. Car. Gen. Stat. § 50-11 (1950).

[82] Penn. Stat. Ann. tit. 23 (1955).

[83] Tex. Civ. Stat. § 4637 (1951).

incident of marriage and that once the marriage is terminated—regardless of where the fault or guilt lies—there is not justification for burdening the husband with the support of his former wife.

These four states have taken a realistic attitude toward alimony. The legislatures have taken the millstone from around the husband's neck. They have set the trend for the remainder of the states to follow.