

ALIMONY: A RETREAT FROM TRADITIONAL CONCEPTS OF SPOUSAL SUPPORT

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I. INTRODUCTION

[S]ociety no longer perceives the married woman as an economically unproductive creature who is "something better than her husband's dog, a little dearer than his horse."¹

This article² seeks to analyze the effects that the economic liberation of the married woman have had and will have on the issue of alimony awards.³

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1. *Otis v. Otis*, 299 N.W.2d 114, 116 (Minn. 1980) (quoting *Rehabilitative Spousal Support*, 12 U.S.F.L. Rev. 493, 494-95 (1978)).

2. In writing this article, we sought to make it gender-neutral. We ultimately succumbed to using the traditional concept of husband as payor and wife as payee since it lends to easier readability and allows us to more clearly reflect the authorities' positions.

3. While alimony is frequently considered with, and as part of, the property settlement, this article is limited to the alimony issue.

It will also discuss how the traditional concepts of the family have shaped court decisions in the alimony area⁴ and question whether they should continue to do so.

Although the responsibility of the husband to support the wife has been a fundamental principal of modern society, a married woman's role has changed dramatically in the past decade. Traditionally, the wife, probably because of her biological makeup as the bearer of children, has been delegated the responsibilities of the family, home, and children. Because these duties provide no income, the husband has supported her, and because her worth was only to be determined by home-type jobs, his support of her has continued beyond the marriage. This tradition has guided our courts in decisions granting spousal support and alimony.

In 1853, the Iowa Supreme Court said: "We think that, in every view of the case, it was going too far for the court to divest the husband of the fee simple title to any portion of his land and transfer it to the wife, for the purpose of giving her alimony."⁵ The court explained:

Alimony is an allowance for maintenance of the wife. It is not to be understood as involving a distribution of the estate by force of law. [cite omitted] It is a reasonable charge for maintenance of the wife, which the law will enforce against the husband, when he refuses to support her, or when she is separated from him by his default. It will be enforced against the husband so long as he refuses to support her, or the separation continues If the law should be so enforced as upon a prayer for alimony to distribute in fee simple the real estate of the husband between him and the wife, it might tend to promote litigation of this kind, and render the proceedings under the Code for divorce not only an easy mode of shaking off the bonds of matrimony, but an ingenious and fashionable way of acquiring title to real estate and changing the inheritance thereof.⁶

Women today have abandoned the traditional role of only being a homemaker and now constitute over two-fifths of all persons in the labor force.⁷ A great number of marital homes are headed by two wage earners. Women have entered the work place in great numbers in not only traditionally women's jobs or secondary careers⁸ but also in the historically higher

4. Early rationales advanced for alimony include punishment of the husband, protection against the wife becoming an economic burden on society, and repayment of the wife's investment in marriage. Note, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C.L. Rev. 794, 794 (1985).

5. *Russell v. Russell*, 4 Greene 26, 29 (Iowa 1853).

6. *Id.*

7. More than 46 million women are in the labor force accounting for 43.8 percent of all workers in 1984. U.S. STATISTICAL ABSTRACT 1985, *Employment Status*, 391.

8. "Marriage and family rearing as a primary career for a majority of women is still a primary style of our culture Although forty plus percent of the work force are women, the number in voluntary primary careers is still a relatively small minority." Ryman, *A Comment*

paid professions and jobs originally taken by men. Situations where a woman earns as much or more than her husband are not uncommon.⁹

However, a large number of married women do not yet have economic equality with their husbands.¹⁰ About eighty percent of women in the work force remain in low-paying, low-skilled jobs with little hope of advancement.¹¹ But because nine out of ten women will now enter the work force at sometime in their lives, and because the average woman can expect to spend thirty-four years in the paid work force, women should be concerned about their own economic productivity.¹² Because today's woman ultimately may be solely responsible for her own support and that of her children, she should be concerned about her own economic security.

These changing social norms should be reflected in current and future alimony awards. This article will attempt to elaborate on possible solutions to the problems that have arisen with the change of the woman's role in society.

II. WHAT IS ALIMONY? SHOULD SUPPORT CONTINUE BEYOND MARRIAGE?

"Literally, alimony signifies nourishment or sustenance, and is said to be the allowance which a husband may be compelled to pay to his wife following a separation from him."¹³ In 1980, the word "alimony" disappeared from Iowa statutory law¹⁴ to be replaced instead by the words "support payments."¹⁵ Iowa Code section 598.21(3) provides:

Upon every judgment of annulment, dissolution or separate maintenance, the court may grant an order requiring support payments to either party for a limited or indefinite length of time after considering all of the following: a. The length of the marriage. b. The age and physical and emotional health of the parties. c. The distribution of property made pursuant to subsection 1. d. The educational level of each party at the time of marriage and at the time the action is commenced. e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an

on *Family Property Rights and the Proposed 27th Amendment*, 22 *DRAKE L. REV.* 505, 510 (1973)(footnote omitted).

9. See, e.g., *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984) (court considered that wife's employment was as remunerative as husband's in rejecting her claim for alimony).

10. See *In re Marriage of Beeh*, 214 N.W.2d 170, 174 (Iowa 1974).

11. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, LEAFLET VOL. __, 20 *FACTS ON WOMEN WORKERS* (1982); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *AMERICAN WOMEN: THREE DECADES OF CHANGE* (1983).

12. *Id.*

13. Annot., 48 A.L.R.2d 270, 272 (1956).

14. DISSOLUTION OF MARRIAGE ACT, ch. 1175, 1980 IOWA ACTS 585.

15. IOWA CODE § 598.21(3) (1985).

award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment. f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal. g. The tax consequences to each party. h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party. i. The provisions of an antenuptial agreement. j. Other factors the court may determine to be relevant in an individual case.¹⁶

Iowa courts continue to use the word alimony.¹⁷ They define alimony as an allowance to the ex-wife in lieu of the husband's legal obligation to support her,¹⁸ but recognize that factors considered in making an alimony or spousal support award extend beyond the mere duty to support.¹⁹

The Iowa courts have determined that the granting of an alimony award depends on the circumstances of each particular case,²⁰ requires consideration of all economic provisions as a whole,²¹ and the husband's ability to pay,²² and requires consideration of the education or training of each party.²³ Alimony must be determined in light of all circumstances, including the property settlement.²⁴ Property division and alimony must be considered together in evaluating their individual sufficiency. They are neither made, nor subject to, evaluation, in isolation from each other.²⁵ However, for purposes of this article, we limit our discussion to alimony or spousal support.

The payment of alimony is not an absolute right,²⁶ nor should it be. There are many cases where it is not warranted.²⁷ As the marriage partners

16. *Id.*

17. *In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981); *Behrle v. Behrle*, 228 N.W.2d 25, 27 (Iowa 1975); *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975); *In re Marriage of Winter*, 223 N.W.2d 165, 169 (Iowa 1974); *In re Marriage of Zoellner*, 219 N.W.2d 517, 524 (Iowa 1974); *In re Marriage of Matson*, 215 N.W.2d 358, 359 (Iowa 1974); *In re Marriage of Downing*, 210 N.W.2d 436, 438 (Iowa 1973); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968) (as modified by *In re Marriage of Williams*, 199 N.W.2d 339, 344 (Iowa 1972)).

18. *In re Marriage of Hitchcock*, 309 N.W.2d at 437 (citing *Knipfer v. Knipfer*, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966)).

19. Iowa CODE § 598.21(3)(1985).

20. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976).

21. *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa 1982).

22. *In re Marriage of Murray*, 213 N.W.2d 657, 660 (Iowa 1973).

23. *In re Marriage of Janssen*, 348 N.W.2d 251, 254 (Iowa 1984); *In re Marriage of Horstman*, 263 N.W.2d 885, 891 (Iowa 1978).

24. *In re Marriage of Bevers*, 326 N.W.2d 896, 900 (Iowa 1982).

25. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976).

26. *Id.*

27. *In re Marriage of Maskel*, 225 N.W.2d 115, 120 (Iowa 1975) (where "marriage was short-lived, each party has an occupation and earnings, and each will receive retirement bene-

reach economic equality, the need for alimony ideally should disappear. The courts have begun to and will continue to see more cases where there is no basis for alimony. For example, alimony was rejected in a case where the parties had attained similar levels of education and where their earnings from employment were nearly equal.²⁸ In another case alimony was rejected where, despite differences in educational levels, the wife's employment was as remunerative as the husband's.²⁹

An argument can be made that the concept of alimony or spousal support should be rejected completely. There are some states where alimony or spousal support has been curtailed or limited by statute.³⁰ The Uniform Marriage and Divorce Act allows spousal support under limited circumstances and does not use the word "alimony."³¹ The uniform act is written

fits," court would not award alimony).

28. *In re Marriage of Griffin*, 356 N.W.2d 606, 609 (Iowa Ct. App. 1984).

29. *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984).

30. Delaware allows a court to award alimony for more than two years if grounds for divorce are mental illness or if marriage lasted for more than twenty years regardless of grounds. If the marriage lasted less than twenty years, alimony is limited to two years. DEL. CODE ANN. tit. 13, § 1512 (1985).

Indiana abolishes maintenance for a spouse except in cases of: (1) spouse incapacitated physically or mentally; (2) spouse lacks property sufficient for needs and is custodian of minor child; (3) rehabilitation, not to exceed two years, is necessary after considering educational level of each spouse, interruption in education or employment of spouse due to homemaking or child care responsibilities, earning capacity of each spouse, and time and expense necessary to acquire sufficient education or training to find appropriate employment. IND. CODE § 31-1-11.5-9 (1985).

Kansas court may not award maintenance for period of time in excess of 121 months. KAN. STAT. ANN. § 60-1610 (1985).

31. UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 160 (1979) provides:

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

- (1) lacks sufficient property to provide for his reasonable needs; and
- (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

- (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the age and the physical and emotional condition of the spouse seeking main-

so that the economic inequities of the marriage are resolved in a property division, and, in some instances, this is in fact possible.³²

With the bitterness that frequently follows a dissolution, the ideal situation would be to put the parties' economic differences to rest with the property division. Where possible, each party should be given his or her own separate assets.³³

While we agree with this concept, and feel it should be done when the parties have sufficient assets to do so, realistically the couples do not always have the assets to equalize the inequities. The inequities must be balanced with future salaries, pensions, and perhaps in some cases social security benefits;³⁴ this can only be done with alimony or spousal support. Furthermore, because alimony is generally included in the gross income of the wife and deductible by the husband in computing his adjusted gross income,³⁵ payment of alimony can frequently be used to reduce the total income tax of the parties. Consequently, money which otherwise would have gone for taxes can sometimes be freed for family support.³⁶ As long as a marriage partner

tenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

32. See *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa Ct. App. 1984). In *Byall*, the court found "two healthy individuals who . . . , during the marriage obtained high levels of education and tenure in their respective vocations." *Id.* They were both currently employed with potential for comparable salaries. Neither made extraordinary sacrifices nor left the marriage substantially disadvantaged. The court therefore considered an essentially equal property division equitable. *Id.*

33. *In re Marriage of Mentel*, 359 N.W.2d 505, 506 (Iowa Ct. App. 1984).

34. See *Sharlot v. Sharlot*, 122 Misc. 2d 350, 470 N.Y.S.2d 544 (1984), *rev'd*, 110 A.D.2d 299, 494 N.Y.S.2d 238 (1985) (where disability benefits of one spouse, although exempt from garnishment, were considered in establishing support for other spouse); see also *In re Marriage of Bales*, 380 N.W.2d 754 (Iowa Ct. App. 1985) (court refused husband's request to modify wife's alimony where husband claimed workers' compensation payments should not be available for alimony).

35. I.R.C. §§ 71, 215 (1985).

36. Alimony payments are generally income to the recipient and deductible by the payor if certain requirements are met. I.R.C. §§ 71, 215 (1985). For payments made under divorce instruments executed after 1984, five requirements must be met: (1) the payments must be cash payments received by (or on behalf of) a spouse or former spouse, (2) the payments must be made under a divorce instrument, (3) the payments must not extend beyond the death of the payee-spouse, (4) the payments (if in excess of \$10,000 in any calendar year) must extend for at least six years (barring earlier death of either spouse or remarriage of payee), (5) the spouses (or former spouses) must not be members of the same household and must not file joint returns. I.R.C. § 71 (1985).

Despite these rules, the parties are permitted, by written agreement, to designate otherwise-qualifying alimony payments as being excludable from gross income by the payee and nondeductible by the payor. These rules, together with the election of nonalimony treatment give taxpayers great flexibility in determining who will be taxed on payments made incident to divorce, which may lower the total amount of taxes that would otherwise have to be paid on the combined incomes of the spouses. CCH FEDERAL TAX GUIDE, Code Sec. 71, ALIMONY AND SEPARATE MAINTENANCE PAYMENTS § 1727 (1985).

has suffered an economic disadvantage that cannot be rectified by the property settlement, alimony or spousal support should remain a remedy, particularly in marriages of long duration where disparity in earnings is great.³⁷

III. THE FAULT CONCEPT: HAS IT TRULY DISAPPEARED?

Fault became a part of the divorce process because of the influence of Christianity during the Middle Ages when marriage was regarded as a sacrament and divorce a sin.³⁸ Iowa employed a fault concept³⁹ in the divorcing process until July of 1970⁴⁰ when it became one of the innovative states⁴¹ in the family law area to enact a no-fault dissolution act. It was followed by forty-seven states.⁴² Society believed the moral issues of divorce termination did not belong in the courtroom and recognized the hypocrisy of the old system. The revised statute in Iowa made the breakdown of the marital relationship the sole basis for termination of the marriage.⁴³

37. See *In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

38. Note, *Dissolution of Marriage in Iowa: Collateral Determinations Under the No-Fault Concept*, 22 *DRAKE L. REV.* 584, 585 (1973).

39. IOWA CODE § 598.8 (1966) provided:

Divorces from the bonds of matrimony may be decreed against the husband for the following causes: 1. When he has committed adultery subsequent to the marriage. 2. When he willfully deserts his wife and absents himself without a reasonable cause for the space of two years. 3. When he is convicted of a felony after the marriage. 4. When, after marriage, he becomes a chronic alcoholic. 5. When he is guilty of such inhuman treatment as to endanger the life of his wife.

Id.

IOWA CODE § 598.9 (1966) provided:

The husband may obtain a divorce from the wife for like cause, and also when the wife at the time of the marriage was pregnant by another than the husband, of which he had no knowledge, unless such husband had an illegitimate child or children then living, which at the time of the marriage was unknown to the wife.

Id.

40. *DIVORCE & MARRIAGE ANNULMENT ACT*, ch. 1266, 1970 IOWA ACTS 380.

41. In 1969 California was the first state to pass a dissolution statute and in 1970 Iowa and Michigan followed. *In re Marriage of Williams*, 199 N.W.2d 339, 344 (Iowa 1972).

42. Freed, *Family Law in the Fifty States: An Overview*, 18 *FAM. L.Q.* 369, 379 (1985).

43. IOWA CODE § 598.17 provides:

A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. The decree shall state that the dissolution is granted to the parties, and shall not state that it is granted to only one party.

If at the time of trial petitioner fails to present satisfactory evidence that there has been a breakdown of the marriage relationship to the extent that the reasonable likelihood that the marriage can be preserved, the respondent may then proceed to present such evidence as though the respondent has filed the original petition.

No marriage dissolution granted due to the mental illness of one of the spouses shall relieve the other spouse of any obligation imposed by law as a result of the

Where under the old law fault had been a factor in determining alimony,⁴⁴ the Iowa court in interpreting the new no-fault statute clearly determined that the "guilty-party" concept must be eliminated.⁴⁵ The court determined that evidence of the parties' conduct, insofar as it placed fault for the marriage breakdown, must be excluded,⁴⁶ and fault must not be used as a factor in awarding property or alimony.⁴⁷ Punishment of the husband is no longer relevant to an alimony award, nor do the wife's bad acts prevent her from receiving alimony to which she is otherwise entitled. The fault concept has now been removed from alimony consideration in most jurisdictions.⁴⁸

Excluding fault evidence at the trial court level is difficult. Dissolutions in Iowa are tried in equity and subject to de novo review.⁴⁹ Objections are not ruled upon, and the evidence goes into the record even if it is clearly inadmissible. The problem is whether the courts can and do truly disregard the fault evidence in their consideration of awarding alimony.

While making it clear that fault is excluded, the Iowa court still considers effort expended in marriage when awarding alimony.⁵⁰ The question is, how do we consider one spouse's superior effort unless by contrast we look to the other's lack thereof?⁵¹ Does the issue of effort expended in marriage open the door for evidence of the other party's bad habits and immoral deeds? It should not, but of course it sometimes does.

Unfortunately, the issue of child custody legitimately opens the door to a barrage of evidence which goes to fault. Clearly, immorality of a parent is

marriage for the support of the mentally ill spouse. The court may make an order for such support or may waive the support obligation when satisfied from the evidence that it would create an undue hardship on the obliged spouse or that spouse's other dependents.

Id.

44. The Iowa Supreme Court set forth the postmarital criteria to be considered in making an alimony award: "4. Conduct of the spouses and particularly that of the *guilty party*." *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968) (emphasis added). See also *Gerk v. Gerk*, 158 N.W.2d 656 (Iowa 1968); *Lessenger v. Lessenger*, 261 Iowa 1076, 156 N.W.2d 845 (1968); *Britven v. Britven*, 259 Iowa 650, 145 N.W.2d 450 (1966); *Cooper v. Cooper*, 259 Iowa 277, 144 N.W.2d 146 (1966); *Jeffries v. Jeffries*, 258 Iowa 623, 138 N.W.2d 882 (1965); *Pfab v. Pfab*, 257 Iowa 303, 132 N.W.2d 483 (1965).

45. *In re Marriage of Williams*, 199 N.W.2d 339, 345 (Iowa 1972).

46. *Id.*; see also *In re Marriage of Peterson*, 227 N.W.2d 139, 142 (Iowa 1975).

47. *In re Marriage of Zoellner*, 219 N.W.2d 517, 524 (Iowa 1974).

48. UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 160 (1979). Virginia, however, will award no permanent maintenance or support where the divorce is no-fault if fault grounds exist. VA. CODE § 20-107.1 (1985).

49. IOWA R. APP. P. 4.

50. *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972); see also *Schantz v. Schantz*, 163 N.W.2d 398, (Iowa 1968).

51. Note, *Dissolution of Marriage in Iowa: Collateral Determinations Under the No-Fault Concept*, 22 DRAKE L. REV. 584, 597 (1963). Will one spouse's good conduct be "emasculated" if not viewed in light of the bad conduct of the other spouse? That is to say, saintliness will not be fully appreciated.

a factor which can be considered in a custody determination.⁵² Evidence on other factors, such as the parent's ability to provide for the child's moral needs and the stability and wholesomeness of the parent's environment, is properly considered on the custody issue.⁵³ These issues can be shown by the prior conduct of the parent.

Arguments have been made that fault evidence should be allowed. A recent study would suggest that no-fault dissolution laws, which no longer consider fault on alimony and property division issues, have resulted in women and children being worse off economically because husbands no longer have to bargain for their freedom as they did under the fault

52. *In re Marriage of Kramer*, 297 N.W.2d 359 (Iowa 1980); *In re Marriage of Seidenfeld*, 241 N.W.2d 881 (Iowa 1976); *In re Marriage of Roff*, 228 N.W.2d 98 (Iowa 1975); *Hagen v. Hagen*, 226 N.W.2d 13 (Iowa 1975); *Jacobs v. Jacobs*, 216 N.W.2d 312 (Iowa 1974). In custody issues the Iowa courts can consider moral misconduct. *In re Marriage of Welbes*, 327 N.W.2d 756, 758 (Iowa 1982).

53. *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The factors are:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

Id.

IOWA CODE § 598.41(3) provides:

In considering what custody arrangement under subsection 2 is in the best interests of the minor child, the court shall consider the following factors:

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child's needs.
- d. Whether both parents have actively cared for the child before and since the separation.
- e. Whether each parent can support the other parent's relationship with the child.
- f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
- g. Whether one or both the parents agree or are opposed to joint custody.
- h. The geographic proximity of the parents.

Id.

system.⁵⁴

Despite the alleged unfairness of no-fault alimony awards,⁵⁵ it is difficult to find much support for a return to the old system.⁵⁶

The essential problem is with the value of having a no-fault law. Since most divorces are uncontested except as to collateral disputes over custody and property, allowing fault evidence on these issues effectively destroys the no-fault concept. The force of no-fault reform is defeated if marital fault becomes once more the crux of every dissolution proceeding. The argument for disallowing fault evidence is, therefore, equally compelling. One goal of the divorce reform in Iowa was to limit the bitter presentation of those details of married life that culminate in marital failure. If this is a worthy goal, then the restraint involved in withholding from the court facts that *arguendo* go to the question of fairness and fault is not an intolerable sacrifice.⁵⁷

The legislature and common law clearly dictate fault should not be considered on the issue of alimony. We cannot ignore the ethical consideration an attorney must make if the attorney is seeking to include fault evidence that he or she clearly knows to be irrelevant in a record, and/or if the only reason for introducing the evidence is the hope the court will give fault consideration on the issue of alimony or property division.⁵⁸ The courts will better serve the public by seeking to be economically fair rather than morally judgmental.

IV. TERMINATION OF ALIMONY ON REMARRIAGE OR COHABITATION

A. Remarriage

The concern of a woman becoming an economic burden on society was among the early rationales advanced for alimony.⁵⁹ The wife historically had been delegated the responsibilities of home and family. These duties provided her with no source of income, and, consequently, the husband provided her with financial support. Because a woman was not to be concerned with her own economic productivity or economic security, the male only needed to support his ex-wife until the next husband or lover came along. It did not matter how long or short the period was. This theory continues to shape our laws in the alimony area. Is this concept realistic and fair in to-

54. L. Weitzman, *THE DIVORCE REVOLUTION* (1985).

55. *Id.*

56. Note, *Dissolution of Marriage in Iowa: Collateral Determinations Under the No-Fault Concept*, 22 *DRAKE L. REV.* 584, 597 (1973).

57. *Id.*

58. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C) provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case"

59. Note, *Alimony Modification and Cohabitation in North Carolina*, 63 *N.C.L. REV.* 794, 794 (1985).

day's society?

Many states statutorily provide that alimony should terminate on remarriage,⁶⁰ cohabitation,⁶¹ or upon living with a person of the opposite sex

60. Alimony may be awarded but is "subject to the contingencies of the death of either party, remarriage of the receiving party, or such contingencies as are set forth in the award." ARK. STAT. ANN. § 34.1211 (1985).

Except as otherwise agreed in writing obligation for support and maintenance terminates on remarriage of obligee. CAL. CIV. CODE § 4801(c) (West 1985).

Remarriage of party receiving maintenance terminates obligation to pay future maintenance. COLO. REV. STAT. § 14-10-122 (1985).

Obligation for permanent alimony terminates upon remarriage of recipient. GA. CODE ANN. § 19-6-5(b) (1985).

Upon remarriage of recipient, decree for alimony may be modified or terminated. HAWAII REV. STAT. § 580-51 (1985).

Unless otherwise agreed, obligation to pay future maintenance terminates upon remarriage of party receiving maintenance. ILL. REV. STAT. ch. 40 § 510 (1985).

Unless otherwise agreed, remarriage of party receiving maintenance terminates obligations for future payments. KY. REV. STAT. § 403.250(2) (1985).

Alimony shall terminate on remarriage, unless made in lump sum. LA. REV. STAT. ANN. § 160 (West 1985).

Right to alimony ceases on remarriage. MD. FAM. LAW CODE ANN. § 11-108 (1985).

Michigan court may terminate alimony after obligee's remarriage, unless contrary to decree. MICH. COMP. LAWS ANN. § 552.13(2) (West 1985).

Unless otherwise agreed to in writing or provided in decree, obligation to pay future maintenance is terminated on remarriage of recipient. MINN. STAT. § 518.64(3) (1984).

Unless otherwise agreed, obligation to pay future maintenance is terminated upon remarriage of recipient. MO. REV. STAT. § 452.370(2) (1985).

Alimony obligation ends on remarriage. MONT. CODE ANN. § 40-4-208(4) (1985).

Except as otherwise agreed, alimony terminates on remarriage of recipient. NEB. REV. STAT. § 42-365 (1985).

Unless otherwise decreed, alimony ceases on remarriage of spouse to whom alimony was to be paid. NEV. REV. STAT. § 125.150(5) (1985).

On application of former husband, court must upon valid remarriage of wife annul all provisions directing payment of money for support of former wife. N.J. REV. STAT. § 25 (1985).

Maintenance terminates on death or remarriage (valid or invalid) of recipient and order may be annulled if wife lives with another man and holds herself out as his wife. N.Y. DOM. REL. LAW § 248 (McKinney 1985).

Remarriage terminates alimony award. PA. CONS. STAT. § 23-1501(e) (1985).

Unless decree states otherwise, remarriage terminates alimony. UTAH CODE ANN. § 30-3-5 (2) (1985).

Unless otherwise provided for by contract, support for spouse ceases on remarriage. VA. CODE § 20-109 (1985).

If party receiving maintenance payments remarries, court must, on application of payor, vacate order requiring such payments. WIS. STAT. § 767.32(3) (1985).

61. Alimony may be terminated on proof spouse receiving alimony has remarried or is living openly or cohabitating with member of opposite sex. ALA. CODE § 30-2-55 (1985).

"Except as otherwise agreed by the parties in writing, there shall be a rebuttable presumption, affecting burden of proof, of decreased need for support if the supported party is cohabitating with a person of the opposite sex." CAL. CIV. CODE § 4801(5) (West 1985).

Unless otherwise agreed, obligation to pay future maintenance terminates if person receiving maintenance cohabitates with another person or resident on a continuing conjugal basis.

and holding oneself out as husband and wife for as long as thirty days.⁶² Decrees frequently provide that alimony should terminate on remarriage or cohabitation. In the absence of a controlling specific statute, many courts including Iowa have determined that while subsequent remarriage does not result in automatic termination of alimony, remarriage shifts the burden on the recipient to show that extraordinary circumstances exist to require the continuation of alimony.⁶³

Understandably, a former husband does not wish to subsidize his ex-wife's new husband or lover. If a wife's need to be cared for was the only factor in making the alimony award, there may appear to be justification for its termination when the next man comes along. However, we have some difficulty accepting this basis for termination in light of today's realities. If the court has considered such factors as, education acquired during marriage by the husband, absence from the job market by the wife, and responsibilities the wife assumed for children, in awarding alimony,⁶⁴ then there appears to be no justification for termination upon remarriage. Married women have a need for personal economic security. Once these women remarry, how can they be assured their new husband can and will take care of them? If husbands are presumed to support wives, then how do we justify such a presumption with current statistics showing over one-half of the women who are married and living with their husbands are in the paid labor force?⁶⁵

As discussed earlier, in Iowa there is no statutory direction to terminate alimony on remarriage or cohabitation, but the Iowa court has held that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show that extraordinary circumstances exist which require the continuation

ILL. REV. STAT. ch. 40 § 510 (1985).

Cohabitation with person of opposite sex who is not member of immediate family is bar to alimony award. PA. CONS. STAT. § 23-507 (1985).

Where recipient lives with third person, rebuttable presumption is raised that recipient is receiving from or contributing support to that person and court should suspend all or part of alimony obligation of former spouse. TENN. CODE ANN. § 36-5-101(3) (1985).

Unless decree states otherwise, alimony terminates upon cohabitation unless it is cohabitation without sexual contact. UTAH CODE ANN. § 30-3-5 (1985).

62. See *Lang v. Superior Court*, 53 Cal. App. 3d 852, 126 Cal. Rptr. 122 (1975).

63. *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985); *Bubar v. Plant*, 141 Me. 407, 44 A.2d 732 (1945); see also Annot., 48 A.L.R.2d 270, 280 (1956).

64. Iowa CODE § 598.21(3)(d) provides: "The educational level of each party at the time of marriage and at the time the action is commenced." Iowa CODE § 598.21(3)(e) provides:

"The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment."

65. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, LEAFLET No. —, 20 FACTS ON WOMEN WORKERS (1982); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. No. —, AMERICAN WOMEN: THREE DECADES OF CHANGE (1983).

of the alimony payments.⁶⁶

In *In re Marriage of Shima*,⁶⁷ the Iowa court stated:

The basic principle that supports both views [that alimony is either automatically terminated or provides a prima facie case for termination] is that it is against public policy that a woman should have support or its equivalent during the same period from each of two men "Aside from positive unseemliness, it is illogical and unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband and an obligation from the present husband for an adequate support at the same time. It is her privilege to abandon the provision made by the decree of the court for her support under sanctions of the law for another provision for maintenance which she will obtain by a second marriage."⁶⁸

The Iowa court in *Shima* appears to say it is presumed a husband must support his wife. It is difficult to reconcile the rationale of *Shima* with Iowa Code section 597.14, which provides in part: "The reasonable and necessary expenses of the family . . . are chargeable upon the property of both the husband and wife, or either of them" Are the courts saying that once a woman remarries she need not be concerned about her income because her new husband has an obligation to support her?

If a wife's alimony award is to make her a productive person and compensate her for the years she devoted to the marriage and did not advance in her career, then what valid reason is there for termination of the award on remarriage? While the factors the court must consider under Iowa Code section 598.21(3)⁷⁰ do contemplate "need," they also require the court to consider such factors as length of marriage, educational advancement made by the other party during marriage, responsibilities assumed for children, custodial responsibilities assumed in the decree, and mutual agreements concerning financial or service contributions with expectations or future reciprocation or compensation by the other party.⁷¹ Why should a woman lose the right to compensation awarded after considering these factors merely because she has remarried? One would wonder if the Iowa court believes a woman's need for economic security should terminate on remarriage. Once she finds a new husband, does she no longer deserve compensation for such things as having helped her former husband obtain a professional degree, staying home to take care of children her former husband has fathered, and losing career advancement, pension, and social security benefits?

66. *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985).

67. 360 N.W.2d 827 (Iowa 1985).

68. *Id.* (quoting *In re Marriage of Woodward*, 229 N.W.2d 274, 279 (Iowa 1975) (quoting *Wolter v. Wolter*, 183 Neb. 160, 164, 158 N.W.2d 616, 619 (1968)).

69. Iowa Code § 597.14 (1985) (emphasis added).

70. Iowa Code § 598.21(3) (1985).

71. *Id.*

The court's decision in *Shima* presumes that the man a woman chooses for her second husband can and will support her. She must rebut that presumption. The value she was to receive for the sacrifices of an earlier marriage should no longer come to her upon remarriage.

The Iowa court, of course, does not completely close the door to a woman's need for alimony after remarriage. The presumption that alimony should terminate is rebuttable, and the burden shifts to the recipient to show that extraordinary circumstances require that the alimony be continued.⁷² The Iowa court, however, has made it very clear that, while a wife was a good homemaker and mother, and this fact may have entered into a court's original decision to award alimony, such factors are not the sort of extraordinary circumstances envisioned by the rule.⁷³ Circumstances that would permit continuation of alimony from a prior marriage must be one existing at the time of a modification petition, not the time of the original decree.⁷⁴ The Iowa court⁷⁵ has stated that extraordinary circumstances include an annulment of second marriage,⁷⁶ invalidity of second marriage,⁷⁷ inability of subsequent spouse to furnish support,⁷⁸ death of subsequent spouse,⁷⁹ and dissolution of a subsequent marriage.⁸⁰ Apparently, the only way alimony would continue would be to show that one's second husband, for whatever reason, cannot support her.⁸¹

In *In re Marriage of Janssen*,⁸² the court determined that the husband's medical degree as an osteopathic physician was to be considered in awarding alimony.⁸³ Because the husband spent a large number of the marital years in school, there had been few marital assets to divide.⁸⁴ The parties had been married during the time the husband obtained the degree.⁸⁵ At the time of the dissolution, the wife was in law school.⁸⁶ She obviously would use the alimony to help her attain her goal of entering the legal profession. The court, without citing a reason for its action, said: "The alimony payments shall terminate sooner upon [the wife's] death or remarriage."⁸⁷ If the wife

72. *In re Marriage of Shima*, 360 N.W.2d at 828.

73. *Id.* at 829.

74. *Id.*

75. *Id.*

76. *Peters v. Peters*, 214 N.W.2d 151 (Iowa 1974).

77. *Boiteau v. Boiteau*, 227 Minn. 26, 33 N.W.2d 703 (1948).

78. *Dietrick v. Dietrick*, 99 N.J. Eq. 711, 134 A. 338 (1926).

79. *Kahler v. Searl*, 259 A.D. 729, 18 N.Y.S.2d 249 (1940).

80. *Brandt v. Brandt*, 40 Or. 447, 67 P. 508 (1902).

81. In *In re Marriage of Shima*, the Iowa court said "[T]here is no showing by Kay that her present husband is unable to support her" 360 N.W.2d at 829.

82. 348 N.W.2d 251 (Iowa 1984).

83. *Id.* at 254.

84. *Id.*

85. *Id.* at 252.

86. *Id.* at 253.

87. *Id.* (emphasis added).

remarried did she no longer have a need for a law degree? If she remarried should she no longer bear the fruit of the professional degree that she sacrificed to help her husband obtain? Because the husband spent a large number of the marital years in school, in this case, there had been few marital assets to compensate the wife for her sacrifices, and the alimony award was to be used to resolve the economic inequities of the marriage.⁸⁸

The concept of terminating alimony on remarriage has its roots in the past where women were totally dependent for support upon their husbands. The presumption that a woman looks to her husband for her sole support is no longer valid. With a changed society, the laws must also be changed.

B. Cohabitation

Should cohabitation with a male result in alimony termination? In *In re Marriage of Orgren*,⁸⁹ the issue of the wife's cohabitation was raised in the original action, and the Iowa Court of Appeals said: "[W]e do not believe that cohabitation is a ground for automatic denial or limitation of alimony payments. Nor should it be when remarriage itself is not. However, Bonnie's financial status may be altered by the addition of another person with whom to share household expenses."⁹⁰ Cohabitation is "clearly a 'relevant factor' within the meaning of Iowa Code section 598.21(3)(1) and may well affect the wife's need for support."⁹¹ Nonetheless, if the alimony is awarded to compensate the woman for the economic sacrifices made in the marriage, then why should it be terminated merely on the basis of cohabitation?

In the case of *In re Marriage of Sappington*,⁹² the Illinois court interpreted its statute which terminated alimony "if the party receiving maintenance, cohabits with another person on a resident, continuing conjugal basis."⁹³ The alimony recipient in *Sappington* had a male friend living with her.⁹⁴ She claimed they had no sexual interest in each other and both denied any sexual conduct toward each other.⁹⁵ The Illinois court stated that alimony is predicated upon a need for support and thus could be terminated upon the following rationale:

We believe that when two people live together, like the defendant and Montgomery, it is the husband-and-wife-like relationship which bears the rational relationship to the need for support, not the absence or presence of sexual intercourse. Therefore, once an ex-spouse paying maintenance has demonstrated that a husband-and-wife-like relationship does

88. *Id.* at 254.

89. 375 N.W.2d 710 (Iowa Ct. App. 1985).

90. *Id.* at 713.

91. *Id.* at 712.

92. 106 Ill. 2d 456, 478 N.E.2d 376 (1985).

93. ILL. REV. STAT. ch. 40, § 510(b) (1981).

94. *In re Marriage of Sappington*, 106 Ill. 2d 456, 478 N.E.2d 376 (1985).

95. *Id.* at —, 478 N.E.2d at 381.

exist, it should be encumbent [sic] upon the maintenance recipient to demonstrate that the relationship in which he or she is engaged is not the type of relationship which was intended by the legislature to justify the termination of the obligation to pay maintenance.⁹⁶

This type of logic is meaningless if the alimony award is predicated upon economic sacrifices during the marriage. A woman seeking alimony to compensate her for the economic disadvantages she suffered in marriage should seek to show in the dissolution the unfairness to her of losing this right on remarriage or cohabitation. She should ask that the decree provide that alimony should *not* terminate on remarriage or cohabitation. She should prove that her needs for economic productivity and security continue even if another man comes along. The courts should realistically appraise that portion of the alimony award which was made for the marital sacrifices. They should recognize that a woman's need for, and right to, economic productivity and security does not end when another man comes along. The courts should structure the alimony awards accordingly.

While recognizing the need for the wife to leave the marriage with economic security, we do not advocate that alimony continue indefinitely. The woman is an economically productive person. She should expect to rely on her own worth. She must expect to help herself. The premise that a woman's former husband owes her support until the next man comes along is as outdated as the assumption that her new husband will support her. There is a strong trend to look toward rehabilitative alimony as an equitable solution; a retreat from former, traditional attitudes of family support makes rehabilitative alimony a popular concept.⁹⁷

V. REHABILITATIVE ALIMONY: A SOLUTION

A. Iowa Case Law

"[T]he trend in modern domestic relations law is to treat alimony as a method for rehabilitating the party disadvantaged by the divorce."⁹⁸ Unlike some states⁹⁹ Iowa does not use the term "rehabilitative" in its dissolution statute but does have statutory directions¹⁰⁰ for a rehabilitative type of

96. *Id.*

97. *Otis v. Otis*, 299 N.W.2d 114, 117 (Minn. 1980).

98. *Bingert v. Bingert*, 247 N.W.2d 464, 468 (N.D. 1976).

99. FLA. STAT. ANN. § 61.08 (West 1985) provides: "(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be *rehabilitative* or permanent in nature." *Id.* (emphasis added).

100. IOWA CODE § 598.21(3)(f) (1985).

Upon every judgment of annulment, dissolution or separate maintenance, the court may grant an order requiring support payments . . . for a *limited* or indefinite length of time after considering . . . the following: . . . (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to

alimony.

In *In re Marriage of Schissel*,¹⁰¹ and *In re Marriage of Bevers*,¹⁰² the Iowa courts refer to rehabilitative alimony and give guidelines for its application. *Bevers* grants rehabilitative alimony¹⁰³ and *Schissel* rejects it.¹⁰⁴ While not calling alimony "rehabilitative," there are other cases where alimony had some rehabilitative purpose¹⁰⁵ and the need for further education of the wife is discussed.¹⁰⁶

In *In re Marriage of Schissel*,¹⁰⁷ the wife sought rehabilitative alimony "to assist her in obtaining a doctorate."¹⁰⁸ The testimony in the case indicated the doctorate would increase her salary \$13,000 a year.¹⁰⁹ In affirming the trial court's rejection of rehabilitative alimony, the Iowa Supreme Court pointed out that the wife's loss of income while attending school had already been considered and she could reasonably finance her studies out of her share of assets.¹¹⁰

In *In re Marriage of Bevers*,¹¹¹ the wife was a college graduate and was out of the job market during the twelve-year marriage.¹¹² The court stated:

We realize that Betty was out of the job market for the duration of her marriage and may need further training. On the other hand, since she has the demonstrated ability to be successfully employed and was offered a job by J.C. Penney Co. in Denver which she declined, it is not necessary that Ron contribute to her support indefinitely.¹¹³

The court awarded rehabilitative alimony of \$200 per month for two years.¹¹⁴

B. Definition and Purpose

Guidelines for the application of rehabilitative alimony are found from other jurisdictions. A great number of cases in which rehabilitative alimony

achieve this goal.

Id. (emphasis added).

101. 292 N.W.2d 421 (Iowa 1980).

102. 326 N.W.2d 896 (Iowa 1982).

103. *Id.* at 900.

104. *In re Marriage of Schissel*, 292 N.W.2d at 428.

105. *In re Marriage of Janssen*, 348 N.W.2d 251 (Iowa 1984).

106. *In re Marriage of Passick*, 375 N.W.2d 284, 286 (Iowa Ct. App. 1985). In that case the Iowa Court of Appeals considered, among other things in awarding alimony, the wife's desire to complete her college education. *Id.*

107. 292 N.W.2d 421 (Iowa 1980).

108. *Id.* at 428.

109. *Id.*

110. *Id.*

111. 326 N.W.2d 896 (Iowa 1982).

112. *Id.*

113. *Id.* at 900.

114. *Id.*

is an issue are from Florida, where the passage of a dissolution of marriage act in 1971 statutorily provided for rehabilitative alimony.¹¹⁵ The Florida statute was amended in 1978 to specify factors the court should consider in making awards.¹¹⁶ These statutes have been criticized as failing to adequately define the rehabilitative alimony concept or give guidance as to when it is an appropriate award.¹¹⁷

"The principal purpose of rehabilitative alimony is to establish the capacity for self-support in the receiving spouse, through redeveloping previous skills or providing new training to develop potential supportive skills."¹¹⁸ This is a most justifiable type of alimony. It assures a woman she need not become an economic burden on society. Rehabilitative alimony has been defined as "alimony payable for a short but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support."¹¹⁹ Its purposes are multi-

115. DISSOLUTION ACT, ch. 71-241, 1971 FLA. LAWS 1319. FLA. STAT. ANN. § 61.08 (now § 61.08(1)) provided:

In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony will be awarded to such spouse and the amount of alimony, if any, to be awarded.

Id.

116. FLA. STAT. ANN. § 61.08(2) (West 1985) provides:

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

Id.

117. As an example of this criticism, one author has stated:

Where the wife has spent years as a homemaker and mother, bypassing her own career aspirations, it seems equitable that she receive some recompense in the form of continued support after dissolution. However, this would seem to disregard the rationale behind rehabilitative alimony and the recognition by courts of the changing norms in society towards equality and independence."

Comment, *Rehabilitative Alimony - A Matter of Discretion or Direction?*, 12 FLA. ST. U.L. REV. 285, 298 (1984).

118. *Pierson v. Pierson*, 462 So. 2d 613, 614 (Fla. Dist. Ct. App. 1985).

119. *Turner v. Turner*, 158 N.J. Super. 313, —, 385 A.2d 1280, 1280 (1978); see also Annot., 97 A.L.R.3d 740, 743.

fold. It will direct a wife to seek and develop within a precise period of time skills necessary to obtain suitable employment. It will provide the husband with some certainty of the nature and extent of his obligation to his former wife. Rehabilitative alimony will permit a court to consider reasonably foreseeable future events involving the parties and make a present determination of when alimony shall cease, which hopefully will avoid further recourse to courts. Assuredly, this will not always occur, but with sufficient information, finality should occur in the vast majority of cases. "Today, when possible, spousal support is used as a method of rehabilitating the spouse disadvantaged by the divorce."¹²⁰

The amount of rehabilitative alimony awarded and the length of time of payment will be determined by the facts and circumstances of each case. Rehabilitative alimony awards have been made for one year to allow the wife to improve her skills,¹²¹ to help the wife recommence law practice,¹²² for tuition and maintenance for cosmetology school and a training period,¹²³ and to help the wife finish dental school where the husband had gone through dental school during the marriage.¹²⁴

Rehabilitative alimony sets a definite term of payment. It does not contemplate that the husband should be required to subsidize a lifetime of employment inactivity by a former wife.¹²⁵ It does not "give the spouse receiving maintenance a lifetime annuity nor" does it "reduce her to menial labor to eke out an existence."¹²⁶ If a wife "has the capacity to make her own way through the remainder of her life unassisted by the former husband, then the courts cannot require him to pay alimony other than for rehabilitative purposes."¹²⁷

The ability of the husband to pay does not justify continuation of alimony where the rehabilitated wife is shown to be self-supporting.¹²⁸ The purpose of rehabilitative alimony is to establish the capacity for self-support in the receiving spouse through redeveloping previous skills or to provide

120. *Smith v. Smith*, 326 N.W.2d 697, 700 (N.D. 1982).

121. *Bussell v. Bussell*, 623 P.2d 1221, 1224 (Alaska 1981).

122. *Holley v. Holley*, 380 So. 1098, 1101 (Fla. Dist. Ct. App. 1980).

123. *Cole v. Cole*, 633 S.W.2d 263, 264 (Mo. Ct. App. 1982).

124. *Hill v. Hill*, 91 N.J. 506, 453 A.2d 537 (1982). The court stated:

In this case, the plaintiff earned money to support the marital household while her husband obtained his dental degree and license. At the time of trial, the plaintiff was pursuing her own graduate education and needed money to complete it. Equity may not compel any alimony award under such circumstances, but under the facts of this case, either rehabilitative or reimbursement alimony might be appropriate. On remand the trial court should consider a possible award of such alimony, taking into account the plaintiff's needs and the defendant's ability to pay.

Id. at —, 453 A.2d at 538-39.

125. *Ware v. Ware*, 461 So. 2d 467, 469 (La. Ct. App. 1984).

126. *In re Marriage of Schulte*, 546 S.W.2d 41, 49 (Mo. Ct. App. 1977).

127. *Roberts v. Roberts*, 283 So. 2d 396, 397 (Fla. Dist. Ct. App. 1973).

128. *Robinson v. Robinson*, 366 So. 2d 1210, 1211-12 (Fla. Dist. Ct. App. 1979).

new training to develop potential supportive skills.

C. *How to Rehabilitate*

The issue of how rehabilitated the wife should be poses a question. Some courts have questioned to what level she should be educated.¹²⁹ If she has a career, should a former husband be required to support a career change? How much education does she in fact need?

In one case, where at the time of divorce it was contemplated the wife would attain a master's degree, and she in fact attained the master's degree, the court determined alimony should not be extended to cover study toward a doctorate degree.¹³⁰ Rehabilitative alimony has been denied where the wife was at the apex of her career and needed no rehabilitation.¹³¹ It has been denied where the wife was gainfully employed.¹³² In another case, despite the fact the wife had a college degree, she was awarded rehabilitative alimony since she had not been employed during the twelve-year marriage.¹³³ In any situation where the wife leaves the marriage without remunerative employment, she should give serious consideration to requesting rehabilitative alimony.

The lack of rehabilitative alimony awards is not so much the result of the court's refusal to grant it but rather the parties' failure to request it and present evidence to support the claim. An attorney representing a wife seeking rehabilitative alimony should: 1. Obtain a complete evaluation of the wife's abilities, education, training and job experience. 2. Have the job market of the community where she will live after the dissolution carefully analyzed. 3. Make a realistic assessment of the wife's and childrens' present and future financial needs. 4. Obtain evidence of the career loss she suffered because of the marriage and family assumption of responsibilities.

Furthermore, the attorney should: 1. Determine the education or re-training costs and the support necessary during the rehabilitative period. 2. Make a computation of the portion of the costs that can reasonably be available from the wife's share of the marital assets.¹³⁴ 3. Determine the availability of programs to assist with educational costs.¹³⁵ 4. Reasonably tailor the needs to the husband's ability to provide or pay. With this evidence the attorney will be able to determine his client's need and to prop-

129. *Holley v. Holley*, 380 So. 2d 1098 (Fla. Dist. Ct. App. 1980).

130. *Lumsden v. Lumsden*, 603 P.2d 564 (Hawaii 1979).

131. *Atkins v. Atkins*, 380 So. 2d 522 (Fla. Dist. Ct. App.), *motion denied*, 388 So. 2d 34 (Fla. Dist. Ct. App.), *pet. denied*, 389 So. 2d 1107 (Fla. 1980).

132. 292 N.W.2d 421 (Iowa 1980).

133. 326 N.W.2d 896 (Iowa 1982).

134. *In re Marriage of Schissel*, 292 N.W.2d at 428 (Iowa 1980).

135. For example, some of the available programs for college education are Pell Grants, National Direct Student Loans, Guaranteed Student Loans, and private loans and grants through the college, university, or area educational facility.

erly assess a request for a rehabilitative alimony award. An attorney representing the husband should assess the same factors and make the same computation in an attempt to minimize the payments and show the wife can be rehabilitated in a minimal period of time. A rehabilitative award once made should be modifiable only upon a showing of total inability by the husband to pay.¹³⁶

The wife, children, and society will be served if the wife becomes an economically self-sufficient being. The husband will benefit because his obligation will be defined and it will not continue forever. Furthermore, the more education the wife has, the greater likelihood she will seek paid employment.¹³⁷

D. *Rehabilitative Alimony Not Proper in all Cases*

There are situations where rehabilitative alimony will continue to be inappropriate. When a wife suffers from a physical or mental disability that prevents her from maintaining gainful employment, she obviously cannot be rehabilitated and rehabilitative alimony is not a proper issue to consider. Historically, such a woman has received an indefinite alimony award.¹³⁸ Should the husband be ordered to pay alimony for the wife's lifetime? What effect should the duration of the marriage and the financial situation of the husband have on this issue?¹³⁹ Should our social programs assist her?¹⁴⁰

In *In re Marriage of Downing*,¹⁴¹ the Iowa court refused to grant alimony beyond one year to a wife who had an eye condition which antedated

136. *Smith v. Smith*, 326 N.W.2d 697, 700 (N.D. 1982).

137. 20 FACTS ON WOMEN WORKERS, OFFICE OF THE SECRETARY, WOMEN'S BUREAU, U.S. DEPT. OF LABOR (1982); AMERICAN WOMEN: THREE DECADES OF CHANGE, BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE (1983).

138. *In re Marriage of Cerven*, 335 N.W.2d 143, 146 (Iowa 1983) (court ordered husband to pay alimony to wife in nursing home til death of either party); *In re Marriage of Kunzman*, 239 N.W.2d 582, 583-84 (Iowa 1976) (court ordered monthly alimony to wife, who court determined to be frail and beset with maladies, as long as husband and wife live and as long as wife remained unmarried); *In re Marriage of Craft*, 226 N.W.2d 6, 8-9 (Iowa 1975) (court affirmed alimony award to 61-year-old wife in poor health and alimony was to continue until she received divorced spouse's social security benefits); *Conway v. Conway*, 217 N.W.2d 625, 626-27 (Iowa 1974) (monthly alimony award affirmed where wife not well and her earning potential was restricted); *Sherrard v. Sherrard*, 175 N.W.2d 411, 412 (Iowa 1970) (holding if wife remains unrehabilitated alcoholic she will be unable to support herself, court affirmed weekly alimony award but modified it to terminate on death or remarriage).

139. *In re Marriage of Cerven*, 335 N.W.2d at 146 (four and a half years after marriage wife is taken to nursing home and court ordered alimony of \$500 a month until death of either party).

140. Currently, social security ex-spousal benefits are available after a marriage of ten or more years. See 42 U.S.C. § 416(d)(1) (1982). However, the dependant must remain single (42 U.S.C. § 402(b)(1)(H) (1982)) and not be drawing on her account. 42 U.S.C. § 402(b)(1)(D) (1982).

141. 210 N.W.2d 436 (Iowa 1973).

the marriage and the marriage was of short duration.¹⁴² The court said, "[I]n addition, the wife, like other handicapped persons, has a duty to endeavor to help herself by seeking employment within her capabilities or by obtaining training and then seeking employment."¹⁴³

In contrast, the disabled wife who stayed home and cared for the family and did not have earned income subject to social security taxes does not have the social security disability available to her that is available to the employed person.¹⁴⁴ She¹⁴⁵ may, if she remains single and the marriage lasted for ten years or more, collect dependency benefits on her ex-husband's account, but only if she and her former spouse are both sixty-two or if her former spouse is deceased and she is sixty.¹⁴⁶ These benefits will never be more than fifty percent of his benefits.¹⁴⁷ Arguments have been advanced that FICA taxes paid during a marriage should be credited equally to both marriage partners to assure they both will have benefits on disability or retirement.¹⁴⁸ There is merit to these arguments.

Should the right to permanent alimony be dependent upon the length of the marriage and why and how the disabling condition manifested itself? Alimony for life was determined proper where rehabilitation of the wife beyond her present ability was deemed unlikely.¹⁴⁹ Permanent periodic alimony was proper for a wife of twenty-three years who was in poor health and devoted her married life to her home and family at her husband's request, where the husband had ability to pay.¹⁵⁰ Permanent maintenance should only be awarded in the case of an older, dependent spouse in a

142. *Id.* at 438.

143. *Id.*

144. A disabled worker under age 65 can receive monthly social security cash benefits. 20 C.F.R. § 404.310 (1985) (emphasis added).

145. "or he." Men are entitled to the same dependency standard as women are. *Coffin v. Secretary of HEW*, 400 F. Supp. 953 (D.D.C.), *appeal dismissed* 430 U.S. 924 (1975). See also *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Yates v. Califano*, 471 F. Supp. 84 (W.D. Ky. 1979).

146. Missal, *Social Security Benefits and the Divorced Spouse*, 92 CASE AND COMMENT 24 (1986)(also published in Vol. 17 No. 2 of the FAMILY LAW REVIEW).

147. *Id.*

148. *Inequitable Treatment of Working Women*, 112 USA TODAY 4, 4-5 (Aug. 1984); Oakar, *Equal Benefits for Women*, 24 FIFTY PLUS 10, 60 (Aug. 1984). In her article, Ms. Oakar stated:

I have long advocated that the earnings-sharing principle be applied to compute social security benefits. Under this approach, marriage would be treated as an economic partnership. Social security credits earned during a marriage would be equally divided between spouses. Benefits earned by each spouse before or after a marriage would not be affected by earnings sharing, but would be added to the workers' record. This is the fairest way to end discrimination against women in the current social security system.

Id.

149. *Gooselaw v. Gooselaw*, 320 N.W.2d 490 (N.D. 1982).

150. *Golden v. Golden*, 395 So. 2d 1255 (Fla. Dist. Ct. App. 1981).

lengthy "traditional" marriage where there is little likelihood that the dependent spouse will become self-sufficient.¹⁵¹ Permanent rather than rehabilitative alimony should have been awarded where there was no showing that a sixty-year-old woman in poor health who had been unemployed for the prior twelve years had the ability to become self-supporting.¹⁵² The court remanded a case for findings on the factors relevant to need for temporary maintenance, such as ability to become self-supporting and responsibility for the young children of the parties.¹⁵³

Should every woman be expected to be self-supporting? What of the economic inequities women continue to suffer in the job market? What of the woman who has not worked during a long-term marriage and her husband has condoned her not working and has income and assets sufficient to pay alimony? In the dissolution of a fifteen-year marriage of a millionaire husband with an alcoholic wife, the trial court's award of twenty-four-month rehabilitative alimony was held improper in light of the husband's ability to support the wife and the fact the wife had no separate estate or employment record and was in ill-health.¹⁵⁴

Surprisingly, there are still people in contemporary society who encourage women to be supported by another rather than be self-sufficient.¹⁵⁵ They seek to point out the earning differential between men and women and claim that, for this reason, women should receive larger awards of alimony for indefinite periods of time.¹⁵⁶ They blame the judges and attorneys for low alimony awards and contend these awards are determined unjustly when the income level of the husband becomes a determinative factor.¹⁵⁷

Clearly, we are faced with different generations of women each with differing abilities. Some of these women are older with few marketable skills and may require an award of permanent alimony because they may not be self-supporting. Society would be better served, and so would the woman herself, if she were encouraged to enter the job market and given a chance to be retrained and use her potential skills.

VI. RECEIPT OF ALIMONY BY THE HUSBAND: DOES EVE PAY ADAM?

Throughout this article we have reluctantly utilized the husband-as-payor and wife-as-payee concept. Dissolution statutes are generally unsexed to allow payments either way. The United States Supreme Court deter-

151. *Peterson v. Peterson*, 367 N.W.2d 90, 94 (Minn. Ct. App. 1985).

152. *Weider v. Weider*, 402 So. 2d 66 (Fla. Dist. Ct. App. 1981).

153. *Riley v. Riley*, 369 N.W.2d 40, 45 (Minn. Ct. App. 1985). See also *Kaste v. Kaste*, 356 N.W.2d 64, 69 (Minn. App. 1984); *Otis v. Otis*, 299 N.W.2d 114, 117 (Minn. 1980).

154. *Wikle v. Wikle*, 390 So. 2d 297 (Ala. 1980); see also Annot., 97 A.L.R. 3d 740.

155. Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 148 (1980).

156. *Id.*

157. *Id.* at 184.

mined that a sexist Alabama dissolution statute was unconstitutional and stated:

In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme "provides that different treatment be accorded . . . on the basis of . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause," [cite omitted]. The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.¹⁵⁸

The court went on to state, "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would 'not adequately justify the salient features of Alabama's statutory scheme.'" [cite omitted].¹⁵⁹ The court determined, "the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."¹⁶⁰

Cases of husbands receiving alimony are still rare.¹⁶¹ Whether this is the result of men not asking for alimony or of courts refusing to grant their requests we cannot determine. We would assume both reasons have contributed to the lack of alimony awards to men.

In one instance, the Florida Court of Appeals affirmed the denial of alimony to a husband who left the marriage without appreciable assets but with the capacity to earn substantial income.¹⁶² The courts appear to be less sympathetic to men who have less education or physical or mental disabilities hindering their ability to be fully employed than to their female counterparts.¹⁶³ There are still stereotypes. Society as reflected through the courts does not consider it right for Eve to support Adam.

The traditional roles still permeate our court decisions. In *In re Marriage of Callenius*,¹⁶⁴ the husband complained he could not pay alimony because he had net losses in the past five years.¹⁶⁵ The court found no merit to

158. *Orr v. Orr*, 440 U.S. 268, 278-79 (1979).

159. *Id.* at 281.

160. *Id.* at 283.

161. *In re Marriage of Dalziel*, Sup. Ct. No. 84-541 (Iowa Ct. App. Nov. 20, 1984) (where husband was permanently disabled and wife was a store buyer earning over \$20,000 a year, court held wife was to pay alimony of \$400 a month until husband's death or remarriage); *McGill v. McGill*, 247 Ga. 428, 276 S.E.2d 587 (1981) (jury verdict which included an alimony award to the husband was affirmed); *Ingram v. Ingram*, 379 So. 2d 955 (Fla. 1980) (award to husband if such an award was necessary to do equity between the parties); *Barnett v. Barnett*, 158 Okla. 270, 13 P.2d 104 (1932) (affirmed award of alimony to husband).

162. *Fried v. Fried*, 390 So. 2d 392 (Fla. Dist. Ct. App.), *pet. denied*, 399 So. 2d 1142 (Fla. 1980).

163. See *supra* notes 153, 154.

164. 309 N.W.2d 510 (Iowa 1981).

165. *Id.* at 516.

his argument and said the evidence was clear that the husband *had the opportunity* to make substantial income from the farm or other known abilities.¹⁶⁶ The court went on to determine that the wife of sixteen years could live comfortably on \$300 per month alimony and on \$11,250 accrued interest, and stated that, "[I]f she desires, she *may* supplement this by employment outside the home."¹⁶⁷ Did the court in *Callenius* say a man must work and a woman may work?

The issue of alimony payments to men will need to be examined, particularly in light of the families where the wife is becoming the primary wage earner and/or obtains education and career advancement during the marriage. Furthermore, since presumptions in favor of motherhood have been erased from our laws¹⁶⁸ and more fathers are receiving custody or physical care of their children,¹⁶⁹ the rights of both parties must be governed by similar standards.

The courts must disregard the stereotypes and recognize the freedom of families to determine whether one or both spouses will be wage earners. Courts must be willing to grant alimony, where justified, to the spouse who leaves the marriage at an economic disadvantage without regard to the party's sex.

VII. CONCLUSION

Today's woman is an economically productive creature. Her roles and responsibilities have changed with changing concepts of family responsibility. We hope this article will increase public awareness of the inequities in the alimony area that are left over from the application of prior concepts.

166. *Id.*

167. *Id.* (emphasis added).

168. *In re Marriage of Bowen*, 219 N.W.2d 683 (Iowa 1974). In abandoning a prior inference that the best interests of young children are served by placing them in their mother's custody, the Iowa Supreme Court said:

We do not think either parent should have a greater burden than the other in attempting to obtain custody in a dissolution proceeding. It is neither necessary nor useful to infer in advance that the best interest of young children will be better served if their custody is awarded to their mothers instead of their fathers. We previously emphasized the weakness of the inference; we now abandon it.

Id. at 688.

169. *Id.* (custody awarded to father); *In re Marriage of Leyda*, 355 N.W.2d 862 (Iowa 1984) (award modified to give physical care to father); *In re Marriage of Gravatt*, 371 N.W.2d 836 (Iowa Ct. App. 1985) (decree modified to grant father physical custody).

