a husband is liable for alimony when he in bad faith contracts a void marriage and, thus, the burden of alimony should be shifted from the first to the second husband. The court held, however, that the statutory provision in question should not be interpreted to give effect to a bigamous marriage that is declared void under another statutory provision.[53] Relying heavily on its earlier decisions,[54] the court noted that under Iowa law "a void marriage is no marriage,"[55] thus leaving the parties to an annulment "in the same relation to each other as though it [the marriage] had never taken place."[56] The result is that under the court's interpretation of Iowa law alimony is not authorized when a *void* marriage is annulled.[57] Continuing, the court interpreted the term "compensation" as used in the statute[58] to mean reimbursement "for a fraud perpetrated on an innocent party," and not as "alimony."[59]

On balance, the *Bridges* and *DeWall* decisions can be reconciled with each other, even though they appear at first glance to be otherwise. First, the invalid remarriage was voidable in *Bridges* but was void in *DeWall*. Moreover, language in these two cases can be construed to mean that each of the courts, if confronted with a similar factual situation, might have ruled as the other court did. For example, the Mississippi Supreme Court, while basing its decision on the fact that the wife knowingly and voluntarily elected to annul her voidable second marriage, suggested that there would have been "a different kind of case, and undoubtedly . . . a different result"[60] if she had been either mentally incompetent at the time of her remarriage or had been forced under duress to remarry. Likewise, the Iowa Supreme Court's decision turned on the fact that since under Iowa law a void marriage has no validity or effect alimony cannot be granted in annulment decrees arising from *void* marriages. Because the court emphasized that a void marriage is *void ab initio*

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53 What is now IOWA CODE § 595.19 (1966) provides: "Marriages between the following persons shall be void: . . . 4. Between persons either of whom has a husband or wife living . . . ."

54 Drummond v. Irish, 52 Iowa 41, 2 N.W. 622 (1879); Carpenter v. Smith, 24 Iowa 200 (1868).

55 DeWall v. Rhoderick, 258 Iowa 433, 440, 138 N.W.2d 124, 128 (1965).

56 *Id.* at 436, 138 N.W.2d at 126.

57 The court made no reference in *DeWall* to its earlier interpretation of the same statutory provision to mean that "alimony may be awarded in proper cases brought to annul a marriage alleged to be illegal." Ricard v. Ricard, 143 Iowa 182, 184, 121 N.W. 525, 525 (1909). Like *DeWall*, that case also involved a void marriage, and the wife was granted temporary suit money and alimony notwithstanding the fact that she, having a living husband at the time of her void marriage, was not the innocent party. The court in *Ricard* maintained that what is now IOWA CODE § 598.24 (1966), *supra* note 52, had to be interpreted to authorize alimony in annulment proceedings to give "any force or effect at all" to what is now IOWA CODE § 598.20 (1966), which provides: "A petition shall be filed in such cases [annulment proceedings] as in actions for divorce, and all the provisions of this chapter in relation thereto shall apply to such cases, except as otherwise provided." Because alimony was authorized in divorce proceedings under what is now IOWA CODE § 598.14 (1966), *supra* note 51, the court concluded that it follows, under what is now IOWA CODE § 598.20 (1966), that alimony is authorized in annulment proceedings. No reference was made in *Ricard* to the provision in what is now IOWA CODE § 595.19 (1966), which declares void a marriage in which one of the parties has a living spouse.

58 What is now IOWA CODE § 598.24 (1966).

59 DeWall v. Rhoderick, 258 Iowa 433, 440, 138 N.W.2d 124, 128 (1965).

60 Bridges v. Bridges, 217 So. 2d 281, 284 (Miss. 1969).

or invalid for all purposes from the beginning, one can speculate with some degree of certainty that the Iowa Supreme Court would allow alimony in an annulment decree arising out of a voidable marrriage.

Resuming alimony upon an annulment of a void remarriage fails to protect the interest of the first husband, who upon his wife's remarriage must pursue his new long-range economic and social plans at the risk that the remarriage was void, thus making him liable for alimony at some time in the future. A possible solution would be for alimony to be authorized by statute in annulment decrees regardless of whether the marriage was void or voidable, thereby causing a wife who was divorced from her first husband to look only to her second husband for legal support. There appears to be no sound reason why a husband who in bad faith, temporarily at least, enjoyed the rights and privileges of marriage, even though it was invalid, should not also have to assume the incumbent responsibilities.

KERMIT L. DUNAHOO

Domestic Relations—THE IOWA SUPREME COURT SPECIFICALLY ENUMERATES FACTORS TO BE CONSIDERED IN DETERMINING ALIMONY ALLOWANCES AND PROPERTY DIVISIONS.—*Schantz v. Schantz* (Iowa 1968).

Plaintiff-wife brought an action for divorce and accompanying relief, alleging cruel and inhuman treatment. In granting judgment for the plaintiff, a fifty-thousand dollar lump-sum property settlement and a one-hundred fifty dollar monthly alimony award was ordered by the trial court. Defendant appealed, claiming the award to be excessive. *Held*, affirmed. The Iowa Supreme Court determined that the trial court had correctly and equitably applied the elements of the general formula for determining the rights and obligations of divorced parties. *Schantz v. Schantz*, — Iowa —, 163 N.W.2d 398 (1968).

Iowa courts have, since their creation, faced the problem of finding a proper and equitable basis for decisions as to amounts to be awarded as property settlements and alimony allowances in divorce decrees. The statutory provision governing such judgments only provides that "[w]hen a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be right."[1] This

[1] IOWA CODE § 598.14 (1966).

provision has remained essentially unaltered since 1851.[2] It has also long been recognized in this jurisdiction that, in making such judgments, there is no single factor which controls the amount of alimony and property awarded the parties involved in a divorce decree. Rather, notice must be taken of several varied facets of the particular circumstances of each case.[3] However, these determining factors have not remained constant, some changes having been evident through the years.

Early Iowa cases recognized that the wife and children's needs could not be the sole criteria, but that consideration must be given to the husband's means and ability to pay.[4] Measurement was to be made by reference to the resources of the parties involved, not to their necessities.[5] After the turn of this century, the Iowa courts began to adopt guidelines more specific than the previous general principles, looking to such factors as the comparative fault of the parties,[6] their financial and physical abilities[7] and the parties' misconduct.[8] The first case in which the Iowa Supreme Court undertook to announce a number of specific factors to be considered in judging the amount of alimony to be awarded a wife was decided in 1921.[9] The court re-emphasized the use of these elements in *Black v. Black*:

> The court does and should take into consideration the sex, age, health, and future prospects of the parties, the private estate of each, the contributions of each to the joint or accumulated property, the children involved and to be provided for, the earning capacity of each, their respective incomes, and their respective indebtedness. These and other facts pertaining to the case are sufficient to enable a court to arrive at a just, fair, and equitable decision in the matter.[10]

These factors were retained and repeated,[11] so that with various additions[12] and deletions, the Iowa Supreme Court came to regard the criteria as settled.[13] However, the court found with increasing frequency that it was required to recite the criteria,[14] so that by the 1960's it appeared to be exhibiting some

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2 Ch. 134 [1851] Iowa Acts 223.

3 Alberhasky v. Alberhasky, 250 Iowa 986, 97 N.W.2d 914 (1959); Russell v. Russell, 4 Greene 26 (Iowa 1853).

4 Zuver v. Zuver, 36 Iowa 190 (1873); Abey v. Abey, 32 Iowa 575 (1871); Russell v. Russell, 4 Greene 26 (Iowa 1853).

5 Evans v. Evans, 159 Iowa 338, 140 N.W. 801 (1913).

6 Closz v. Closz, 184 Iowa 739, 169 N.W. 183 (1918).

7 Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N.W. 520 (1920).

8 *Id.* at 9, 179 N.W. at 521.

9 Mitchell v. Mitchell, 193 Iowa 153, 185 N.W. 62 (1921).

10 200 Iowa 1016, 1018, 205 N.W. 970, 971 (1925).

11 Brannen v. Brannen, 237 Iowa 188, 21 N.W.2d 459 (1946); Twombley v. Twombley, 227 Iowa 177, 287 N.W. 841 (1939); Ellsworth v. Ellsworth, 218 Iowa 957, 256 N.W. 690 (1934).

12 Dillavou v. Dillavou, 235 Iowa 634, 17 N.W.2d 393 (1945) (length of marriage; industry of various parties).

13 Nelson v. Nelson, 246 Iowa 760, 768, 68 N.W.2d 746, 751 (1955): "In Black v. Black . . . we announced the rule now followed in this jurisdiction."

14 Cooper v. Cooper, 259 Iowa 277, 144 N.W.2d 146 (1966); Weiland v. Weiland, 255 Iowa 477, 122 N.W.2d 837 (1963); Rider v. Rider, 251 Iowa 1388, 105 N.W.2d 508 (1960); Alberhasky v. Alberhasky, 250 Iowa 986, 97 N.W.2d 914 (1959).

irritation.[15] It was in this environment that the Iowa Supreme Court, in *Schantz*, systematically listed for the first time a general formula, consisting of both premarital and postmarital criteria, to be considered in determining the amounts of alimony and property division in divorce decrees.

> The court presented the following criteria:
>
> Use of the following general formula may be helpful in arriving at an equitable determination of financial or property rights and obligations of the parties to a divorce action, though each element is not always present or important.
>
> A. PREMARITAL CRITERIA:
>
> 1. Social position and living standards of each party.
> 2. Their respective ages.
> 3. Their respective mental or physical condition.
> 4. What each sacrificed or contributed, financially or otherwise, to the marriage.
> 5. The training, education and abilities of each party.
>
> B. POSTMARITAL CRITERIA:
>
> 1. Duration of the marriage.
> 2. Number of children, their respective ages, physical or mental conditions, and relative parental as opposed to financial needs.
> 3. Net worth of property acquired, contributions of each party thereto by labor or otherwise, net worth and present income of each party.
> 4. Conduct of the spouses and particularly that of the guilty party.
> 5. Present physical and mental health of each party.
> 6. Earning capacity of each party.
> 7. Life expectancy of each party.
> 8. Any extraordinary sacrifice, devotion or care by either spouse in furtherance of a happy marriage or in preservation of the marital relationship.
> 9. Present standards of living and ability of one party to pay balanced against relative needs of the other.
> 10. Any other relevant factors which will aid in reaching a fair and equitable determination as to respective rights and obligations of the parties.[16]

There are several types of authority cited by the court as sources for the factors enumerated, including a number of recent Iowa decisions,[17] a 1951 Utah decision in which the elements are listed in a strikingly similar manner,[18] two

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[15] *See, e.g.*, Kjar v. Kjar, 154 N.W.2d 123, 125 (Iowa 1967) ("it is well established in this jurisdiction . . . ."); Weiland v. Weiland, 255 Iowa 477, 480, 122 N.W.2d 837, 839 (1963) ("We have frequently stated . . ."). *See also* Cole v. Cole, 259 Iowa 58, 143 N.W.2d 350 (1966); Lessenger v. Lessenger, 258 Iowa 170, 138 N.W.2d 58 (1965); Pfab v. Pfab, 257 Iowa 303, 132 N.W.2d 483 (1965); Rasmussen v. Rasmussen, 252 Iowa 414, 423, 107 N.W.2d 114, 119 (1961) ("We will not recite the principal matters to be considered in awarding alimony . . . .").

[16] Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968).

[17] Gerk v. Gerk, 158 N.W.2d 656 (Iowa 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); Lessenger v. Lessenger, 258 Iowa 170, 138 N.W.2d 58 (1965).

[18] MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951).

legal encyclopedias,[19] and a treatise.[20] The Iowa decisions consist of several cases in which the elements are recited in determining alimony, property division and child support and are general examples of the factors utilized for many years. The Utah decision appears to have greatly influenced the format and the specific criteria used, while the remaining sources consist of general discussions of the factors in determining alimony and property division.

In considering the elements announced by the court in *Schantz*, it is necessary to realize that the Iowa courts have not separated alimony and property division into completely unrelated categories of relief. Rather, the rule has evolved that, while recognizing the fundamental differences in the basis of each type of award,[21] they have been collected under the general term of "alimony."[22] Few differences may be found between the criteria enumerated in decisions dealing only with property division[23] and those relating to the amount of alimony to be awarded.[24] Indeed, the language and sources used in *Schantz* indicate that the court intends the formula to be applied to both.[25] Also, the decision repeats the caveat that various elements may be unimportant or absent from the facts of any particular case.[26] Thus, all of the factors may be considered to be various aspects of the long-recognized general rule that the amount awarded be based upon the necessities of the wife and financial ability of the husband.[27]

The court, in dividing the criteria into premarital and postmarital divisions, has clearly indicated those factors to be considered in awarding alimony and property. While several of the criteria enumerated in *Schantz* have not been specifically mentioned in prior decisions, they may, by their nature, be considered to have been an implicit part of more general factors. There appears to have been no shift of emphasis to conditions not previously considered by the Iowa Supreme Court. Consequently, an examination of each factor of the criteria and decisions which have utilized that element to determine alimony and property awards may be helpful for a general back-

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19 27B C.J.S. *Divorce* § 295(2) (1959); 24 AM. JUR. 2d *Divorce & Separation* §§ 630-36, 925-34 (1966).

20 2 W. NELSON, DIVORCE & ANNULMENT § 14.135 (2d ed. 1961).

21 Alimony is based on the common-law duty of the husband to support the wife, while a property settlement is based upon the wife's right to a just and equitable share of the accumulated joint property. Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966); 27A C.J.S. *Divorce* § 202 (1959).

22 Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966); Brin v. Brin, 240 Iowa 659, 37 N.W.2d 261 (1949).

23 Cooper v. Cooper, 259 Iowa 277, 144 N.W.2d 146 (1966); Pfab v. Pfab, 257 Iowa 303, 132 N.W.2d 483 (1965).

24 Kjar v. Kjar, 154 N.W.2d 123 (Iowa 1967); Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 145 N.W.2d 456 (1966).

25 In introducing the criteria, the court stated they could be used in determining "an equitable determination of *financial or property rights and obligations* of the parties . . . ." (Emphasis added.) Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968). *See also* authorities cited notes 17-20 *supra*.

26 "[E]ach element is not always present or important." Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968).

27 Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 145 N.W.2d 456 (1966); Berry v. Berry, 253 Iowa 388, 112 N.W.2d 663 (1962); 24 AM. JUR. 2d *Divorce & Separation* § 630 (1966).

ground. Of course, divorce cases are particularly dependent upon the facts and circumstances, so factual precedents may be of only limited value.[28] Therefore, the decisions cited are only examples of the court's use of the particular element being examined. The five premarital elements deal mostly with the personal characteristics of the parties before and during the marriage rather than their financial circumstances.

Social Position—Living Standard. This element appears to have been derived from *MacDonald v. MacDonald*,[29] although it is a generally-recognized factor to be considered in alimony or property division decisions.[30] This factor, however, is not rigidly applied, and may be of little value in cases where the parties have been living beyond their means prior to the divorce action.[31]

Respective Ages. The ages of the parties are generally recognized as important factors[32] and have been utilized by the courts in awarding alimony and property in divorce decrees.[33] The parties' ages are, of necessity, closely tied to the postmarital element of the life expectancy of the parties.[34]

Mental or Physical Conditions. While the general health of the parties has been regarded as a factor to be given consideration in ordering alimony and making a division of property, the element of the parties' mental or physical condition at the time of marriage appears to have been first specifically enunciated by the Iowa Supreme Court in *Schantz*.[35] However, in the past, the physical and mental health of the parties has apparently played a role in judging the amount and duration of alimony to be awarded a wife, even though not specifically enumerated.[36]

Sacrifices or Contributions to the Marriage. The court has regarded sacrifices of material benefit, such as the loss of pension rights upon marriage,[37] as factors to be considered in making divorce settlements. Likewise, one's contributions,[38] or lack thereof,[39] in any measurable way has been held to be relevant evidence for the court's attention.

Training, Education and Ability. The relative ability to support oneself due to education, training or ability has previously been regarded as a proper element for consideration[40] though not specifically as premarital criteria.

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28 Cole v. Cole, 259 Iowa 58, 61, 143 N.W.2d 350, 352 (1966).

29 120 Utah 573, 236 P.2d 1066 (1951).

30 27A C.J.S. *Divorce* § 233(6) (1959); 27B C.J.S. *Divorce* § 295(2) (1959); Annot., 1 A.L.R.3d 6, 41 (1965).

31 Annot., 1 A.L.R.3d 6, 42 (1965).

32 2 W. Nelson, Divorce & Annulment § 14.38 (2d ed. 1961); 27A C.J.S. *Divorce* § 233(1) (1959); 27B C.J.S. *Divorce* § 295(2) (1959).

33 Gerk v. Gerk, 158 N.W.2d 656 (Iowa 1968); Saunders v. Saunders, 211 Iowa 976, 234 N.W. 830 (1931); Halley v. Halley, 130 Iowa 683, 107 N.W. 807 (1906).

34 *See* text accompanying notes 64-65 *infra*.

35 *Cf.* MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066 (1951).

36 Andreesen v. Andreesen, 252 Iowa 1152, 110 N.W.2d 275 (1961).

37 Britven v. Britven, 259 Iowa 650, 145 N.W.2d 450 (1966).

38 Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N.W. 520 (1920).

39 Hansen v. Hansen, 255 Iowa 1050, 125 N.W.2d 139 (1963).

40 Hawkins v. Hawkins, 250 Iowa 233, 93 N.W.2d 584 (1958); Kitchen v. Kitchen, 238 Iowa 582, 27 N.W.2d 901 (1947).

Closely related to a party's earning capacity, a postmarital factor,[41] the Iowa Supreme Court seems to have adopted it as a premarital element from *MacDonald v. MacDonald*.[42]

The ten postmarital criteria deal with several aspects of the divorce and its parties, including the personal characteristics of those involved, the abilities and burdens of each and their financial positions and future expectations.

Duration of the Marriage. This factor was first announced in Iowa in 1945[43] and has since become an element of many court decisions awarding alimony or making a division of property.[44]

Children and Their Needs. Children of divorced parties have always been considered of primary importance,[45] and their needs must be taken into account, along with the wife's, in balance with the husband's ability to pay.[46] This element may, to a large degree, be translated into an award for child support[47] but is a proper subject of consideration in making both alimony and property judgments.[48]

Net Worth of Acquired Property, Contributions of Parties, Net Worth and Present Income of Parties. This factor is intended to ascertain the present financial positions of the parties, the value of the jointly acquired property and the efforts of each in accumulating that property. The financial status of each at the time of the divorce has long been considered a proper element in making awards of alimony and property division.[49] Generally considered to be of major importance in making such decisions,[50] it has been held that the parties' comparative financial positions are of prime importance.[51] Likewise, the property acquired during the marriage and the parties' efforts toward such acquisition are to be considered. Where one party has not contributed, either by direct or indirect means, the court may limit alimony.[52] Conversely, where the wife has contributed to the acquisition of property, her allowances may be accordingly increased.[53]

Conduct of Spouses, Particularly Guilty Party. This factor is a source of much controversy, as it is often questioned whether the concept of "fault"

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41 *See* text accompanying notes 61-63 *infra*.
42 120 Utah 573, 236 P.2d 1066 (1951).
43 Dillavou v. Dillavou, 235 Iowa 634, 17 N.W.2d 393 (1945).
44 *See, e.g.*, Cooper v. Cooper, 259 Iowa 277, 144 N.W.2d 146 (1966); Pfab v. Pfab, 257 Iowa 303, 132 N.W.2d 483 (1965).
45 Kitchen v. Kitchen, 238 Iowa 582, 27 N.W.2d 901 (1947); Aitchison v. Aitchison, 99 Iowa 93, 68 N.W. 573 (1896).
46 White v. White, 251 Iowa 440, 101 N.W.2d 18 (1960).
47 *Id.*
48 Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 145 N.W.2d 456 (1966); Lessenger v. Lessenger, 258 Iowa 170, 138 N.W.2d 58 (1965).
49 Evans v. Evans, 159 Iowa 338, 140 N.W. 801 (1913); Russell v. Russell, 4 Greene 26 (Iowa 1853).
50 24 Am. Jur. 2d *Divorce & Separation* § 631, 933 (1966); 2 W. Nelson, Divorce & Annulment §§ 14.46, 14.138 (2d ed. 1961).
51 Simpson v. Simpson, 247 Iowa 546, 74 N.W.2d 582 (1956).
52 Murray v. Murray, 244 Iowa 548, 57 N.W.2d 234 (1953); Rule v. Rule, 204 Iowa 1122, 216 N.W. 629 (1927).
53 Farrand v. Farrand, 246 Iowa 488, 67 N.W.2d 20 (1954); Dillavou v. Dillavou, 235 Iowa 634, 17 N.W.2d 393 (1945) (reduction of husband's debts).

should be a measure of amount of alimony and property awards. There are movements in several jurisdictions to eliminate fault or conduct from consideration in awarding alimony,[54] but it is still the general rule that fault, while not the determining factor, should be considered.[55] The Iowa Supreme Court has considered the conduct of the parties as a material element for many years[56] and has recently ruled it to be an important, but not controlling, factor.[57]

Present Physical and Mental Health. The court has regularly given considerable attention to the physical and mental conditions of the parties, as other factors such as earning capacity or increased expenses may be affected by poor health.[58] The courts have awarded alimony at least in part because of the wife's health,[59] and the present health of the parties now appears to be well-established as a factor to be considered in making such judgments.[60]

Earning Capacity of Each Party. The capacity of both parties to earn is of major importance. Not only the husband's, but also the wife's, capacity to earn a living must be considered.[61] Not just income, but earning capacity is the measure.[62] The Iowa Supreme Court has often listed earning capacities of the parties as an important factor for determining alimony or the division of property.[63]

Life Expectancy. This element, closely related to the premarital criterion of the parties' ages,[64] had not been considered as a separate factor for determining alimony or the division of property in Iowa prior to *Schantz.* However, the life expectancy of a party is closely tied to considerations of the parties' ages, and may be considered to have been an implicit part of that element when it has been considered by the court in awarding alimony and property.[65]

Extraordinary Sacrifice or Care in Furtherance of the Marriage. This factor also had not been specifically enunciated in Iowa prior to *Schantz.* Apparently a complement to the factor of the conduct of the parties, and par-

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54 Hofstadter & Levittan, *Alimony—A Reformulation,* 7 J. FAMILY L. 51 (1967). *See also* H.F. 4, 63d General Assembly (1969); S.F. 4, 63d General Assembly (1969) (proposal to eliminate the consideration of fault included in divorce law reform bills).

55 Annot., 1 A.L.R.3d 6, 28 (1965); 24 AM. JUR.2d *Divorce & Separation* 636 (1966); 2 W. NELSON, DIVORCE & ANNULMENT §§ 14.40, 14.135 (2d ed. 1961); 27A C.J.S. *Divorce* §§ 233(2), 233(5) (1959).

56 Murray v. Murray, 244 Iowa 548, 57 N.W.2d 234 (1953); Mitchell v. Mitchell, 193 Iowa 153, 185 N.W. 62 (1921); Dupont v. Dupont, 10 Iowa 112 (1859).

57 Kjar v. Kjar, 154 N.W.2d 123 (Iowa 1967); Cooper v. Cooper, 259 Iowa 277, 144 N.W.2d 146 (1966).

58 Annot., 1 A.L.R.3d 6, 42 (1965).

59 Andreesen v. Andreesen, 252 Iowa 1152, 110 N.W.2d 275 (1961); Inman v. Inman, 196 Iowa 845, 195 N.W. 583 (1923).

60 *See, e.g.,* note 17 *supra.*

61 24 AM. JUR. 2d *Divorce & Separation* §§ 632, 633 (1966); Annot., 1 A.L.R.3d 6, 39 (1965).

62 24 AM. JUR. 2d *Divorce & Separation* § 632 (1966).

63 Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 145 N.W.2d 456 (1966); Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N.W. 520 (1920).

64 *See* text accompanying notes 32-34 *supra.*

65 *See* note 32 *supra.*

ticularly that of the guilty party,[66] this allows the court to consider a party's devotion or efforts to maintain a workable marriage relationship in ordering alimony. It appears, then, that a court, in addition to "punishing" the "guilty" party, may also "reward" extraordinary diligence to preserve the marriage.

Present Living Standards, Ability to Pay and Relative Needs. The parties' "standard of living" to which they have been accustomed prior to the divorce had not been explicitly employed as a factor by the Iowa Supreme Court prior to *Schantz.* However, such may be considered a part of the needs and abilities of the parties. As previously mentioned, the several criteria set forth in *Schantz* are merely various aspects of the general underlying rule that the amount awarded be based upon the wife's necessities and the husband's financial abilities.[67] That these two general considerations must be balanced has been a long-followed procedure in Iowa and elsewhere.[68]

Any Other Relevant Factors. An "open door" clause, this allows a court much flexibility in tailoring its considerations of the factors to the facts and circumstances of each case. The supreme court has emphasized that precedents are of little value in determining factual issues and that each case must be determined according to its own particular facts.[69] This final element of the general formula set forth in *Schantz* allows the court to fit the considerations to each case and to consider other factors not enumerated herein to be utilized in making alimony awards and property divisions.

The Iowa Supreme Court, by specifically listing the criteria to be considered in awarding alimony and property settlements, accomplished several tasks. It clarified and emphasized the law as to what factors should and will be taken into consideration, utilizing a relatively simple "check-list" that should be of greater benefit to the Bench and Bar than the previously used practice of lumping factors together into a few lengthy sentences. It has also reiterated in a striking fashion the controlling concepts of divorce awards of alimony and property in Iowa. Indeed, it may be more than coincidence that the court utilized *Schantz* to emphasize the criteria prevailing in Iowa at a time when the legislature is giving consideration to reforming Iowa divorce laws, including discarding the "fault" concept. The court, in taking such pains to reaffirm and reassert the several elements, appears to be saying that such changes as the elimination of the guilty party's conduct from consideration must come from the legislative branch of the government. It is, then, clarifying the law not only for the Iowa lawyers but also for the legislators of the state.

DENNIS G. LINDER

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66 *See* text accompanying notes 54-57 *supra.*

67 *See* text accompanying note 27 *supra.*

68 2 W. NELSON, DIVORCE & ANNULMENT, §§ 14.39, 14.41 (2d ed. 1961); 24 AM. JUR. 2d *Divorce & Separation* § 631 (1966); 27A C.J.S. *Divorce* §§ 233(3), 233(6) (1969); note 27 *supra.*

69 Cole v. Cole, 259 Iowa 58, 61, 143 N.W.2d 350, 352 (1966).

Release—The Release of an Original Tort-Feasor Is Not a Bar to Malpractice Action Against Treating Physician.—*Smith v. Conn* (Iowa 1968).

Plaintiff broke her leg as a result of a fall on church property. Defendant, an osteopathic physician, was employed to treat her injuries. An action was brought for malpractice alleging that the defendant performed his duties negligently. Defendant, as part of his answer, alleged plaintiff had settled her claim with the church and executed a complete release of all liability in connection therewith. Defendant urged that the settlement and release of the church barred an action against a subsequent treating physician. This contention was sustained and plaintiff appealed to the Supreme Court of Iowa. *Held,* reversed and remanded, all justices concurring. A release by an injured party of the original tort-feasor does not of itself preclude an action by the injured person against a physician or surgeon for negligent treatment of the injury. *Smith v. Conn,* — *Iowa* —, 163 N.W.2d 407 (1968).

The majority of courts faced with the issue have held that a general release of a negligent tort-feasor bars a subsequent malpractice action against the treating physician.[1] There is, however, a growing minority of jurisdictions holding that a release by an injured party of the original tort-feasor does not of itself bar an action against a physician or surgeon for negligent treatment.[2]

The majority rule seems to be based on two grounds. As a matter of law the original tort is considered to be the proximate cause of any injuries resulting from the malpractice which occurred while treating the original injury.[3] Consequently, it is the almost universal rule that the original wrongdoer is liable for the aggravation of the original injury resulting from the negligent treatment of a physician or surgeon.[4] The ensuing liability of the original tort-feasor for the aggravated injury leads to the conclusion that the injury resulting from the joint action is a single injury and constitutes basis for but a single cause of action.[5] An additional ground for the majority rule is that there should be only one satisfaction for the same injury and failure to bar an action for malpractice after release of the original tort-feasor might enable the injured person to recover twice for the same injury.[6] This theory is furthered by the conclusion that a settlement with one of the joint tort-feasors represents a full satisfaction of the entire claim[7] and by case holdings that a re-

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1 Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Feinstone v. Allison Hosp., Inc., 106 Fla. 302, 143 So. 251 (1932); Keown v. Young, 129 Kan. 563, 283 P. 511 (1930); Thompson v. Fox, 326 Pa. 209, 192 A. 107 (1937). *See also,* Annot., 40 A.L.R.2d 1075 (1955).

2 Ash v. Mortensen, 24 Cal. 2d 654, 150 P.2d 876 (1944); Coullaird v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 92 N.W.2d 96 (1958); DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966); *See also,* Annot., 40 A.L.R.2d 1075 (1955).

3 Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963).

4 Phillips v. Werndorff, 215 Iowa 521, 243 N.W. 525 (1932).

5 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

6 Hansen v. Collett, 79 Nev. 159, 380 P.2d 301 (1963); Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).

7 Derby v. Prewitt, 236 N.Y.S.2d 953, 187 N.E.2d 556 (1962).