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officer, even though he could not justify an arrest for the underlying crime of prostitution, may still effect an arrest for the crime of resisting or obstructing an officer.

The rule of reasonable provocation bases the right to resist squarely upon the common law justification for resisting an unlawful arrest—provocation. It would eliminate a potential for abuse created by the *Nunes*/statutory approach, *i.e.*, if no grounds exist for an arrest, an arresting officer could create the necessary grounds by provoking the arrestee into resistance and then lawfully arresting him for such resistance. Such a practice would create a potentially dangerous conflict and is clearly unjust. Under a provocation rule, the difficult distinction between a patently unlawful arrest and one valid on its face could be eliminated. If and when standards of reasonableness change, so would the availability of the defense.

The Missouri courts and legislature should reconsider the abrogation of the right to resist an unlawful arrest. Retaining such a limited right based on provocation would entail little social cost since men in the heat of passion will use force to preserve their liberty regardless of the existence of the defense.

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DOMESTIC RELATIONS—AWARD OF NOMINAL MAINTENANCE TO PRESERVE JURISDICTION TO MODIFY

McBane v. McBane[1]

The twenty-three year marriage of Elinor and William McBane was dissolved on September 25, 1975, in a decree that divided the marital property and awarded the wife custody of a minor child and an allowance for child support. Elinor McBane earned a gross salary of $700 per month as a registered nurse supervisor at the time the dissolution action was brought. The prospects for her continuing to be financially self-reliant were not good, however, because a spinal condition and progressive arthritis already affected her ability to perform general floor nurse duties.[2] Despite this evidence, the decree denied any award of mainte-

1. 553 S.W.2d 521 (Mo. App., D.K.C. 1977).

2. *Id.* at 523. Because two of the wife's lumbar vertebrae had been fused, continued work posed a danger that another disc would herniate.

nance to her and she appealed this denial, contending that the court should have awarded at least nominal maintenance in order to retain jurisdiction to modify the award later.[3] The appeal raised two questions: whether an award of nominal maintenance is consistent with the need-based criteria for awarding maintenance under the current dissolution statute, and whether an initial award of maintenance is a precondition to jurisdiction for later modifying the decree to award maintenance. The Missouri Court of Appeals, Kansas City District, after finding that the wife had an existing physical condition that presented a substantial potentiality of disabling her, modified the original judgment by inserting a provision for nominal maintenance of one dollar per year for the purpose of retaining jurisdiction to award maintenance in the future.[4]

Maintenance is a statutory invention; in order for a court to award an allowance for the support of a spouse or to modify such allowance, authority must be found in the statutes.[5] The current statutory provisions for the allowance of maintenance are found in section 452.335, RSMo (Supp. 1975) and the provisions for modification of maintenance are found in section 452.370, RSMo (Supp. 1975).[6] The *McBane* court expressly construed the maintenance statute to permit the allowance of nominal maintenance and implicitly construed the modification of the maintenance statute to preclude modification of a judgment to insert a provision for spousal maintenance unless the original judgment awarded some maintenance.[7] These readings of the current maintenance provisions continue rules of construction that grew up under the differently worded prior statute.[8] This note will critically examine these two constructions of the current maintenance provisions to determine whether they are well founded.

Herbert v. Herbert[9] was the first Missouri case to hold that if a divorce decree does not provide for alimony[10] the court is subsequently without

3. *Id.* at 522.

4. *Id.* at 524-25.

5. Abright v. Abright, 454 S.W.2d 957, 958 (St. L. Mo. App. 1970); Gordon v. Ary, 358 S.W.2d 81, 84 (K.C. Mo. App. 1962); Hughes v. Wagner, 303 S.W.2d 181, 184 (St. L. Mo. App. 1957); Smith v. Smith, 350 Mo. 104, 109, 164 S.W.2d 921, 924 (1942); Bishop v. Bishop, 151 S.W.2d 553 (St. L. Mo. App. 1941).

6. The provisions are adopted from the Uniform Marriage and Divorce Act, 9 U.L.A. 455 (1973). Several other states have recently enacted similar statutes. ARIZ. REV. STAT. ANN. §§ 14-10-114, 14-10-122 (1973); DEL. CODE tit. 13, §§ 1512, 1519 (Supp. 1977); ILL. ANN. STAT. ch. 40, §§ 504, 510 (Smith-Hurd Supp. 1978); KY. REV. STAT. §§ 403.200, 403.250 (Supp. 1976); MONT. REV. CODES ANN. §§ 48-322, 48-330 (Supp. 1977); WASH. REV. CODE ANN. §§ 26.09.090, 26.09.170 (Supp. 1977).

7. 553 S.W.2d at 524.

8. 1855 Mo. Laws (*codified at* § 452.070, RSMo 1969, *repealed* Jan. 1, 1974).

9. 221 Mo. App. 201, 299 S.W. 840 (St. L. Ct. App. 1927), *construing* § 1806, RSMo 1919 (which is identical to § 452.070, RSMo 1969). The contrary result in Scales v. Scales, 65 Mo. App. 292 (St. L. Ct. App. 1896), has been largely ignored

jurisdiction to modify the decree and insert a provision for alimony. Despite the fact that the question turned on a construction of the alimony statutes then in effect, the opinion did not analyze the specific wording of the statute. Instead it merely cited cases from three other jurisdictions as supporting the rule it adopted.[11]

The most often cited Missouri case on this question is *Smith v. Smith*.[12] The statutory provision controlling in *Smith* provided that the court "may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper. . . ." The *Smith* court found that this statute did not contain any "express provisions . . . permitting the court after a decree of divorce, to make new orders as to alimony" and held that in order for there to be a subsequent modification, some liability for alimony must have been fixed at the time the divorce was granted.[13] The theory adopted in *Smith* for denying a later action for alimony was that no authority was granted by the modification statute "since there is nothing in the decree to alter or modify."[14]

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in subsequent Missouri cases. Baker v. Baker, 274 S.W.2d 322, 324 n.1 (Spr. Mo. App. 1954).

10. The rule for periodic alimony or maintenance has been different from that applied to the division of marital property. In general, property settlements or lump sum awards are not modifiable. A recent case has held that even periodic alimony, if for a determinate period, is analogous to alimony in gross and so is not modifiable. Laney v. Laney, 535 S.W.2d 510 (Mo. App., D.K.C. 1976). The question of modification of maintenance of a spouse has been held to be separate from that of child support, which is generally modifiable even where the initial decree does not provide for child support. Robinson v. Robinson, 268 Mo. 703, 186 S.W. 1032 (1916); Backy v. Backy, 355 S.W.2d 389 (St. L. Mo. App. 1962); Herbert v. Herbert, 221 Mo. App. 201, 299 S.W. 840 (St. L. Ct. App. 1927). Agreements between husband and wife in settlement of marital property are governed by still another hypertechnical rule, that provision for maintenance in an agreement which is "approved" but not "incorporated" into a decree is not modifiable, whereas provision for maintenance in an agreement which is incorporated into the decree is modifiable as alimony. Goulding v. Goulding, 497 S.W.2d 842, 845 (Mo. App., D.K.C. 1973); Toth v. Toth, 483 S.W.2d 417, 422 (Mo. App., D. St. L. 1972).

11. Howell v. Howell, 104 Cal. 45, 47, 37 P. 770, 771 (1894) (construing a California statute, now repealed, which provided that the husband may be compelled to provide maintenance for the wife and that "the court may from time to time modify its orders in these respects"); Kelley v. Kelley, 317 Ill. 104, 109, 147 N.E. 659, 661 (1925) (construing an Illinois statute, now repealed, which provided: "The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance . . . as shall appear reasonable and proper"; Spain v. Spain, 177 Iowa 249, 251, 158 N.W. 529, 530 (1916) (construing an Iowa statute, now repealed, which provided: "When 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. Subsequent changes may be made by it in these respects when circumstances render them expedient.").

12. 350 Mo. 104, 164 S.W.2d 921 (1942).

13. *Id.* at 923, *construing* § 1519, RSMo 1939 (identical to § 1806, RSMo 1919, interpreted in *Herbert,* and to § 452.070, RSMo 1969).

14. *Id.* at 924.

It is questionable whether the statutory language supported such an interpretation. As noted, the statute in force when *Smith* was decided provided that the court could make such alterations as to the allowance of alimony and maintenance as were proper.[15] A common sense view would regard the insertion of an alimony provision when there had not been one in the original decree as an "alteration as to the allowance of alimony," and thus authorized by the statute. One taking such an approach would reject as artificial the argument in *Smith* that inserting a provision for alimony is not strictly an alteration because there is nothing in the decree to alter. The use of the words "alteration as to" cannot be said to presuppose an extant allowance of alimony, because "alteration as to" has a more inclusive meaning than "alteration in" or "alteration of"; a change "as to" a thing in ordinary usage does encompass a change from the nonexistence to the existence of the thing.

Smith's overtechnical argument that what does not exist cannot be modified involves not only a narrow construction of the statutory language, but also a narrow view of the policy behind the statute. *Smith* does cite the reasons for having a statute that allows modification of maintenance payments: "Flexibility is necessarily required in order to accommodate the payments to the current needs of the wife and the ability of the husband to pay as future conditions may affect these factors."[16] The *Smith* court proceeded as if this reason for modifiability applies exclusively where maintenance payments are originally ordered, ignoring the fact that the need for adjustments to meet changed needs is equally pressing when there was no maintenance award in the initial decree. Nonetheless, later Missouri cases have followed *Smith* without exception.[17]

The statutory provision for modification of maintenance interpreted in *Smith* has been repealed and replaced by section 452.370, and the new provisions have altered the statutory framework in which the question of a procedural bar to subsequent modification must be viewed. The current statute provides that "the provisions of any decree respecting

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15. Although nearly every jurisdiction follows the rule adopted in *Smith,* only the Nebraska and Wisconsin modification statutes explicitly prohibit the later insertion of support provisions. NEB. REV. STAT. § 42-365 (1974); WIS. STAT. ANN. § 247.32 (West Supp. 1977). The New York statute expressly permits such insertion. N.Y. [DOM. REL.] LAW art. 13, § 236 (McKinney 1977). *See* Pap v. Pap, 51 App. Div. 1091, 381 N.Y.S. 542 (1976); Bertsche v. Bertsche, 343 N.Y.S.2d 176 (Fam. Ct. 1972); M. v. M., 70 Misc. 2d 974, 335 N.Y.S.2d 207 (Fam. Ct. 1972); Smith v. Smith, 60 Misc. 2d 692, 303 N.Y.S.2d 193 (Fam. Ct. 1969).

16. 164 S.W.2d at 924.

17. Glick v. Glick, 372 S.W.2d 912 (Mo. 1963); Kerby v. Kerby, 544 S.W.2d 292 (Mo. App., D.K.C. 1976); Carrell v. Carrell, 503 S.W.2d 48 (Mo. App., D.K.C. 1973); Ruckman v. Ruckman, 337 S.W.2d 100 (St. L. Mo. App. 1960); Baker v. Baker, 274 S.W.2d 322 (Spr. Mo. App. 1954); Finley v. Finley, 172 S.W.2d 473 (Spr. Mo. App. 1943).

maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."[18] This language lends itself less readily than did the prior statutory language to the interpretation that it precludes an action for maintenance subsequent to a decree devoid of any allowance for maintenance. Applying the *Smith* rule under the terms of section 452.370 would require the implausible holding that the denial of maintenance in a dissolution judgment is not a "provision respecting maintenance." Moreover, the policy of allowing modification of maintenance in changed circumstances is served by allowing insertion of such a provision where circumstances render continuing refusal of maintenance unreasonable. The *McBane* court did not consider whether section 452.370 allows the addition of maintenance provisions which were not allowed under section 452.070; its award of nominal maintenance was straightforwardly predicated on the assumption that it does not. It is to be hoped that future decisions turning on the reservation of jurisdiction for the modification of dissolution judgments will expand their analysis.[19]

The effect of erecting this procedural bar to subsequent actions for maintenance is to require a spouse to go through the motions of seeking support in the action for dissolution of marriage, even though his or her current needs would not justify a maintenance award, merely to preserve the ability to request an allowance in the event of changed circumstances.[20] This requirement creates an unnecessary pitfall for an unwary spouse who fails to seek maintenance in the original decree. This result is unfortunate, because the policy of the statute is not served by such myopic interpretation of the statutory language. The rule applied in *Smith* and its progeny that jurisdiction to modify maintenance requires an initial award of maintenance was assumed without discussion still to be good law in *McBane*; this tacit assumption was an indispensable premise in the reasoning that led to the court's award of nominal maintenance.

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18. § 452.370, RSMo (Supp. 1975). An exception is provided for property settlement agreements between the parties which are incorporated into the judgment for dissolution pursuant to § 452.325(6), RSMo (Supp. 1975).

19. It should be noted, in defense of the court's failure to examine whether the change in statute should effect a change in the rule, that the point was probably not argued by the litigants because a new interpretation was in neither party's interest. For the wife to argue that § 452.370 permits a maintenance award where there was none in the dissolution judgment would be to abandon her appeal requesting nominal maintenance inasmuch as it would not be needed for retention of jurisdiction; for the husband to argue that § 452.370 ought not to be construed as § 452.070 had been would be to concede that the award or nonaward of nominal maintenance would have no practical impact.

20. McKensey v. McKensey, 65 N.J. Eq. 633, 55 A. 1073 (1903).

Given this interpretation of the modification provisions, the question arises whether a court is able to award nominal maintenance under current statutes. The prior statutory provision for maintenance, section 452.070, did not specify the criteria courts should apply in determining whether to enter an award of maintenance. The section merely provided that an order for maintenance should issue "as, from the circumstances of the parties and the nature of the case, shall be reasonable. . . ."[21] The current statute is far more explicit. It provides that a maintenance order may be granted to either spouse in a dissolution proceeding "but only if [the court] finds that the spouse seeking maintenance (1) [l]acks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (2) [i]s unable to support himself through appropriate employment. . . ."[22] Both of these conditions, known as the "subsection (1) criteria," must be satisfied before a court is empowered by the statute to issue a maintenance order, and both entail a factual finding of financial need.[23]

Applying these criteria, the *McBane* court enumerated the items of property allotted to the wife, which were valued at roughly $20,000, none of which were income-producing. The court observed that the property was clearly insufficient to satisfy her reasonable needs "looking forward to the indefinite future."[24] The question was thus narrowed to whether Elinor McBane was unable to support herself through appropriate employment, despite the fact that she was apparently able to support herself on her salary as a registered nurse. The court found that the wife's existing physical condition presented a substantial possibility of disabling her from continued employment. Subsection (2) of section 452.335 provides that once it has been determined pursuant to the subsection (1) criteria that maintenance should be awarded, the amount and duration of maintenance should be determined in the light of all relevant factors, including "the age, and the physical and emotional condition of the spouse seeking maintenance."[25] Hence, the *McBane* court appeared to be using the criteria provided in subsection (2) of 452.335 to justify the initial award of maintenance permitted by subsection (1). *In re Marriage of Sharp,*[26] a Colorado decision interpreting a similar statute, held that the subsection (1) provisions, which are prerequisites to awarding maintenance and require a definition of reasonable needs and appropriate employment, must be read in connection with the list of

21. 1855 Mo. Laws (*codified at* § 452.070, RSMo 1969, *repealed* Jan. 1, 1974).
22. § 452.335(1), RSMo (Supp. 1975).
23. "The whole of maintenance appears to be what was formerly merely a part of it: need of the party seeking maintenance and the ability of the other to pay." Krauskopf, *Maintenance: Theory and Negotiation,* 33 J. Mo. B. 24, 24 (1977).
24. 553 S.W.2d at 523.
25. § 452.335(2)(5), RSMo (Supp. 1975).
26. 539 P.2d 1306 (Colo. App. 1975).

factors in subsection (2), although on the face of the statute the latter are to be considered only in setting the amount and duration of maintenance. Similarly, in *Brueggmann v. Brueggemann*[27] the Missouri Court of Appeals, St. Louis District, considered a petitioner's age in determining what appropriate employment for that individual might be. Consequently, the *McBane* court's consideration of the wife's health in making the initial determination whether maintenance should be awarded is not without support in the case law. The *McBane* court moved directly from a description of Elinor McBane's physical condition and the finding that her condition rendered her employment status unstable to an order awarding nominal maintenance, without articulating its major premise, *viz.*, that she was unable to support herself through appropriate employment because of the existence of a job-threatening physical disability. The requirement that the person seeking maintenance be unable to support himself through appropriate employment can be broken up into two factors: inability to support oneself and inappropriate employment. The failure to specify exactly which of these criteria justified the award leaves the *McBane* opinion open to criticism.

The court did discuss several recent cases involving similar fact situations to support its award of nominal maintenance. Only one of those cases, *Davis v. Davis,*[28] was decided under maintenance provisions comparable to those in effect in Missouri,[29] and the opinion in that case appears to suffer from this same defect of failing to explain its central premise. In *Davis* the trial court granted an award of nominal maintenance of one dollar per year and the husband appealed that award. The appellate court affirmed the judgment, holding that the need-based criteria for awarding maintenance are satisfied in a situation where the respondent introduced evidence of an ankle injury sufficient to support the trial court's finding that her present and future employment status was unstable.[30] The statutory basis of this holding was not specified. The court might have meant that instability in current employment is to be considered inappropriate employment; alternatively, the court might have meant that unstable employment amounts to an inability to be self-supporting. If the former were meant, it is not clear what standards of stability or of appropriateness were assumed; the latter seems to stretch

27. 551 S.W.2d 853, 858 (Mo. App., D. St. L. 1977).

28. 35 Colo. App. 447, 534 P.2d 809 (1975), *construing* COLO. REV. STAT. §§ 14-10-114, 14-10-122 (1973).

29. Three other cases cited in *McBane* are distinguishable. Evans v. Evans, 337 So. 2d 998 (Fla. App. 1976) was decided under a very different statute. The current Florida maintenance provisions are FLA. STAT. ANN. §§ 61.08, 61.14 (West Supp. 1977). Pettibone v. Pettibone, 22 Ariz. App. 570, 529 P.2d 724 (1974), was decided before the effective date of the Uniform Marriage and Divorce Act provisions adopted in Arizona. Carrell v. Carrell, 503 S.W.2d 48 (Mo. App., D.K.C. 1973) was also rendered before the effective date of the new statutes and did not grant nominal maintenance.

30. 534 P.2d at 812.

the meaning of "unable to support himself."[31] In following the *Davis* precedent, the *McBane* decision similarly did not explain which of the statute's need-based criteria were met in Elinor McBane's financial circumstances.

Another logical lacuna in the *McBane* court's move from describing Elinor McBane's physical condition as rendering her employment unstable to awarding nominal maintenance appears in its practice of looking forward to the "indefinite future"[32] to determine the ability of the spouse seeking maintenance to support himself. It is well settled that there is no statutory basis for a court indulging in speculation or conjecture as to future needs of a dependent spouse in awarding maintenance. Several recent Missouri cases have found it error and abuse of discretion for a trial court to award maintenance for a fixed term only[33] or to award maintenance which is "stair-stepped" in decreasing and terminable amounts[34] if there is no evidence before it that the dependent spouse's prospects for financial independence were likely to improve. If a court should not provide for future termination of support without evidence that circumstances will change, neither should a court ground the initial award of support on conjecture as to future conditions. It is probably for this reason that *McBane* and *Davis* are careful to limit their grants of nominal maintenance to situations where the instability of the dependent spouse's employment is related to "a physical condition *existing at the time of the marriage dissolution*"[35] or to an "*existing* injury."[36] This approach fails to separate the question whether a physical disability exists from that of whether the spouse is presently inappropriately employed or presently unable to support himself, and it is the latter which the maintenance statute requires. By not pegging the award of nominal maintenance to statutory criteria of inappropriateness of employment or of inability to support oneself, the court leaves its award unjustified.

It was not really a consideration of present financial needs that moved the courts in *McBane* and *Davis* to grant maintenance, as is manifest from the amounts granted (one dollar per year). Rather, the awards were made in contemplation of a rule of interpretation held over from earlier modification statutes. All that the recipients of nominal maintenance awards had shown themselves to be in reasonable need of was the court's continuing jurisdiction. Unless the potential loss of the court's

31. § 452.335(1), RSMo (Supp. 1975).
32. 553 S.W.2d at 523.
33. *In re* Marriage of Valleroy, 548 S.W.2d 857 (Mo. App., D. St. L. 1977); *In re* Marriage of Powers, 527 S.W.2d 949 (Mo. App., D. St. L. 1975).
34. *In re* Marriage of Cornell, 550 S.W.2d 823 (Mo. App., D. Spr. 1977); LoPiccolo v. LoPiccolo, 547 S.W.2d 501 (Mo. App., D. St. L. 1977).
35. 553 S.W.2d at 524 (emphasis added).
36. 534 P.2d at 813 (emphasis added).

jurisdiction is included in section 452.335(1) as a factor relevant to determining reasonable need and appropriateness of employment, the statutes do not seem to authorize an award of maintenance in cases like *McBane*.[37]

It cannot be denied that granting one dollar annual maintenance under a need-based statute is paradoxical at best. *McBane* offers no explanation as to why courts should be forced to award a nominal amount of maintenance when the evidence convinces the court that the recipient has no present need of support payments. This result could be avoided if the courts would not strain to interpret provisions for modification of maintenance to preclude the modification of a dissolution judgment that does not contain an award of maintenance or an express reservation of jurisdiction.[38] Until and unless the courts change their approach, *McBane* stands for the proposition that financially independent parties who anticipate the future impairment of earning capacity will be required to produce evidence of likely future financial needs to preserve their right to request maintenance when their needs become actual.

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37. That § 452.335 and Colorado's § 14-10-114 do not list retaining jurisdiction as a factor should provide an argument that those sections do not require an award of maintenance as a precondition to the court having jurisdiction over the question in changed circumstances. However, the force of that argument is weakened by the fact that the listed factors are not exclusive of other considerations. Brueggemann v. Brueggemann, 551 S.W.2d 853, 856 (Mo. App., D. St. L. 1977).

38. In Carrell v. Carrell, 503 S.W.2d 48 (Mo. App., D.K.C. 1977), the court reduced a previous award of maintenance to nothing in the light of changed circumstances and inserted a provision that the court reserved jurisdiction to reinstate the alimony as circumstances require. Where such a provision may be inserted in the initial decree, the objections to awarding nominal maintenance under the current statute could be sidestepped, but requiring such a provision in the decree as a precondition of jurisdiction to alter maintenance merely substitutes a different trap for an unwary spouse whose ability to support himself is unstable. The legislative policy favoring modification ought to be given effect to eliminate the pitfalls that preclude reassessing the need for maintenance in changed circumstances.