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## Maintenance: A Decade of Development

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# MAINTENANCE: A DECADE OF DEVELOPMENT

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## I. INTRODUCTION

### A. *Theory and Discretion*

Maintenance law, in accord with the “no-fault” divorce movement that swept the country in the 1970’s, eliminated the “damages for fault” nature of alimony. Gone were the necessity for the recipient to be “innocent,” the requirement that the obligor be “at fault,” and the underlying norm that, if he could pay, the breaching husband automatically would have to do so. The whole of maintenance appeared to be what was formerly only a part of it: need of the party seeking maintenance and the ability of the other to pay. A decade of court interpretation in Missouri has confirmed this radical change.<sup>1</sup> As one of the earliest maintenance statutes based on the Uniform Marriage and Divorce Act, the Missouri interpretations may be a paradigm for development elsewhere. Therefore, this article utilizes the development of the new maintenance law in one state, Missouri, to explore principles applicable throughout the country.

The attitudinal change of recent years concerning equality and individualism is reflected in most states’ statutes, as it is in Missouri, by the elimination

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1. See *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. App., St. L. 1977); *In re Marriage of Neubern*, 535 S.W.2d 499 (Mo. App., St. L. 1976).

of the concept that only a wife could be entitled to alimony. Alimony law had required individualized determinations of need and ability to pay, but it was bottomed on the underlying stereotype that only women would need financial help. The new maintenance creates no presumptions about either men or women, but treats them equally in the sense that the criteria to be considered apply to both men and women.<sup>2</sup> However, courts are not required to assume that any particular woman possesses the equivalent earning capacity of her husband. The purpose of maintenance is to respond to need if it exists in the case at hand, not to create a new, unrealistic stereotype.<sup>3</sup>

Conceptual bases for maintenance are seldom addressed in court opinions, but may, in fact, influence how attorneys and judges deal with more specific issues. The Missouri statute<sup>4</sup> is based on the Uniform Marriage and Divorce Act<sup>5</sup> which was promulgated by the Commissioners after Professor Robert Levy had prepared a comprehensive Preliminary Analysis for them.<sup>6</sup> In the Analysis,<sup>7</sup> Levy said that a noteworthy conceptual framework for alimony was constructed by the Task Force on Family Law and Policy which recommended that alimony criteria should include recompense for the contributions of a homemaker to the family's well-being which was not otherwise made (presumably in property division) and that alimony should recompense for loss of earning capacity suffered by either spouse because of the marriage. Levy then recommended full support of custodians of minor children and, if property division were insufficient, alimony for the person who had contributed substantially to the marriage but had developed no earning skills. Obviously, he was thinking of the homemaker who restricts her employment career during the marriage in order to further the welfare of the family.

Traditional family patterns, which persist even with younger couples, allocate resources for the good of the family even though utility is not maximized for a particular individual.<sup>8</sup> Couples choose to have wives devote full- or part-time to homemaking and child care because they value the resulting benefits to the family's quality of life over additional income she may have earned; if

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2. In *Orr v. Orr*, 440 U.S. 268 (1979), the Supreme Court held that a statute permitting alimony only to women violated the equal protection clause of the fourteenth amendment. As a result alimony statutes not changed by legislation were no longer valid.

3. In 1981 the median annual earnings of year round full-time workers in the United States was \$20,260 for men and \$12,001 for women. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 673, THE FEMALE-MALE EARNINGS GAP: A REVIEW OF EMPLOYMENT AND EARNINGS ISSUES 9, Table 6 (1982). The 40% less earnings for women was nearly the same whether college-educated or not. *Id.* at 2.

4. MO. REV. STAT. § 452.335 (1978).

5. UNIF. MARRIAGE AND DIVORCE ACT, 9 U.L.A. 494 (1973).

6. Krauskopf, *Maintenance: Theory and Negotiation*, 33 J. MO. BAR 24, 28 (1977).

7. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 153 (1968).

8. Smith & Beninger, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201 (1982).

they are in the labor market, married women choose jobs that allow them to combine homemaking with a minimum of disruption such as choosing jobs near home and subordinating their own career development when the husband's advancement requires a geographic move.<sup>9</sup> The result in labor force participation is that more than one-fourth of all women workers hold part-time jobs and that the average sixteen-year-old woman now will spend 27.7 years in the work force compared to 38.5 years for a comparable man.<sup>10</sup> The result for an individual woman is a drastic reduction in earning capacity due to loss of skill development and experience, on-the-job training, and seniority. The reduction is an average lifetime decrease in earning capacity of 1.2% for each year out of the labor force.<sup>11</sup> For college-educated women, the decrease can be as high as 4.3% each year.<sup>12</sup> The typical "displaced homemaker" graphically illustrates this economic effect.<sup>13</sup>

An economist has characterized alimony as making up for the opportunity cost of decreased earning capacity due to homemaking and has asserted it is essential to encourage socially desirable devotion to homemaking.<sup>14</sup> The homemaker contributes to the income producing spouse's welfare directly by freeing that spouse to devote nearly all energy and time to income producing activities. This is an especially valuable contribution when the income producing spouse desires children but cannot or will not divert time and energy from producing income to child-rearing. Either a full-time homemaker, or one who is "underemployed" and sacrifices career development to carrying out the primary child-rearing role, allows the other spouse to enjoy parenthood without diluting that spouse's career and earning potential. The Colorado Supreme Court, interpreting a statute similar to Missouri's, said it would be inequitable to saddle the homemaker spouse with the burden of reduced earning potential

9. *Id.* at 204.

10. FACTS ON WOMEN WORKERS 1, WOMEN'S BUREAU, U.S. DEP'T OF LABOR (1982).

11. Mincer & Polachek, *Women's Earnings Reexamined*, 13 J. HUM. RESOURCES 118, 120-21 (1978).

12. Mincer & Polachek, *Family Investments in Human Capital: Earnings of Women*, in ECONOMICS OF THE FAMILY 415 (T. Schultz ed. 1974).

13. VOICES FOR WOMEN 92, REP. OF THE PRESIDENT'S ADVISORY COMMITTEE FOR WOMEN (1980), states:

Employers have been unwilling to credit displaced homemakers with previous work experience or transfer volunteer skills into remunerative employment due to the fact that these women have been removed from the work force for a substantial period of time. Many of these women have office skills but these are rusty and outmoded. They have no knowledge of updated office techniques and are too old to take advantage of many nontraditional training and apprenticeship programs which have age limitations. Still others are competing with younger, more experienced women in the traditional female job fields—nursing, teaching, social services, . . . [T]he displaced homemaker frequently settles for a low skilled, low paying job which requires little or no training and consequently affords only limited opportunity for upward mobility.

14. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

while allowing the other, who had been freed to develop earning capacity, to continue in an advantageous position.<sup>15</sup> In short, the justification for obligating the income producing spouse with maintenance payments after the marriage ends is that the homemaker spouse's efforts benefited the other spouse at the expense of the homemaker. Our social system imposes the obligation through maintenance law because society values and seeks to encourage homemaking and child-rearing. To the extent that maintenance compensates for the long-term adverse effects of homemaking, maintenance protects the socially valuable role of homemaker.

The first Missouri opinion to recognize compensation for lost earning capacity as a function of maintenance was *In re Marriage of Powers*.<sup>16</sup> A fuller discussion soon followed in *Brueggemann v. Brueggemann*.<sup>17</sup> Numerous other opinions have elaborated upon the purposes of maintenance as compensation for contributions to the obligor spouse or the family and for lost earning capacity.<sup>18</sup> Interestingly, the most succinct summary is in a case ruling that no workers' compensation death benefits were payable to a divorced spouse of the deceased worker. In *Jamison v. Churchill Truck Lines*,<sup>19</sup> the court said,

Marriages involve long term commitments. Spouses often detrimentally rely on these commitments. Such reliance often requires long term remedies, such as maintenance . . . Maintenance is awarded when one spouse has detrimentally relied on the other spouse to provide the monetary support during the marriage. If the relying spouse's withdrawal from the marketplace so injures his marketable skills that he is unable to provide for his reasonable needs maintenance may be awarded. Maintenance provides a remedy for a spouse's reliance.<sup>20</sup>

In sum, Missouri courts recognize that modern maintenance is based primarily on the concept that homemaking and child-rearing are to be protected for the good of the larger society by compensation for the contributions made and loss of earning power incurred when the marriage ends by divorce.

A practical analysis of maintenance awards must acknowledge trial courts' broad discretion. In *Murphy v. Carron*,<sup>21</sup> the Missouri Supreme Court held that the judgment of the trial court in court-trying cases will be sustained "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erro-

15. *In re Marriage of Franks*, 189 Colo. 499, 508, 542 P. 2d 845, 852 (1975).

16. 527 S.W.2d 949, 956 (Mo. App., St. L. 1975).

17. 551 S.W.2d 853 (Mo. App., St. L. 1977).

18. *In re Marriage of K.B.*, 648 S.W.2d 201 (Mo. App., S.D. 1983); *Niehaus v. Niehaus*, 593 S.W.2d 607 (Mo. App., E.D. 1980); *Hurley v. Hurley*, 607 S.W.2d 169 (Mo. App., E.D. 1980); *In re Marriage of Morris*, 588 S.W.2d 39 (Mo. App., W.D. 1979); *Madden v. Madden*, 585 S.W.2d 220 (Mo. App., E.D. 1979); *Kerns v. Kerns*, 552 S.W.2d 350 (Mo. App., K.C. 1977).

19. 632 S.W.2d 34 (Mo. App., E.D. 1982).

20. *Id.* at 35-36.

21. 536 S.W.2d 30, 32 (Mo. 1976) (en banc).

neously applies the law."<sup>22</sup> Review is limited to mistake of law or abuse of discretion.<sup>23</sup> In *Diehl v. Diehl*,<sup>24</sup> the court said that the appealing party had the burden to "show an abuse of discretion that shocks our sense of justice."<sup>25</sup> Increasingly, appellate courts affirm if there is any evidence at all to support the findings, stating that no abuse of discretion exists.<sup>26</sup> Because the trial courts' judgments are upheld almost routinely, inconsistent decisions on similar facts can be affirmed depending upon who appeals. The wide range of discretion given the trial courts should be kept in mind as appellate opinions are read or discussed. At best, we can determine only the outer perimeters of limits and a wide range of decisionmaking that is permissible.

### B. *Statutory Structure*<sup>27</sup>

The statute permits maintenance only if the party seeking it lacks "suffi-

22. *Id.* at 32.

23. *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc); *Bull v. Bull*, 634 S.W.2d 228 (Mo. App., E.D. 1982); *Rasmussen v. Rasmussen*, 627 S.W.2d 117 (Mo. App., W.D. 1982); *Schreier v. Schreier*, 625 S.W.2d 644 (Mo. App., E.D. 1981).

24. 670 S.W.2d 590 (Mo. App., E.D. 1984).

25. *Id.* at 591.

26. Most frustrating for those trying to discern guidelines is the cryptic opinion that sets out no facts and states no reasons for affirmance or, at most, that the evidence is sufficient. *See, e.g., Rogers v. Rogers*, 674 S.W.2d 671 (Mo. App., W.D. 1984); *Mason v. Mason*, 560 S.W.2d 614 (Mo. App., Spr. 1978).

27. MO. REV. STAT. § 452.355 (1978):

Maintenance order when jurisdiction lacked—findings required for

1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, 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.

2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including 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 maintenance;

cient property to provide for his reasonable needs" and "is unable to support himself through appropriate employment." Courts have held that these two requirements determine eligibility for or the right to maintenance.<sup>28</sup> Subsection (1) sets out no criteria or factors to measure "reasonable needs," to decide whether the spouse is able to "support himself," or to assess what is "appropriate employment." Subsection (2) empowers the court to determine the amounts and time of maintenance "after considering all relevant factors" including seven specifically listed.<sup>29</sup> Since most of these factors are relevant to determining financial resources and ability to earn or to measure "reasonable needs," courts have read the two subsections together.<sup>30</sup> Therefore, it is appropriate to use the relevant factors in subsection (2) to determine "reasonable needs" and the extent to which "property" and "appropriate employment meet them." Among the factors listed in subsection (2), the two pertinent only to amounts and duration are ability of the obligor to pay while meeting his own needs and conduct of the party seeking maintenance.

Prior to the new legislation, a statute<sup>31</sup> had provided for in gross alimony, a certain sum of money to be paid in a lump sum or in installments. This statute was not repealed and the new legislation said nothing about in gross payments. Early decisions under the 1974 law clarified that in gross maintenance was authorized,<sup>32</sup> and could be ordered in conjunction with periodic maintenance.<sup>33</sup> After a few lump sum orders were modified on appeal to allow installment payments,<sup>34</sup> trial courts began to order in gross maintenance payable in installments.<sup>35</sup> Trial courts next ordered a specific amount of money to be paid periodically for a certain number of installments or a certain length of time.<sup>36</sup> In 1983, the Missouri Supreme Court held that durational or time lim-

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

(7) The conduct of a party seeking maintenance during the marriage.

28. *Brown v. Brown*, 673 S.W.2d 113 (Mo. App., W.D. 1984).

29. *See supra* note 27.

30. *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. App., St. L. 1977); *In re Marriage of Sharp*, 539 P.2d 1306 (Colo. App. 1975).

31. MO. REV. STAT. § 452.080 (1969).

32. *Carr v. Carr*, 556 S.W.2d 511 (Mo. App., Spr. 1977); *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977); *Miller v. Miller*, 553 S.W.2d 482 (Mo. App., St. L. 1977); *In re Marriage of Dickey*, 553 S.W.2d 538 (Mo. App., K.C. 1977).

33. *Sawtell v. Sawtell*, 569 S.W.2d 286 (Mo. App., K.C. 1978).

34. *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977); *Broyles v. Broyles*, 555 S.W.2d 696 (Mo. App., K.C. 1977).

35. *Rasmussen v. Rasmussen*, 627 S.W.2d 117 (Mo. App., W.D. 1982); *Royal v. Royal*, 617 S.W.2d 615 (Mo. App., W.D. 1981) (rev'd for lack of evidence); *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980).

36. By 1982, each division of the appellate court had upheld a durational limit: *Kerns v. Kerns*, 552 S.W.2d 350 (Mo. App., K.C. 1977); *Anderson v. Anderson*, 605 S.W.2d 524 (Mo. App., E.D. 1980) (modified); *In re Marriage of Daniel*, 639 S.W.2d 650 (Mo. App., S.D. 1982). However, many cases have been reversed for insufficient evidence to justify the termination date. *See cases discussed, infra*, Section III. Durational Limits.

ited maintenance was the same in nature as maintenance in gross and section 452.335.2 authorized all three payment forms.<sup>37</sup> The court said, "Section 452.335 thus covers the full range of support payments to a spouse, maintenance for an indefinite term, maintenance for a limited period and maintenance in gross."<sup>38</sup> The need requirements of section 452.335.1 must be met to justify any of these forms of maintenance.<sup>39</sup>

## II. AWARDING OR DENYING MAINTENANCE

### A. *Basis to Award or Deny*

#### 1. Reasonable Needs

##### a. The Standard for Need

The bellwether case on the concept of reasonable needs is *Brueggemann v. Brueggemann*.<sup>40</sup> The court stated that to proceed logically, the trial judge must make a threshold determination of reasonable needs of the spouse seeking maintenance. The statute has a new emphasis on the self-sufficiency of both parties following dissolution, but *Brueggemann* said that does not require ignoring that a marriage did exist:

In many marriages by tacit or express agreement, the wife remains at home and cares for the children and foregoes her opportunity to develop a career or acquire job experience. Where such a spouse has been out of the job market for extended periods, an independent determination of her appropriate lifestyle and earning capacities may be difficult or impossible. In such a case it may be proper for the court to place greater emphasis on the lifestyle enjoyed during the marriage, the duration of the marriage and other traditional factors . . . "[R]easonable needs" as used in the statute does not automatically equal the standard of living established during the marriage. Reasonable needs is a relative term. In a marriage of lengthy duration where one spouse has foregone career development, the marital standard of living may serve as an important guide in computing the spouse's reasonable needs. In a very practical sense it is frequently the best evidence of what the parties have together determined their "reasonable needs" to be.<sup>41</sup>

Mrs. Brueggemann had been a homemaker for thirty-one years, only being employed a few years before the dissolution in order to help pay for the children's college education. She earned barely one-third that of Mr. Brueggemann. Their marriage standard of living was set modestly by his \$15,000

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37. *Doerflinger v. Doerflinger*, 646 S.W.2d 798 (Mo. 1983) (en banc).

38. *Id.* at 800.

39. *Walker v. Walker*, 631 S.W.2d 68 (Mo. App., E.D. 1982); *Merrit v. Merrit*, 616 S.W.2d 585 (Mo. App., S.D. 1981); *Daus v. Daus*, 595 S.W.2d 19 (Mo. App., E.D. 1979); *Shroder v. Shroder*, 552 S.W.2d 342 (Mo. App., K.C. 1977).

40. 551 S.W.2d 853 (Mo. App., St. L. 1977).

41. *Id.* at 857 (citation and footnote omitted); *accord Phelps v. Phelps*, 620 S.W.2d 462 (Mo. App., W.D. 1981).



annual net income and the \$5,500 annually she had earned since the children started college. Mrs. Brueggemann's expense statement for herself and child totaled \$10,300. The court reduced her monthly reasonable needs by the amount the husband paid on the mortgage. The court recognized that her reasonable needs exceeded her income. Thus, the import of the court's analysis is that, if a person has been hindered by homemaking in developing earning capacity, then reasonable needs may well exceed what can be earned. The longer the duration of the marriage and devotion to homemaking, the more the marriage service will have lessened earning capacity. The standard of living during the marriage, rather than the standard one is able to maintain independently, is more and more an appropriate measure of reasonable needs as the marriage duration is longer and longer.<sup>42</sup>

The marriage standard of living as a measure of reasonable needs is equally applicable to a wealthy scale of living. *In re Marriage of Morris*<sup>43</sup> involved a husband who earned over \$100,000 a year, owned two homes, two country club memberships and several investments. The marriage had lasted nearly twenty-five years during which Mrs. Morris had adopted and raised Mr. Morris' child. She was fifty years old with only a high school education and no particular employable skills. She had been awarded \$75,000 in non-income-producing property, \$10,000 lump sum maintenance, and \$1,500 a month periodic maintenance. The appellate court held that insufficient weight had been given to the marital standard of living, citing the Florida condominium with its golf club facilities and other related expenses as the parties' well-established lifestyle. Mrs. Morris had indicated expenses of \$2,567 a month and requested \$3,500 a month to cover her income tax liability on the maintenance payments. The appellate court concluded that a reasonable amount for monthly maintenance would be \$1,900. Many similar decisions from all the appellate districts have upheld substantial awards because of the high standard of living during a long marriage.<sup>44</sup> It should be noted, however, that even these awards are not likely to enable the recipient to maintain that former high standard. Mrs. Morris, for example, had indicated needs of \$2,567 a month without considering income tax liability, but eventually obtained only \$1,900 a month.

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42. *Accord Childers v. Childers*, 652 S.W.2d 311 (Mo. App., E.D. 1983); *In re Marriage of K.B.*, 648 S.W.2d 201 (Mo. App., S.D. 1983); *Pederson v. Pederson*, 599 S.W.2d 51 (Mo. App., E.D. 1980).

43. 588 S.W.2d 39 (Mo. App., W.D. 1979).

44. *Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. 1984) (en banc); *Childers v. Childers*, 652 S.W.2d 311 (Mo. App., E.D. 1983); *Bull v. Bull*, 634 S.W.2d 228 (Mo. App., E.D. 1982); *In re Marriage of Deatherage*, 595 S.W.2d 36 (Mo. App., S.D. 1980); *C.B.H. v. R.N.H.*, 571 S.W.2d 449 (Mo. App., St. L. 1978); *Butcher v. Butcher*, 544 S.W.2d 249 (Mo. App., K.C. 1976); *D.M.S. v. P.E.S.*, 526 S.W.2d 361 (Mo. App., K.C. 1975); *cf. Blount v. Blount*, 674 S.W.2d 612 (Mo. App., E.D. 1984) (removing time limit on \$2200 a month); *In re Marriage of Pitluck*, 616 S.W.2d 861 (Mo. App., W.D. 1981) (reversing inadequate amount); *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App., St. L. 1975) (same).

Later cases have been careful to enunciate that the pre-dissolution standard of living is not mandated automatically as the sole measure of reasonable needs.<sup>45</sup> However, the emphasis on utilizing the marriage standard of living continues when the marriage was lengthy.<sup>46</sup> In contrast, there is strong language that the ex-spouse from a short marriage ordinarily is not expected to continue to support the other.<sup>47</sup>

There is almost no appellate guidance as to what are or are not reasonable ongoing or recurring needs other than what is appropriate to the standard of living approved as acceptable. Ordinarily, the petitioner for maintenance files an expense statement listing every possible category of expense that has been incurred in the recent past and on the basis of those past expenses, estimates future needs. One of the few decisions disallowing an expense was *Fausett v. Fausett*,<sup>48</sup> which held that contributions to savings accounts and depreciation of personal property were not reasonable expenses. The court said,

the ultimate goal [of the Dissolution of Marriage Act] is to place each of the former spouses in an independent, self-sufficient status. Creating a future estate or preserving marital property intact from the ravages of use and time under the guise of maintenance are at war with both the literal meaning of 'maintenance' and the conceptual theories undergirding the Dissolution of Marriage Act.<sup>49</sup>

Items normally included are: house payment or rent; property insurance and real estate taxes; property maintenance; clothing acquisition and cleaning, food, medical and dental expenses and insurance costs; transportation costs including car payments, insurance and licensing; entertainment; pets; furniture and household goods; tools and appliances and their maintenance; gifts; contributions to church and charities; club or organization memberships; magazine and newspaper subscriptions; and costs of babysitter and household help.

Lack of evidence of need is the most common basis for the rare reversal of a maintenance award.<sup>50</sup> A petitioner ordinarily must present an income and

45. *Rasmussen v. Rasmussen*, 627 S.W.2d 117, 120 (Mo. App., W.D. 1982); *Hauser v. Hauser*, 625 S.W.2d 924, 926 (Mo. App., E.D. 1981).

46. *Compare Childers v. Childers*, 652 S.W.2d 311 (Mo. App., E.D. 1983) (13 years long) with *Pederson v. Pederson*, 599 S.W.2d 51 (Mo. App., E.D. 1980) (6 years long). See also *Schreier v. Schreier*, 625 S.W.2d 644 (Mo. App., E.D. 1981); *Madden v. Madden*, 585 S.W.2d 220 (Mo. App., E.D. 1979) (marriage of 35 years).

47. See cases discussed, *infra*, Section III. Durational Limits.

48. 661 S.W.2d 614 (Mo. App., W.D. 1983).

49. *Id.* at 618.

50. *Goodrich v. Goodrich*, 667 S.W.2d 39 (Mo. App., S.D. 1984); *Trunko v. Trunko*, 642 S.W.2d 673 (Mo. App., E.D. 1982); *Horrige v. Horrige*, 618 S.W.2d 202 (Mo. App., W.D. 1981); *Fastnacht v. Fastnacht*, 616 S.W.2d 98 (Mo. App., W.D. 1981); *Merritt v. Merritt*, 616 S.W.2d 585 (Mo. App., S.D. 1981); *Abney v. Abney*, 575 S.W.2d 842 (Mo. App., St. L. 1978); *Shroder v. Shroder*, 552 S.W.2d 342 (Mo. App., K.C. 1977); *Horrige v. Horrige*, 542 S.W.2d 324 (Mo. App., K.C. 1976); *cf. Givens v. Givens*, 599 S.W.2d 204 (Mo. App., E.D. 1980).

expense statement and testimony to establish needs. However, the other spouse's testimony may establish the needs of both spouses by showing the past expenses of both.<sup>51</sup> The appellate court will allow a fair margin of error when the amount ordered appears to exceed the petitioner's need as indicated by the evidence.<sup>52</sup>

b. Specific or Temporary Needs

i. Paying off debts

The need to liquidate debts supports an in gross maintenance award when the obligor spouse had been partly responsible for the debts. *D.E.W. v. M.W.*<sup>53</sup> illustrates well the petitioning spouse who had loaned money to the other spouse or who had borrowed money for the other spouse only to see it frittered away or lost in unfortunate business adventures. Petitioner was not able to provide for her own needs and continue payments on the debts she had incurred for the husband's benefit. She requested and was awarded \$10,000 to pay off the debts. In *Broyles v. Broyles*,<sup>54</sup> another court recognized a similar equity where the wife had invested significant amounts of separate property in a marital trucking venture which failed. Both spouses had financial difficulties and illnesses, but her financial losses were greater and at the time of trial she was not earning due to an auto accident. She needed the \$5,000 to enable her to pay debts accumulated in their joint ventures. The court described her present indebtedness as contrasting dramatically with her comfortable financial status just prior to the marriage. Although the wife in *McCully v. McCully*<sup>55</sup> had not invested her separate funds, she had been a homemaker for twenty-five years and innocently had signed joint debts, some in blank, at the insistence of the husband. When he was discharged in bankruptcy, she was left solely responsible and was without means to pay them. In *Gunkel v. Gunkel*,<sup>56</sup> the award was enough to enable the petitioner to pay the loan balance on a mobile home she was awarded in the property division.

These decisions have two important characteristics. First, the recipient needed the requested funds in order to pay the debts and meet her other reasonable needs. Second, since the recipient had requested only a lump sum amount, no question was raised concerning the possible insufficiency of the in gross amount to meet needs. Presumably, the amount was adequate or the

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51. *C.B.H. v. R.N.H.*, 571 S.W.2d 449 (Mo. App., St. L. 1978); see also *Kalish v. Kalish*, 624 S.W.2d 531 (Mo. App., E.D. 1981) (award for more maintenance than asked for supported by evidence); *Rickard v. Rickard*, 616 S.W.2d 95 (Mo. App., E.D. 1981) (evidence supported maintenance even though 19-year-old wife testified that she could take care of herself).

52. *Sarandos v. Sarandos*, 643 S.W.2d 854 (Mo. App., E.D. 1982).

53. 552 S.W.2d 280 (Mo. App., St. L. 1977).

54. 555 S.W.2d 696 (Mo. App., K.C. 1977).

55. 550 S.W.2d 911 (Mo. App., K.C. 1977).

56. 633 S.W.2d 108 (Mo. App., E.D. 1982).

recipient would have requested more; the obligor appealed and the court held it was proper to impose an obligation for lump sum maintenance.<sup>57</sup>

## ii. Maintenance requested for education or training

Missouri courts have recognized educational or training expenses such as college, nursing school, cosmetology school, or secretarial schools as a reasonable need even for a spouse in a relatively short marriage.<sup>58</sup> The statute in subsection 2 includes as a relevant factor in setting maintenance the time necessary to acquire sufficient educational training to enable the party seeking maintenance to find appropriate employment.<sup>59</sup> This is consistent with the perceived emphasis on self-sufficiency in the new legislation. These cases establish that rehabilitative maintenance may be awarded even after a marriage so short that no other form of maintenance would have been justified.<sup>60</sup> The leading researcher on the effect of alimony awards has urged strongly that temporary maintenance to younger women for training be ample and lengthy enough to provide significant improvement in income-producing ability.<sup>61</sup> Her reasoning is that subsidization of education adequate to produce a high level of self-sufficiency will have long range positive consequences for society and for the parties and their children. Otherwise, the former homemaker, desperate to earn something quickly, plunges into a low paying job from which she is never able to escape.

## iii. Maintenance for restitution

A handful of decisions defy categorization of maintenance as within reasonable needs for day-to-day support, but rather could fall within the broader purpose mentioned by Levy: recompense for contributions to the welfare of the

57. An interesting example is *Elliott v. Elliott*, 621 S.W.2d 305 (Mo. App., W.D. 1981). The wife apparently had requested periodic maintenance but was given \$15,500 in gross. Only the husband appealed. The opinion analyzed the evidence which established her need for at least that much. She did not question on appeal whether the award was not a sufficient amount. See also *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980); *Miller v. Miller*, 553 S.W.2d 482 (Mo. App., St. L. 1977).

For the contrasting situation where the obligor requested a limit on the amount or duration of the maintenance, see *infra* Section III. Durational Limits.

58. *In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983); *In re Marriage of Gardner*, 636 S.W.2d 679 (Mo. App., S.D. 1982); *In re Marriage of G.B.S.*, 641 S.W.2d 776 (Mo. App., E.D. 1982); *Cole v. Cole*, 633 S.W.2d 263 (Mo. App., W.D. 1982); *Pederson v. Pederson*, 599 S.W.2d 51 (Mo. App., E.D. 1980); *Raines v. Raines*, 583 S.W.2d 564 (Mo. App., E.D. 1979); cf. *Goff v. Goff*, 557 S.W.2d 55 (Mo. App., St. L. 1977).

59. MO. REV. STAT. § 452.335.2(2) (1978).

60. In *Raines v. Raines*, 583 S.W.2d 564, 566 (Mo. App., E.D. 1979), for example, the marriage had been viable for only 15 to 18 months.

61. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1267 (1981).

family which otherwise have not been compensated.<sup>62</sup> One of these is *Harris v. Harris*<sup>63</sup> where the husband dissipated the wife's portion of proceeds from the sale of the family home which they had agreed to share equally. The appellate court upheld an in gross maintenance award for the amount of the wife's share, saying that it merely was carrying out their agreement. There was no discussion of whether the funds were needed for day-to-day living expenses. Since the wife was a registered nurse employed for many years, it seems unlikely. The court did not consider that necessary to uphold the award. Instead, the maintenance in gross appeared to be restitutionary. It served the equitable purpose of fulfilling her reasonable expectations while preventing unjust enrichment to him by restoring her share of the proceeds.<sup>64</sup> Maintenance was used as a remedy for her reliance. Within the meaning of the statute one could say that her reasonable need was to be compensated for the funds. However, the justice of the result apparently was so obvious that the court gave it no discussion.

In a similar case, the husband had obtained unconscionably the wife's assent to a separation agreement providing they would share equally payment of a \$15,000 debt to the wife's mother.<sup>65</sup> There was evidence that the husband never intended to pay and, when enforcement was threatened, he filed for bankruptcy. The appellate court affirmed, setting aside the separation agreement and the decree which incorporated it and entering an order for in gross maintenance of \$9,900. The original decree had given the wife \$2,400. The added \$7,500 is exactly the amount the husband had promised to pay. There was no discussion of either her need for the money for living expenses or of the purpose for the award, but the justice of giving her an added \$7,500 is patent.<sup>66</sup> Although the court said it merely was enforcing their contract, the husband had benefited from the money borrowed initially and would benefit from the wife paying his share to the creditor. That is the benefit he had to restore to the wife in order to avoid unjust enrichment. Once again, avoidance of unjust enrichment and honoring reasonable expectations appear legitimate purposes for maintenance in gross.<sup>67</sup>

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62. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 153 (1968).

63. 670 S.W.2d 171 (Mo. App., W.D. 1984).

64. See RESTATEMENT OF RESTITUTION § 160 (1937); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 391 (1980).

65. *In re Marriage of Bartlett*, 664 S.W.2d 655 (Mo. App., S.D. 1984).

66. Whether the judicial goal of avoiding the effects of bankruptcy is permissible under federal bankruptcy law is another question.

67. See also *In re Marriage of Dickey*, 553 S.W.2d 538 (Mo. App., K.C. 1977), where the court entered a judgment for \$75,000 in gross maintenance after husband's answer had been struck twice for failure to conduct discovery.

## iv. Recompense for contribution to spouse's education

Nationwide, an equitable award, either of maintenance or under the court's inherent equity power without regard to statutory maintenance or property division, is used increasingly to recompense the spouse who was employed in order to further the graduate or professional education of the student spouse.<sup>68</sup> As early as 1976 appellate courts in Missouri approved taking into account contributions to the acquisition of education when deciding division of the marital property.<sup>69</sup> However, when the marriage breaks up shortly after the advanced degree is acquired, there is usually insufficient marital property to compensate justly. Neither has there been time to share the advantages of the increased earning capacity and the concomitant higher standard of living that it permits. Courts of other states have granted "reimbursement alimony"<sup>70</sup> or an equitable award in order to honor the contributing spouse's expectations of sharing in the increased earning capacity and to prevent unjust enrichment to the educated spouse.<sup>71</sup> The method for measuring the amount of compensation varies.<sup>72</sup>

In two leading decisions, Missouri courts have approved monetary awards to the contributing spouse in this situation. The trial court in *Lowrey v. Lowrey*<sup>73</sup> granted \$550 per month for five years to a wife who had worked as a nurse during four years of the husband's dental schooling, thereby providing \$58,000 to support the marriage. \$550 a month for five years is \$33,000 which probably is close to the wife's contributions minus her own living expenses for the time her husband was in school. The trial court commented in regard to the maintenance order that both parties were in good health and could support themselves at "subsistence and then some" but that the wife's contribution toward her husband's attaining his degree in dentistry was a factor taken into

68. See, e.g., *Washburn v. Washburn*, 101 Wash. 2d 168, 677 P.2d 152 (1984); *Haugan v. Haugan*, 117 Wis. 2d 200, 343 N.W.2d 796 (1984); *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984); *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) (dicta); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); see also Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980).

69. *In re Marriage of Vanet*, 544 S.W.2d 236, 241 (Mo. App., K.C. 1976).

70. See, e.g., *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

71. See authorities cited *supra*, note 64.

72. Four different methods, used alone or in conjunction, are explained in *Haugan v. Haugan*, 117 Wis. 2d 200, 211-14, 343 N.W.2d 796, 802-03 (1984), as: (1) cost value or contribution in money and service (minus the employee's own living expenses); (2) opportunity costs, e.g., the lowered standard of living during the education period caused by lack of income from the student spouse and any lost opportunities for education or better employment which the employed spouse suffered; (3) expected return on investment, i.e., just share of present value of the enhanced earning capacity of the educated spouse; (4) labor theory of value, i.e., a share of the present value of the enhanced earning capacity equivalent to the number of years contributed.

73. 633 S.W.2d 157 (Mo. App., W.D. 1982).

consideration in setting the maintenance. The trial judge stated that the separation occurred when the earning capacity had not been realized to the extent of accumulating assets. He found with regard to the relative position of the parties that the wife "is entitled to maintenance, but that entitlement in some respects is tied to, I suppose, a theory of recoupment concerning the investment that she made from her earnings towards the Respondent being put in a position to obtain a professional position."<sup>74</sup> He said he was going to order maintenance for a time to put the wife in a whole or even position with regard to the energies and assets she contributed to the marriage and to the respondent. Unfortunately, the appellate opinion did not rule on the appropriateness of compensation for contribution to education as a reasonable need for maintenance. The wife had testified that she earned \$947 net monthly, her itemized expenses were \$1,510, and she expected salary increases at regular intervals. The husband appealed. It was easy for the appellate court to affirm, stating that the award of maintenance was based upon her need to close the gap between her income and her monthly expenses until the expected increase in income occurred. It concluded, "Once the trial judge found the requirements of § 452.335.1 to be satisfied, he could consider . . . other relevant factors including contributions toward the development of the spouse's special earning capacity in determining the amount of the maintenance to be awarded."<sup>75</sup> The appellate court did not state how the contributions could be relevant. Perhaps, the current gap between income and expenses would not exist if she had the \$33,000 which she previously had contributed to him. The case would be analogous to those in which the wife had loaned money to the husband or had become solely obligated on their jointly acquired debts and maintenance was ordered to enable her to meet expenses while paying off the debts.<sup>76</sup> At most, the decision holds that recompense for contribution to education is proper when the evidence establishes a need for maintenance to meet day-to-day living expenses.<sup>77</sup>

In two ways *Scott v. Scott*<sup>78</sup> was a significant new development in Missouri law. First, it upheld an award for having contributed to the other's education without regard to the recipient's need for day-to-day living expenses. Second, it held that the award need not be categorized as either property division or as maintenance. Thus, it authorized an equitable award apart from statutory authority. *Scott* involved a less than ten year marriage in which

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74. *Id.* at 159.

75. *Id.* at 161.

76. *See supra*, notes 64-67.

77. Numerous Missouri opinions state in dicta that a proper factor to consider in awarding maintenance is contribution to the obligor spouse's earning capacity or education. *See, e.g.*, *Schreier v. Schreier*, 625 S.W.2d 644, 650 (Mo. App., E.D. 1981); *Pederson v. Pederson*, 599 S.W.2d 51, 53 (Mo. App., E.D. (1980); *Hull v. Hull*, 591 S.W.2d 376, 382 (Mo. App., W.D. 1979); *see also Lovett v. Lovett*, 688 S.W.2d 329 (Ky. 1985) (under a similar statute using the acquired education to establish the standard of living).

78. 645 S.W.2d 193 (Mo. App., W.D. 1982).

there were three children and had been employed throughout the husband's law schooling. She had contributed \$17,400 in wages and \$14,500 in separate property to their support during that time. She also had contributed the remainder of her separate property to the down-payment on the family home. Additionally, the wife's family had made substantial gifts. The husband, in contrast, still had untouched non-marital property of at least \$18,900. After giving the wife most of the modest marital property, the trial court awarded her \$12,000, which it labeled a "property settlement," and maintenance of \$400 a month for four months and \$200 a month for forty-four months. The evidence showed monthly expenses of \$1,600 and that she could earn up to \$12,000 a year. If the child support payments of \$440 a month were added to \$200 a month maintenance and \$1,000 a month earnings, wife's expenses would be met fully.

The appellate court in *Scott* disapproved the label of "property settlement" on the \$12,000 award and looked at its substance, saying, "It is necessary to consider the enhanced prospects of the husband by reason of his professional education. The wife made the contribution to the education . . . but she will not be around for the anticipated harvest."<sup>79</sup> The court first referred to the Michigan decision in *Moss v. Moss*<sup>80</sup> as an "appealing approach." It described *Moss* as involving a lump sum alimony award to a wife who at the time of the divorce was earning more than the husband (who had just finished medical school) and "normally would not be entitled to maintenance." The Missouri court quoted favorably from the *Moss* opinion to the effect that the award represented the wife's contribution to the acquisition of the husband's medical degree. The *Scott* court thereby approved of maintenance as appropriate to meet the reasonable need of compensation for the educational contribution even though there was no need for money for day-to-day living expenses. However, the court avoided holding that statutory maintenance in Missouri could serve such a purpose. Instead, it discounted the necessity of compensating by the lump sum maintenance approach. The court of appeals held that it is better not "to hamstring our trial courts by confining them to a marital property theory or a lump sum maintenance theory or any other particular approach."<sup>81</sup> The court stated that trial courts have flexibility to fashion their decrees to meet the variety of circumstances presented by the cases. Although the court in affirming the \$12,000 award spoke favorably of the lump sum maintenance in *Moss*, it clearly held that a non-labeled equitable award is appropriate to compensate for contribution to a spouse's education.

These decisions are consistent with the nationwide trend granting compensation for contribution to the other spouse's education in order to honor expectations of sharing in the rewards of an advanced degree and to prevent unjust enrichment of the spouse who has acquired the increased earning

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79. *Id.* at 196.

80. 80 Mich. App. 693, 264 N.W.2d 97 (1978).

81. 645 S.W.2d at 197.



ability.

## 2. Inability to Provide for Self

Since the earliest decisions, Missouri courts have been consistent in holding that section 452.335.1 precludes the grant of maintenance unless the requesting party lacks sufficient property to provide for her reasonable needs and is unable to support herself through appropriate employment.<sup>82</sup> Occasionally, a court asserts affirmatively that if neither property nor employment are sufficient to meet needs, then maintenance is appropriate.<sup>83</sup> The court must then decide the amounts and time of maintenance.<sup>84</sup>

### a. Property to Provide for Reasonable Needs

Section 452.335.1 authorizes maintenance only if the party seeking it lacks sufficient property to provide for his reasonable needs. This means all property must be considered, both separate property and the share of marital property which has been awarded.<sup>85</sup> For this reason the division of property should be completed before the court considers maintenance.<sup>86</sup> The amount of property received in division has been a relevant factor in determining maintenance in many cases.<sup>87</sup>

There is no obligation to consume non-income producing property, especially the family home, to produce funds to meet reasonable needs.<sup>88</sup> Of

82. *Royal v. Royal*, 617 S.W.2d 615 (Mo. App., W.D. 1981); *Rickard v. Rickard*, 616 S.W.2d 95 (Mo. App., E.D. 1981); *In re Marriage of Jackson*, 592 S.W.2d 875 (Mo. App., S.D. 1980); *In re Marriage of Badalamenti*, 566 S.W.2d 229 (Mo. App., St. L. 1978); *Beckman v. Beckman*, 545 S.W.2d 300 (Mo. App., St. L. 1976); *Seelig v. Seelig*, 540 S.W.2d 142 (Mo. App., St. L. 1976).

83. *Steffan v. Steffan*, 597 S.W.2d 880, 884 (Mo. App., W.D. 1980).

84. *Horrige v. Horrige*, 618 S.W.2d 202 (Mo. App., W.D. 1981).

85. *State ex rel. Horrige v. Pratt*, 563 S.W.2d 168 (Mo. App., K.C. 1978).

86. *Spicer v. Spicer*, 585 S.W.2d 126 (Mo. App., S.D. 1979); *Shroder v. Shroder*, 552 S.W.2d 342 (Mo. App., K.C. 1977).

87. *Roberts v. Roberts*, 652 S.W.2d 325 (Mo. App., W.D. 1983) (denial affirmed); *Boone v. Boone*, 637 S.W.2d 249 (Mo. App., E.D. 1982) (affirmed \$90 less than need in maintenance because property sufficient); *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982) (affirmed \$500 maintenance because with income from \$100,000 property received in division needs met); *Merritt v. Merritt*, 616 S.W.2d 585 (Mo. App., S.D. 1981); *Metts v. Metts*, 625 S.W.2d 896 (Mo. App., E.D. 1981) (denial of maintenance affirmed).

88. *Fausett v. Fausett*, 661 S.W.2d 614 (Mo. App., W.D. 1983); *Miller v. Miller*, 635 S.W.2d 350 (Mo. App., W.D. 1982); *In re Marriage of Arnold*, 632 S.W.2d 28 (Mo. App., S.D. 1982); *Steffan v. Steffan*, 597 S.W.2d 880 (Mo. App., W.D. 1980); *Miranda v. Miranda*, 596 S.W.2d 61 (Mo. App., W.D. 1980); *In re Marriage of Lindenfelser*, 596 S.W.2d 71 (Mo. App., S.D. 1980); *In re Marriage of Brewer*, 592 S.W.2d 529 (Mo. App., S.D. 1979); *Arp v. Arp*, 572 S.W.2d 232 (Mo. App., K.C. 1978); *Goff v. Goff*, 557 S.W.2d 55 (Mo. App., St. L. 1977); *Broyles v. Broyles*, 555 S.W.2d 696 (Mo. App., K.C. 1977); *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. App., Spr. 1977).

course, non-income producing property is considered to the extent that it does supply needs. For example, the mortgage-free family home would meet the major need of housing.<sup>89</sup> Otherwise, non-income producing property is not considered in determining ability to provide for one's own needs.<sup>90</sup>

The focus is on income-producing property.<sup>91</sup> Denial of maintenance has been affirmed when an income-producing business was awarded to the requesting spouse.<sup>92</sup> Numerous opinions have noted that receipt or ownership of income-producing property was an appropriate factor in making the maintenance award.<sup>93</sup> On the other hand, arguments that receipt of property through division necessarily precludes maintenance are wholly unsuccessful. If both income from property and income from employment are insufficient to meet reasonable needs, maintenance may be ordered.<sup>94</sup>

## b. Supporting Self Through Appropriate Employment

### i. Duty to seek employment

One of the most important changes in the divorce reform legislation of 1974 is the affirmative obligation to seek employment. Section 452.335.1 creates this obligation by providing that maintenance may be ordered only when the spouse seeking maintenance is unable to support herself through appropriate employment.<sup>95</sup> If an individual is able to do so, she is required to support herself in employment corresponding to her skills and interests.<sup>96</sup> In *Givens v. Givens*,<sup>97</sup> an unusual reversal of an award of maintenance to the wife occurred because she was employed and had testified that she could support herself.<sup>98</sup>

89. *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. App., St. L. 1977).

90. *Abney v. Abney*, 575 S.W.2d 842 (Mo. App., St. L. 1978).

91. *Arp v. Arp*, 572 S.W.2d 232 (Mo. App., K.C. 1978); *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977).

92. *In re Marriage of Neubern*, 535 S.W.2d 499 (Mo. App., St. L. 1976).

93. *Boone v. Boone*, 637 S.W.2d 249 (Mo. App., E.D. 1982); *Lowrey v. Lowrey*, 633 S.W.2d 157 (Mo. App., W.D. 1982); *Steffan v. Steffan*, 597 S.W.2d 880 (Mo. App., W.D. 1980); *In re Marriage of Dodd*, 532 S.W.2d 885 (Mo. App., St. L. 1976).

94. *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982) (affirmed \$100,000 income producing property and \$500 monthly maintenance); *Smith v. Smith*, 586 S.W.2d 362 (Mo. App., E.D. 1979) (affirmed \$111,000 income-producing property and \$500 monthly maintenance).

95. *Madden v. Madden*, 585 S.W.2d 220 (Mo. App., E.D. 1979); *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. App., St. L. 1977).

96. *In re Marriage of Faulkner*, 582 S.W.2d 292 (Mo. App., E.D. 1979).

97. 599 S.W.2d 204 (Mo. App., E.D. 1980).

98. *But see Rickard v. Rickard*, 616 S.W.2d 95 (Mo. App., E.D. 1981), affirming award of \$30 per week maintenance even though wife testified she was able to take care of herself and did not require husband's assistance. In *Rickard*, the wife was 18 or 19 years old, had custody of their one-year-old child, and was dependent upon public assistance. The public assistance, the baby, and absence of any evidence of her employability outweighed her testimony and supported the trial court's finding that she could not support herself adequately. There has been no discussion in Missouri of a

Another rare reversal in *Goodrich v. Goodrich*<sup>99</sup> was based on insufficient evidence of need to support the award. The evidence established only a three year marriage without children, and that the wife who sought maintenance was healthy and gainfully employed, earning more than the husband.

ii. Earning ability vs. temporary condition

Temporary unemployment may not establish sufficient inability to support oneself. In *Hurley v. Hurley*,<sup>100</sup> the court held that a relatively young (age thirty-two) woman in good health with ordinarily employable skills as a medical secretary and dental assistant appropriately was denied maintenance from her ex-spouse of ten years even though she had been unemployed and seeking work for three months in two different states. The court noted that she had been employed recently and was drawing unemployment compensation.<sup>101</sup> The decision is consistent with other statements that prior employment and future prospects will be taken into account in determining present ability to support oneself.<sup>102</sup> On the other hand, it is not an abuse of discretion to grant maintenance to a spouse who has not been employed for some time but who has a college education or recently has acquired an advanced education.<sup>103</sup> The key differentiating factor may be the length of time the spouse seeking maintenance has been out of the employment market to serve as a full-time homemaker. The *Hurley* court mentioned that maintenance is most often granted to the homemaker who has lost her opportunity to develop occupational skills,<sup>104</sup> or that it is granted for the purpose of education to increase employment skills. The difference between *Hurley* and the situation where the homemaker just has acquired the new education is that the latter has had no opportunity to demonstrate that she, in fact, is employable, i.e., has an earning capacity. Therefore, the same court which denied maintenance to Mrs. Hurley who had been unemployed for three months may grant it to a homemaker who not yet has obtained a job.<sup>105</sup>

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public policy preferring imposition of maintenance obligations over dependence on the public purse for needy ex-spouses. Such a preference, at least in long-term situations, seems inherent in the statute.

99. 667 S.W.2d 39 (Mo. App., S.D. 1984).

100. *Hurley v. Hurley*, 607 S.W.2d 169 (Mo. App., E.D. 1980).

101. *But see Rickard*, 616 S.W.2d at 95.

102. *Tygett v. Tygett*, 639 S.W.2d 282 (Mo. App., E.D. 1982) (evidence must justify inference that wife will realize expectation of employment); *Nunn v. Nunn*, 644 S.W.2d 370 (Mo. App., E.D. 1982); *Metts v. Metts*, 625 S.W.2d 896 (Mo. App., E.D. 1981) (affirmed denial of maintenance where wife received \$251,900 in property division, was healthy and had been employed during the marriage as an executive secretary for an insurance company, had a real estate license, and had kept books for their corporations).

103. *Geldmeier v. Geldmeier*, 669 S.W.2d 33 (Mo. App., E.D. 1984); *Goff v. Goff*, 557 S.W.2d 55 (Mo. App., St. L. 1977).

104. *Hurley v. Hurley*, 607 S.W.2d 169, 170 (Mo. App., E.D. 1980).

105. *See also Atchison v. Atchison*, 636 S.W.2d 410 (Mo. App., E.D. 1982)

## iii. Party seeking maintenance presently employed

In most cases involving homemakers who previously had not been employed full-time during the marriage, the amount of their earnings at the time of marriage dissolution does not meet their reasonable needs. Consideration of only a few cases dramatizes the severe loss of earning capacity by virtue of being out of the labor force for an extended period.<sup>106</sup> Consequently, it has been held error to exclude the wife's testimony that she had been a homemaker during her marriage.<sup>107</sup> This also explains why awards of maintenance to former homemakers who now are employed usually are affirmed if the obligor spouse can afford to make the payments. Some decisions treat evidence that expenses exceed income as sufficient in itself to avoid an abuse of discretion in awarding maintenance.<sup>108</sup> Many courts recognize the function of maintenance as "meeting the gap" between what the spouse is able to produce and her reasonable needs.<sup>109</sup> No decisions were found affirming a total denial of

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(\$20 a week "presumptively" correct where young wife with baby and without high school education has sought employment for six months).

106. See, e.g., *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc) (49-year-old wife after 22 years raising five children had two part-time jobs as receptionist and secretary, working 45 hours a week for \$430 a month); *Geil v. Geil*, 647 S.W.2d 161 (Mo. App., E.D. 1983) (husband had discouraged wife from employment during 25 year marriage; since separation 47-year-old wife had tried unsuccessfully to obtain employment and was enrolled in typing and data processing classes); *Klinge v. Klinge*, 554 S.W.2d 474 (Mo. App., St. L. 1977) (55-year-old wife after 28 years and four children was earning \$400 a month at two part-time jobs as receptionist and substitute teacher); *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977) (38-year-old wife after 16 years in home obtained employment as clothing salesperson after dissolution proceedings began and testified she worked 9 hours and earned \$4); *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App., St. L. 1975) (12 year marriage; court recognized failure to develop earning capacity in lengthy marriage). See discussion, *supra*, at notes 6-12.

107. *Toomey v. Toomey*, 636 S.W.2d 313 (Mo.) (en banc) (homemaker during all of two marriages to the husband), *cert. denied*, 495 U.S. 1106 (1982). See Krauskopf, *Applying the Maintenance Statute*, 33 J. MO. BAR 93, 99 (1977) (suggesting that evidence tending to show that a particular person's service to the marriage has lessened her earning capacity should be introduced including numbers of children, extent of homemaking, jobs or education relinquished, complete employment history showing breaks and lack of seniority).

108. *Lewis v. Lewis*, 637 S.W.2d 207 (Mo. App., E.D. 1982); *Atchison v. Atchison*, 636 S.W.2d 410 (Mo. App., E.D. 1982); *Roth v. Roth*, 620 S.W.2d 454 (Mo. App., E.D. 1981); *Steffan v. Steffan*, 597 S.W.2d 880 (Mo. App., W.D. 1980).

109. *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc); *Fausett v. Fausett*, 661 S.W.2d 614 (Mo. App., W.D. 1983); *In re Marriage of K.B.*, 648 S.W.2d 201 (Mo. App., S.D. 1983) (20 year homemaker employable as dental hygienist; husband dentist); *Childers v. Childers*, 652 S.W.2d 311 (Mo. App., E.D. 1983) (wife earned \$553 a month as secretary; \$1,300 a month maintenance affirmed); *McKnight v. McKnight*, 638 S.W.2d 789 (Mo. App., W.D. 1982) (affirmed \$450 a month maintenance to wife who earned \$445 a month); *Weant v. Weant*, 622 S.W.2d 789 (Mo. App., W.D. 1981) (wife held two jobs each earning only slightly over minimum wage); *Maynard v. Maynard*, 601 S.W.2d 649 (Mo. App., E.D. 1980); *Viers v. Viers*,

maintenance to a long-term homemaker when this gap existed and the obligor could fill it without sacrificing his own livelihood. In other words, ability to hold a job is not a reason for denying maintenance.<sup>110</sup>

#### iv. Lack of marketable skills

Missouri courts consistently recognize that "appropriate" employment is that which corresponds to the skills, education, and training of the person seeking maintenance.<sup>111</sup> Lack of marketable skills severely limits appropriate employment for many longtime homemakers. The "displaced homemaker" can be healthy, intelligent, and eager to enter the employment market but not be able to acquire positions adequate to meet reasonable needs because no employable skills have been developed.<sup>112</sup> Lack of marketable skills and education is often mentioned as an appropriate factor in awarding maintenance.<sup>113</sup> This factor is most significant for a long-term homemaker, especially when she is forty-five or more years old at the time of dissolution. The lack of skills due to long service in the home and the current inability to acquire skills and job seniority render this the most demanding case for maintenance.<sup>114</sup>

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600 S.W.2d 214 (Mo. App., E.D. 1980); *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. App., Spr. 1977) (\$375 maintenance affirmed; court said work could supplement); *In re Marriage of Dodd*, 532 S.W.2d 885 (Mo. App., St. L. 1976) (maintenance of \$200 month affirmed to wife earning \$138 a month).

110. The dicta in *Steinmeyer v. Steinmeyer*, 669 S.W.2d 65 (Mo. App., E.D. 1984), that maintenance could have been refused entirely is not substantiated by precedent. See discussion, *infra*, Section III. Durational Limits. Recent denials affirmed in the eastern district appear not to involve long-term, full-time homemakers. See, e.g., *Wachter v. Wachter*, 645 S.W.2d 111 (Mo. App., E.D. 1982); *Worley v. Worley*, 615 S.W.2d 561 (Mo. App., E.D. 1981).

111. *In re Marriage of Faulkner*, 582 S.W.2d 292 (Mo. App., E.D. 1979).

112. VOICES FOR WOMEN 92, REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE FOR WOMEN (1980). See, e.g., *P.L.K. v. R.J.K.*, 682 S.W.2d 486 (Mo. App., W.D. 1984).

113. *Diehl v. Diehl*, 670 S.W.2d 590 (Mo. App., E.D. 1984) (wife could not even drive); *In re Marriage of Runez*, 666 S.W.2d 430 (Mo. App., S.D. 1983) (wife's English limited); *Bell v. Bell*, 641 S.W.2d 854 (Mo. App., W.D. 1982); *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982); *In re Marriage of Pitluck*, 616 S.W.2d 861 (Mo. App., W.D. 1981); *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980) (had not completed grade school); *Maynard v. Maynard*, 601 S.W.2d 649 (Mo. App., E.D. 1980); *Niehaus v. Niehaus*, 593 S.W.2d 607 (Mo. App., E.D. 1980); *In re Marriage of L.*, 548 S.W.2d 262 (Mo. App., K.C. 1977); *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. App., Spr. 1977); *In re Marriage of Dodd*, 532 S.W.2d 885 (Mo. App., St. L. 1976).

114. See, e.g., *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc) (49-year-old wife after 22 years in the home earning \$430 a month working 45 hours a week as secretary and receptionist); *Diehl v. Diehl*, 670 S.W.2d 590 (Mo. App., E.D. 1984) (wife unemployed during 20 year marriage); *Jones v. Jones*, 658 S.W.2d 483 (Mo. App., E.D. 1983) (50 year marriage, wife never employed outside home); *Geil v. Geil*, 647 S.W.2d 161 (Mo. App., E.D. 1983) (47-year-old wife after 25 years in the home unable to obtain employment and enrolled in typing and data processing classes; husband had discouraged employment during marriage); *Felkner v. Felkner*, 652

The homemaker in a second marriage who does not have marketable skills also can be protected even though that second marriage is relatively short. In *Kerns v. Kerns*,<sup>115</sup> the marriage had lasted only six years but a \$200 a month maintenance award was affirmed. The appellate court noted that the fifty-five year old wife had been employed as a real estate salesperson prior to the marriage but the husband had preferred to "have her as a housewife."<sup>116</sup> During the marriage, she assisted him in his business and worked in the real estate business only occasionally. In *Ort v. Ort*,<sup>117</sup> an award of \$500 a month maintenance was affirmed where the second marriage lasted only eight years but the fifty-five year old wife had not been employed "for several years." The court described her as "physically disabled, marginally educated and marginally trained."<sup>118</sup> Neither of these opinions stated a rationale for the affirmance. Both suggest the possibility that the second marriage eliminated alimony from the first marriage which would not be reinstated.<sup>119</sup> *Kern* indicates strongly that the wife may have become self-supporting after the first marriage but damaged her earning capacity at the second husband's request. It is possible that Mrs. Ort also relinquished whatever minimal employment she had to maintain the second home. Together they paint a picture of a second "job" as homemaker at an age when both husband and wife should realize that the last chance for maintaining or developing earning capacity is being sacrificed for the marriage. Therefore, maintenance appears especially appropriate for the second spouse even in a relatively short marriage, if she does not have sufficient marketable skills.<sup>120</sup>

#### v. Employment appropriate to status and interests

The Comments to Section 308 of the Uniform Marriage and Divorce Act from which the Missouri maintenance section is taken state that employment

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S.W.2d 174 (Mo. App., E.D. 1983) (19 year marriage; court states that the longer the marriage the less likely the homemaker spouse will be able to acquire skills through training); *Niehaus v. Niehaus*, 593 S.W.2d 607 (Mo. App., E.D. 1980); *Madden v. Madden*, 585 S.W.2d 220 (Mo. App., E.D. 1979) (54-year-old wife after 35 years in the home employed as a part-time bank teller at \$2.81 an hour); *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977) (38-year-old wife after 16 years in the home earned \$4.00 during her first nine hour day selling women's clothing); *cf. In re Marriage of K.B.*, 648 S.W.2d 201 (Mo. App., S.D. 1983) (44-year-old wife trained as dental hygienist but 20 years in the home sacrificed development of career).

115. 552 S.W.2d 350 (Mo. App., K.C. 1977).

116. *Id.* at 351.

117. 652 S.W.2d 184 (Mo. App., E.D. 1983).

118. *Id.* at 185.

119. *Glass v. Glass*, 546 S.W.2d 738 (Mo. App., K.C. 1977).

120. Contrast second marriages in which the wife has not sacrificed her employment opportunities. For cases affirming denial of maintenance, *see Slenker v. Slenker*, 673 S.W.2d 846 (Mo. App., S.D. 1984); *Satterfield v. Satterfield*, 635 S.W.2d 80 (Mo. App., E.D. 1982); *In re Marriage of Hartzell*, 634 S.W.2d 556 (Mo. App., E.D. 1982).

should be "appropriate to his or her skills and interests."<sup>121</sup> The Comment from the Uniform Law has been quoted favorably by Missouri courts a number of times.<sup>122</sup> In one of the earliest decisions under the 1974 Act, the husband, who could well afford to fully support the wife, argued that unless she was expected to obtain employment to contribute to her support, the language "appropriate employment" would apply only to the poor.<sup>123</sup> The court responded by quoting from pre-Act cases to the effect that the wife should be maintained in the station of life and style to which the husband's social standing and pecuniary faculties entitle her. Other factors in the case were a physical disability, age, and custody of a thirteen-year-old. However, the case strongly suggests that after a long marriage at an upper class standard of living, in which wives devote their time to assisting their husband's careers directly through entertaining and indirectly by their membership in country clubs and good works in civic and charitable causes, it would not be appropriate to expect that homemaker to obtain employment as a clerk in the discount store or, perhaps, even as a receptionist or secretary. The numerous cases in which substantial monthly maintenance has been approved or increased reinforces the conclusion that social status is relevant in determining interests which affect what type employment is appropriate.<sup>124</sup>

The courts have held that "appropriate employment" does not require a wife "to accept a job unsuited to her interests and talents for no other reason than its availability, when more suitable jobs are in reasonable prospect."<sup>125</sup> In *Scott v. Scott*,<sup>126</sup> the husband complained that the wife had refused to pursue a job selling insurance or trust services. The wife, who was thirty-one years old with a master's degree in elementary guidance and who had taught psychology on a college level, explained that it was not the kind of job she was prepared for and that she was seeking employment in her field. The court affirmed \$400 a month maintenance for four years. The award would enable her to look longer for employment which would be closer to her skills and interests. In the long run, this probably would be more remunerative and socially valuable than something for which she was not prepared. A similar concept was expressed earlier by a court which said that the policy of the law was neither to provide a lifetime annuity nor to reduce the wife "to menial labor to eke out an

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121. UNIF. MARRIAGE AND DIVORCE ACT, 9 U.L.A. 494 (1973).

122. UNIF. MARRIAGE AND DIVORCE ACT, 9 U.L.A. 494 (1973), quoted in *Brueggemann v. Brueggemann*, 551 S.W.2d 853, 857 (Mo. App., St. L. 1977), and *Spicer v. Spicer*, 585 S.W.2d 126, 129 (Mo. App., S.D. 1979). Employment "corresponding" to skills and interests was used in *In re Marriage of Faulkner*, 582 S.W.2d 292 (Mo. App., E.D. 1979).

123. *Butcher v. Butcher*, 544 S.W.2d 249, 254 (Mo. App., K.C. 1976).

124. See cases cited at The Standard for Need, *supra*. However, even these awards seldom exceed \$2,000 a month. Without other income, that is not enough to support a high standard of living.

125. *Scott v. Scott*, 645 S.W.2d 193, 198 (Mo. App., W.D. 1982); *Faulkner v. Faulkner*, 582 S.W.2d 292, 295 (Mo. App., W.D. 1979).

126. 645 S.W.2d 193 (Mo. App., W.D. 1982).

existence."<sup>127</sup>

#### vi. Custodian of a child

Section 452.335.1 provides that maintenance may be granted only when the person seeking either (1) lacks sufficient property and (2) is unable to support himself "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." The language and structure are unambiguous in allowing maintenance to one who otherwise could contribute to her own support or fully supply that support but for the fact that she is remaining home to care for a child. The Preliminary Analysis for the Commissioners on Uniform Laws had expressed the goal of enabling custodians of children to remain at home through maintenance and child support if property division were insufficient.<sup>128</sup> The language leaves extremely broad discretion in the court to determine when a person otherwise capable of employment will be excused because of child custody. There are no guidelines for interpreting "condition or circumstances" which "make it appropriate" that the custodian not be required to seek employment outside the home. The courts have enunciated little that is helpful, perhaps because the custodian seldom attempts to use custody as a reason for not becoming employed. The only appellate court statement which seems to discount entirely the fact of custodianship of pre-school children is dicta because the court had held previously that the evidence established that the wife's needs were met fully.<sup>129</sup>

As may be expected, when the child is pre-school age the courts are more likely to find that seeking outside employment is inappropriate. Awards of maintenance were affirmed utilizing this factor in *In re Marriage of Vanet*<sup>130</sup> and *Butler v. Butler*.<sup>131</sup> The *Vanet* court, after stating the trial court's implicit finding that it was inappropriate for the wife to seek employment, explained that the wife's alleged earning capacity was an illusory financial resource and entitled to little or no weight in determining maintenance.<sup>132</sup> The most extreme opinion utilizing this portion of the statute is *P.A.A. v. S.T.A.*,<sup>133</sup> in which the appellate court reversed a denial of maintenance to a mother of two children aged five and two at the time of trial. The appellate court said, "Her place is in the home with the children," and cited *Vanet* concerning the illusory nature of her alleged earning capacity.<sup>134</sup> Ironically, in none of these cases was the amount of maintenance and child support sufficient to support

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

128. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 147 (1968).

129. *Cissell v. Cissell*, 573 S.W.2d 722 (Mo. App., St. L. 1978).

130. 544 S.W.2d 236 (Mo. App., K.C. 1976).

131. 562 S.W.2d 685 (Mo. App., St. L. 1977).

132. *In re Marriage of Vanet*, 544 S.W.2d 236, 243 (Mo. App., K.C. 1976).

133. 592 S.W.2d 502 (Mo. App., S.D. 1979).

134. *Id.* at 504.



fully the custodian at a standard of living comparable to that during the marriage. A husband usually cannot support fully the children and the custodial parent. Marriage dissolution forces nearly all able-bodied former homemakers, including custodians of small children, into the work place even with the help of maintenance.

In cases involving elementary and junior high age children, the appellate courts ordinarily defer to the trial courts.<sup>135</sup> When the trial court has granted maintenance, it is affirmed with a statement to the effect that it was proper to consider custodianship of children in making the award.<sup>136</sup> In *Sarandos v. Sarandos*,<sup>137</sup> the court approved maintenance for a mother who had been home full time to raise two older sons and wished to give the thirteen-year-old son the same nurture and caring. The court quoted from an earlier decision<sup>138</sup> to the effect that, given her limited employment experience, it was not unreasonable to place the welfare of the son above the possible financial burden on the boy's father to provide maintenance. On the contrary, a number of appellate courts have stated the consideration as a double negative: if custody does not require staying at home, then maintenance may be awarded only if the custodian is not able to support herself through employment.<sup>139</sup> Using the words "custody does not require" indicates the extreme deference that is given to the trial court's decision that it is appropriate to seek employment.

The issue of appropriateness of the custodial parent becoming employed seldom is discussed when the children are high school age or older. In two cases the courts upheld an award of maintenance stairstepped to terminate after the teenagers would reach age twenty-one. This indirectly recognized that the custody of children affected the amount of maintenance awarded.<sup>140</sup>

#### vii. Physical and mental health

Ill health or physical disability which adversely affects the ability to sup-

135. *E.g., In re Marriage of Carmack*, 550 S.W.2d 815 (Mo. App., St. L. 1977).

136. *Sarandos v. Sarandos*, 643 S.W.2d 854 (Mo. App., E.D. 1982) (13-year-old child); *Goff v. Goff*, 557 S.W.2d 55 (Mo. App., St. L. 1977) (three children, two under 10); *Butcher v. Butcher*, 544 S.W.2d 249, 254 (Mo. App., K.C. 1976) (13-year-old child).

137. 643 S.W.2d 854 (Mo. App., E.D. 1982).

138. *In re Marriage of Prenavo*, 556 S.W.2d 463 (Mo. App., St. L. 1977).

139. *Lewis v. Lewis*, 637 S.W.2d 207 (Mo. App., E.D. 1982) (affirming \$400 a month maintenance); *Metts v. Metts*, 625 S.W.2d 896 (Mo. App., E.D. 1981) (children 12 and 16, affirmed denial of maintenance); *J.A.A. v. A.D.A.*, 581 S.W.2d 889 (Mo. App., E.D. 1979); *Abney v. Abney*, 575 S.W.2d 842 (Mo. App., St. L. 1978).

140. *Hebron v. Hebron*, 566 S.W.2d 829 (Mo. App., St. L. 1978) (five children all minors, youngest 13 at time of award); *Cain v. Cain*, 536 S.W.2d 866 (Mo. App., Spr. 1976) (two teenage girls). A later eastern district decision held that mere expected emancipation is not a sufficient basis for limiting the duration of maintenance. *Blount v. Blount*, 674 S.W.2d 612 (Mo. App., E.D. 1984); see discussion *infra*, Section III. Durational Limits.

port oneself<sup>141</sup> is recognized consistently as a relevant factor in awarding maintenance.<sup>142</sup> When added to advanced age, long marriage, and no marketable skills, the case for maintenance is unimpeachable. Occasionally, disability forms the basis for reversing a denial of maintenance.<sup>143</sup> The health consideration is relevant when the condition is mental or emotional as well as physical.<sup>144</sup> The high percentage of appealed cases in which health is an issue suggests that attorneys on both sides always should investigate possible evidence on this factor. However, once the record shows health problems that do lessen the ability to earn, appeal to challenge an award probably is futile except on grounds of inability to pay.

## B. *Factors to Reduce Amount*

### 1. Ability of Obligor to Pay

#### a. Statutory Factor Applied

By meeting the need requirements of section 452.335.1, the party seeking maintenance has established eligibility or a right to maintenance.<sup>145</sup> Consequently, the factor enumerated in section 452.335.2 (6)—“The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance”—should affect only the amount or duration of maintenance and in itself should not preclude an award of maintenance. This explains some decisions that have affirmed awards of *nominal* maintenance when there exist both need of the requesting party and inability to pay on the part of the potential obligor.<sup>146</sup>

141. *Abney v. Abney*, 575 S.W.2d 842 (Mo. App., St. L. 1978) (remanded for evidence on effect of disability).

142. *Diehl v. Diehl*, 670 S.W.2d 590 (Mo. App., E.D. 1984); *Jones v. Jones*, 658 S.W.2d 483 (Mo. App., E.D. 1983); *Ort v. Ort*, 652 S.W.2d 184 (Mo. App., E.D. 1983); *Schreier v. Schreier*, 625 S.W.2d 644 (Mo. App., E.D. 1981); *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980); *In re Marriage of Cody*, 572 S.W.2d 635 (Mo. App., St. L. 1978); *McBane v. McBane*, 553 S.W.2d 521 (Mo. App., K.C. 1977); *Hulsey v. Hulsey*, 550 S.W.2d 902 (Mo. App., St. L. 1977); *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. App., E.D. 1977); *Butcher v. Butcher*, 544 S.W.2d 249 (Mo. App., K.C. 1976); *In re Marriage of Dodd*, 532 S.W.2d 885 (Mo. App., St. L. 1976).

143. *McLay v. McLay*, 597 S.W.2d 714 (Mo. App., W.D. 1980); *Sullivan v. Sullivan*, 555 S.W.2d 71 (Mo. App., K.C. 1977).

144. *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982); *Niehaus v. Niehaus*, 593 S.W.2d 607 (Mo. App., E.D. 1980); *Smith v. Smith*, 586 S.W.2d 362 (Mo. App., E.D. 1979); *Kerns v. Kerns*, 552 S.W.2d 350 (Mo. App., K.C. 1977).

145. *Brown v. Brown*, 673 S.W.2d 113 (Mo. App., W.D. 1984); *see also* *Horridge v. Horridge*, 618 S.W.2d 202 (Mo. App., W.D. 1981) (if neither property nor employment are sufficient to meet reasonable needs, the court must set the amounts and time of maintenance).

146. *Bell v. Bell*, 641 S.W.2d 854 (Mo. App., W.D. 1982); *Phelps v. Phelps*, 620 S.W.2d 462 (Mo. App., W.D. 1981); *McBane v. McBane*, 553 S.W.2d 521 (Mo. App., K.C. 1977).

Once again the trial judge is vested with wide discretion. Trial court decisions to grant maintenance are affirmed almost routinely. Courts have said that an award would be reversed only if it were patently unwarranted or wholly beyond the ability of the obligor to pay.<sup>147</sup> However, this does not mean that awards are upheld without any review at all. Appellate courts have stated that the award should not exceed the obligor's capacity to provide<sup>148</sup> and that the duty is only to pay insofar as the obligor is able.<sup>149</sup> One court upheld an award after noting that the husband would incur "no sacrifice" of expenditures for his own needs.<sup>150</sup> The most likely fact is that trial courts are considering seriously the obligor's ability to pay when setting the initial award.<sup>151</sup> The large number of awards that are modest in amount, varying from \$50 to \$500 a month and less than the full needs of the spouse requesting maintenance, indicates that both parties' attorneys and the trial judge usually weigh this factor heavily.<sup>152</sup> In one case in which the issue of need for maintenance had been litigated intensely and was held established, the appellate court, nevertheless, remanded for findings on the obligor's ability to pay.<sup>153</sup>

The Missouri courts articulate as a guide to applying this factor that they are considering the relative economic condition of the parties<sup>154</sup> or that they are striking a balance between the husband's ability to pay and the wife's

147. *In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983); *In re Marriage of Schafer*, 609 S.W.2d 198 (Mo. App., W.D. 1980).

148. *Brown v. Brown*, 537 S.W.2d 434 (Mo. App., St. L. 1976).

149. *Phelps v. Phelps*, 620 S.W.2d 462 (Mo. App., W.D. 1981).

150. *Niehaus v. Niehaus*, 593 S.W.2d 607 (Mo. App., E.D. 1980).

151. Apparently, only one case has reversed an award of maintenance for insufficiently considering the ability of the obligor to meet his own needs. *See Alvino v. Alvino*, 659 S.W.2d 266 (Mo. App., E.D. 1983). When the marriage is short, denial of maintenance from a husband with a modest income is likely to be affirmed. *In re Marriage of Kennedy*, 673 S.W.2d 836 (Mo. App., S.D. 1984).

152. The most comprehensive empirical research on dissolution economics was conducted in California and concluded that women were far worse off economically after divorce than men largely because men paid little in support, allowing them to maintain their previous or a higher standard of living. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). The study discovered that women and children bear the brunt of reduced standard of living due to one household becoming two. It criticized that result because of the negative effect on children. This economic post-divorce phenomenon is stated often as the feminization of poverty or the impoverishment of women. The practical means by which this result could occur is that the reasonable needs of the women are set too low and that even those needs are not met by support awards if attorneys and judges believe the obligation on the obligors will interfere with meeting the obligors' own needs to maintain a comfortable lifestyle close to that experienced during the marriage. In other words, if there is not sufficient money for both to maintain the earlier standard of living, the person seeking suffers. Since women, generally, earn less than men, they and the children in their custody suffer most.

153. *Sarandos v. Sarandos*, 643 S.W.2d 854 (Mo. App., E.D. 1982).

154. *N.J.W. v. W.E.W.*, 584 S.W.2d 148 (Mo. App., W.D. 1979).

reasonable needs.<sup>155</sup> Even in cases where the ability to pay is obvious, the court is likely to mention that it is a factor appropriately considered.<sup>156</sup> In another group of cases, the appellate courts have referred explicitly to the extreme disparity in income or expenses between the husband and wife as though that were relevant in weighing the ability of the obligor to meet his needs while meeting those of the requesting party.<sup>157</sup> Disparity may well be an influence in a few cases where both incomes and expenses were modest, and the courts have affirmed awards even when they were likely to restrict the prior living standard of the obligor.<sup>158</sup>

Both the award and the denial of maintenance have been affirmed when the parties' very modest incomes were not sufficient to meet both persons' needs and the trial court's action has equalized their positions. In *Brueggemann v. Brueggemann*,<sup>159</sup> maintenance was denied even though the wife had claimed an income of \$5,600 and expenses of \$10,300 contrasted with husband's claimed income of \$10,300 and expenses of \$8,600. The court added to wife's income \$150 in child support and subtracted from her expenses \$114 in mortgage payments which the husband was ordered to pay monthly. When those amounts are added to the husband's expenses, a remarkably equal picture emerges. Wife's income was \$7,400 and her expenses were \$8,932 for a shortage of \$1,532. Husband's income was \$10,300 and his expenses were \$11,768 for a shortage of \$1,468. The result was that they shared equally in

155. *Bull v. Bull*, 634 S.W.2d 228 (Mo. App., E.D. 1982); *In re Marriage of Zuniga*, 622 S.W.2d 705 (Mo. App., E.D. 1981); *Myers v. Myers*, 586 S.W.2d 797 (Mo. App., W.D. 1979); *Sawtell v. Sawtell*, 569 S.W.2d 286 (Mo. App., K.C. 1978).

156. *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc); cf. *Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. 1984) (en banc) (noting approvingly maintenance over \$4,000 a month); *Geil v. Geil*, 647 S.W.2d 161 (Mo. App., E.D. 1983) (rev'd denial of maintenance); *Cregan v. Clark*, 658 S.W.2d 924 (Mo. App., W.D. 1983); *Sarandos v. Sarandos*, 643 S.W.2d 854 (Mo. App., E.D. 1982) (affirmed maintenance 10% in excess of proved needs); *In re Marriage of Pine*, 625 S.W.2d 942 (Mo. App., W.D. 1981).

157. *Diehl v. Diehl*, 670 S.W.2d 590 (Mo. App., E.D. 1984) (noting that husband's stated expenses were double the award to wife); *Childers v. Childers*, 652 S.W.2d 311 (Mo. App., E.D. 1983) (noting husband's income seven times that of wife whose expenses exceeded her income by \$1,300); *J.A.A. v. A.D.A.*, 581 S.W.2d 889 (Mo. App., E.D. 1979) (husband earning \$17,000 and wife \$6,800; court suggested both may have to adjust budgets downward); *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977) (noting wife's expenses \$7,200 and husband's income between \$60,000 and \$75,000).

158. In *In re Marriage of Dodd*, 532 S.W.2d 885 (Mo. App., St. L. 1976), after a 27 year marriage the wife, who had no skills, earned \$138 a month and the husband \$830. The appellate court affirmed orders to pay \$200 child support and another \$200 maintenance. In *Viers v. Viers*, 600 S.W.2d 214 (Mo. App., E.D. 1980), the husband, who had custody and earned only \$900 a month, was ordered to pay \$50 a month to the wife, who earned \$500 a month as a janitor. In *Dickerson v. Dickerson*, 576 S.W.2d 567 (Mo. App., E.D. 1979), a husband, who earned \$1,100 a month, was ordered to pay \$100 to a wife, who earned \$640 a month.

159. 551 S.W.2d 853 (Mo. App., St. L. 1977).

their shortfall.<sup>160</sup> Similar outcomes have been achieved by awarding maintenance.<sup>161</sup> In *Murray v. Murray*,<sup>162</sup> the court affirmed an award of \$50 a week maintenance against an argument that the trial court had not considered the husband's ability to pay. The court footnoted the sad results for parties of limited means: the husband had \$61 a week and the wife had \$62 a week for themselves.

Perhaps long-term marriages with pitifully little in property or income should continue regardless of personal compatibility. Economic interest may call for the parties to continue to share the effects of the joint earning capacity developed during their lives. The cases discussed here were decided relatively soon after adoption of the 1974 law. Such extreme situations seldom appear in the appellate records now. Attorneys, acting in their role as counselors at the stage when one of the parties is considering marriage dissolution, may be advising them that due to the fact that the parties are never likely to be able to meet their needs in separate households, they should consider continuing the marriage and one household.<sup>163</sup>

However, obligors' hopes of freedom from the obligations of marriage may rise after learning of a 1983 decision which appears to be the first reversal of an award of maintenance for failure to consider adequately the obligor's ability to meet his needs while contributing to the other. In *Alvino v. Alvino*,<sup>164</sup> the marriage had lasted thirty-five years and produced eleven children, two of whom were in the custody of the wife. The husband earned \$1,123

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160. Unfortunately, the reference to the *Brueggemann* case in the Missouri Bar Family Law CLE at page 12-18 (3rd ed. 1982), is extremely misleading. It sets out only the figures indicating that the husband had much more income than the wife, thereby erroneously suggesting that the court allowed such a disparity to exist without an obligation to pay maintenance.

161. In *Murphy v. Murphy*, 536 S.W.2d 951 (Mo. App., K.C. 1976), the husband with an income of \$800 a month reported expenses of only \$350. Wife earned \$60 a week and asserted expenses of \$650 for herself and three children. Husband was ordered to pay \$100 a month for each of three children and \$150 a month maintenance. The effect was that each received his stated needs plus \$40 or \$50 even though husband was paying more than half his income in support.

162. 538 S.W.2d 587 (Mo. App., St. L. 1976).

163. In *Jones v. Jones*, 658 S.W.2d 483 (Mo. App., E.D. 1983), a marriage of over 50 years, the appellate court noted that on one version of the evidence there was a \$202 difference in their incomes after a 50/50 division of property and \$175 maintenance monthly. But that disparity would occur only if the 77-year-old man continued to work as a school crossing guard. The court held that even on the latter assumption, there was no abuse of discretion in not ordering greater maintenance. The case shows that, even in a modest income situation, disparity will not be eliminated always. But *Jones* is intriguing primarily because the parties had agreed to remain in the family home, sharing equally income from rented portions. One wonders why they wanted the marriage dissolved or why the attorneys could not devise a satisfactory alternative arrangement to a contested and appealed case. However, assuming the parties insisted on dissolution, the house sharing appears a creative solution to the economic situation. See also R. NEELY, THE DIVORCE DECISION (1984).

164. 659 S.W.2d 266 (Mo. App., E.D. 1983).

monthly from regular employment and an unstated amount from part-time work. The trial court ordered \$400 child support and \$500 maintenance monthly. That would be \$300 each for the wife and two children, leaving only \$273 for the husband, if nothing from the part-time work were considered. This was reversed as an abuse of discretion with the flat statement that it was insufficient to meet his needs.

b. Earning Ability vs. Temporary Condition

A temporary slump in income will not affect the amount of maintenance the obligor may be ordered to pay. Rather, the courts have stated repeatedly that both prior and anticipated earning capacity of the obligor are the relevant factors.<sup>165</sup> A reduction in income will not serve alone as a basis for reduction of family support payments.<sup>166</sup> This is well illustrated by *Steffan v. Steffan*,<sup>167</sup> where the husband had switched from insurance to real estate sales within a year of the dissolution trial. The *Steffan* court said, "Whether the husband's future earning capacity consistently slumps to an extent which might prompt and support modification of the present maintenance award awaits another time and occasion."<sup>168</sup> In *In re Marriage of Vanet*,<sup>169</sup> the husband had left an established law firm eleven months prior to the dissolution trial in order to "launch out" on his own. The *Vanet* court commented that the members of the court are not "blind to the fact that a lawyer's income is subject to fluctuation, and, if for no other reason, a lawyer's capacity to pay maintenance and child support, if realistically assessed, properly entails consideration of both his past and anticipated earning capacity."<sup>170</sup>

The husband who quits or limits his work as a regular matter<sup>171</sup> or in connection with the marital troubles or the dissolution proceedings<sup>172</sup> receives no sympathy from the appellate courts. They hold that a person may not de-

165. *Scott v. Scott*, 645 S.W.2d 193 (Mo. App., W.D. 1982); *Bull v. Bull*, 634 S.W.2d 228 (Mo. App., E.D. 1982); *Broyles v. Broyles*, 555 S.W.2d 696 (Mo. App., K.C. 1977); *Brown v. Brown*, 537 S.W.2d 434 (Mo. App., St. L. 1976); *Naeger v. Naeger*, 542 S.W.2d 344 (Mo. App., St. L. 1976); *Murray v. Murray*, 538 S.W.2d 587 (Mo. App., St. L. 1976); *Richardson v. Richardson*, 524 S.W.2d 149 (Mo. App., St. L. 1975).

166. *Seelig v. Seelig*, 540 S.W.2d 142 (Mo. App., St. L. 1976); *Foster v. Foster*, 537 S.W.2d 833 (Mo. App., K.C. 1976).

167. 597 S.W.2d 880 (Mo. App., W.D. 1980).

168. *Id.* at 883.

169. 544 S.W.2d 236 (Mo. App., K.C. 1976).

170. *Id.* at 242.

171. *In re Marriage of Cody*, 572 S.W.2d 635 (Mo. App., St. L. 1978) (little evidence of husband's income because he hangs around pool rooms, plays a bit of pool, and borrows money from mother and girlfriends rather than having regular employment).

172. *Jackson v. Jackson*, 655 S.W.2d 786 (Mo. App., E.D. 1983) (upon separation husband quit previously lucrative employment); *Morovitz v. Morovitz*, 633 S.W.2d 211 (Mo. App., E.D. 1982) (husband quit job when wife filed for dissolution).

cline voluntarily to work and plead lack of income as a basis for shirking responsibilities to the family.<sup>173</sup> In *Klinge v. Klinge*,<sup>174</sup> after a marriage of twenty-eight years, the husband, who was a physician-surgeon with an income in the upper \$70,000-per-year bracket, lost his hospital surgical privileges and began work on a twenty hour a week basis with a clinic at a full-time rate of \$35,000 annually. He refused full-time work, saying that he wanted to devote time to his own office practice. That choice was denied him by the court as he could not do so and meet the fairly modest maintenance awards entered. The court affirmed \$500 a month child support (for two children) and \$400 a month maintenance, saying that the husband may not escape his responsibility to his family or stymie justified support for them by deliberately limiting his work to reduce his income. Similar is *Bull v. Bull*,<sup>175</sup> where the court affirmed a \$2,000 per month maintenance award noting the husband controlled his salary through control of a highly successful close corporation and his previous salary was ample to pay that amount.

### c. Property Affecting Ability to Pay

Just as property is relevant to determine the ability of the person seeking maintenance to supply his or her own needs, it is also relevant in determining ability to pay maintenance. In *Horridge v. Horridge*,<sup>176</sup> the court said both separate property and the marital property awarded to the obligor could illustrate ability to pay. In *Diehl v. Diehl*,<sup>177</sup> the court in affirming maintenance noted that non-essential assets such as a camper and boat had been awarded to the obligor, thus implying that he could sell them. In *Scott v. Scott*,<sup>178</sup> the court affirmed a \$12,000 lump sum award saying that the obligor had untouched separate property that could be utilized to pay the award. Of course, some types of property would not have to be sold but could be used as security for a loan to pay a lump sum award.

## 2. Conduct During Marriage

### a. Relevance of Conduct

Section 452.335.2(7), "Conduct of a party seeking maintenance during the marriage," is a factor to be considered, not in determining the right or

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173. *In re Marriage of Cody*, 572 S.W.2d 635 (Mo. App., St. L. 1978) (citing *Boyer v. Boyer*, 567 S.W.2d 749 (Mo. App., K.C. 1978)); *Butler v. Butler*, 562 S.W.2d 685 (Mo. App., St. L. 1977). This is the traditional law of Missouri. *See, e.g., Weiss v. Weiss*, 392 S.W.2d 646 (Mo. App., St. L. 1965).

174. 554 S.W.2d 474 (Mo. App., St. L. 1977).

175. 634 S.W.2d 228 (Mo. App., E.D. 1982).

176. 618 S.W.2d 202 (Mo. App., W.D. 1981).

177. 670 S.W.2d 590 (Mo. App., E.D. 1984).

178. 645 S.W.2d 193 (Mo. App., W.D. 1982).

eligibility for maintenance, but rather in setting the amount and duration.<sup>179</sup> In *Brown v. Brown*,<sup>180</sup> the wife had cohabited with another man during the twenty-seven months of a six year marriage that immediately preceded the decree. Although the appellate court reversed the entire award of in gross maintenance for lack of evidence to support it, the court held that the cohabitation during the marriage alone could not preclude maintenance, but was only relevant on the issue of duration and amount.

#### b. Type and Time of Conduct

Personal conduct during the marriage, in addition to that affecting property or money, is relevant.<sup>181</sup> Good conduct, especially rising to the level of sacrifice by one spouse for the benefit of the other, is relevant. In a case where the wife had loaned money to the husband and also had borrowed money for his benefit for which she was obligated after the marriage, it was proper to consider that good conduct relevant.<sup>182</sup> Misconduct or bad conduct apparently is relevant only when a degree of fault or willfulness has contributed to it. A denial of maintenance because of conduct was reversed where the cause was emotional illness.<sup>183</sup> The emotional disturbance was attributed to childbirth and becoming attached to a psychiatrist during psychiatric therapy in what was described as a common transference phenomenon. Additionally, the conduct may have to precede the dissolution closely enough that it could not be considered condoned. In one case, the court affirmed \$1,500 a month maintenance to a forty-four-year-old wife even though she had experienced drug and alcohol problems. The court noted that she had not had those problems for four years preceding the filing for dissolution.<sup>184</sup>

#### c. Degree of Relevant Conduct

From the beginning of litigation under the statute the courts have been reluctant to encourage counter charges and extensive airing in court of bitter accusations concerning trivialities. In *Brueggemann v. Brueggemann*,<sup>185</sup> the court refused to recount the testimony consisting of charges and counter-charges of misconduct. Other opinions have acknowledged the alleged misconduct, but affirmed awards of maintenance saying simply that neither party had been exemplary<sup>186</sup> or that the conduct was not sufficient to deny mainte-

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179. *Brown v. Brown*, 673 S.W.2d 113 (Mo. App., W.D. 1984); *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980); *In re Marriage of Carmack*, 550 S.W.2d 815 (Mo. App., St. L. 1977).

180. 673 S.W.2d 113 (Mo. App., W.D. 1984).

181. *Butcher v. Butcher*, 544 S.W.2d 249 (Mo. App., K.C. 1976).

182. *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977).

183. *P.A.A. v. S.T.A.*, 592 S.W.2d 502 (Mo. App., S.D. 1979).

184. *C.B.H. v. R.N.H.*, 571 S.W.2d 449 (Mo. App., St. L. 1978).

185. 551 S.W.2d 853 (Mo. App., St. L. 1977).

186. *J.A.A. v. A.D.A.*, 581 S.W.2d 889 (Mo. App., E.D. 1979).



nance.<sup>187</sup> The courts consider relevant only serious misconduct, and then only when one party is significantly more at fault than the other. In affirming maintenance, the court in *Fausett v. Fausett*<sup>188</sup> stated the requirement as conduct by the errant spouse which placed "extra burdens on the non-errant spouse."<sup>189</sup>

There are only a few appellate reports in which it is clear that the misconduct was sufficient to affect seriously the amount of maintenance. In *Schnitker v. Schnitker*,<sup>190</sup> the court affirmed denial of maintenance to a forty-two-year-old woman who had not been employed during most of a twenty year marriage, noting that she had \$30,000 in cash, the husband who had custody of the children had expenses exceeding his income, and the "breakup of the parties came when the wife took up with another man."<sup>191</sup> Even more extreme action by the appellate court was its reversal of an in gross maintenance award in *Brown v. Brown*<sup>192</sup> saying that the wife's cohabitation with another man for twenty-seven months during the marriage was relevant. In *Rasmussen v. Rasmussen*,<sup>193</sup> the main factor justifying a durational limit on maintenance was misconduct of the intensely jealous wife in harassing the husband by threatening his life, asking him to leave the marital home, physically attacking him, making threatening phone calls to women she believed were involved with him, publicly confronting and humiliating him with threats, and trying to have him fired from his employment.

#### d. Conduct of the Obligor Spouse

Since *Brueggemann v. Brueggemann*,<sup>194</sup> it has been recognized that the legislature, by allowing maintenance to both parties and eliminating fault considerations other than the conduct of the party seeking maintenance, evinced a "legislative intent to remove any punitive quality as to the party providing maintenance."<sup>195</sup> The legislature insisted upon inserting conduct into the bill which originally was drafted as worded in the Uniform Marriage and Divorce Act precluding conduct considerations. Members of the legislature were concerned that vengeance might be asserted against an adulteress who obtained maintenance. However, when reminded that imprisonment for contempt in re-

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187. *In re Marriage of Carmack*, 550 S.W.2d 815 (Mo. App., St. L. 1977).

188. 661 S.W.2d 614 (Mo. App., W.D. 1983).

189. *Id.* at 619.

190. 646 S.W.2d 123 (Mo. App., W.D. 1983).

191. *Id.* at 124-26; see also *J.H.M. v. E.C.M.*, 544 S.W.2d 582, 586-87 (Mo. App., St. L. 1976) (affirming denial of maintenance to 40-year-old unemployed wife who had slept with another man while children were in the house and aware of her conduct).

192. 673 S.W.2d 113 (Mo. App., W.D. 1984).

193. 627 S.W.2d 117 (Mo. App., W.D. 1982).

194. 551 S.W.2d 853 (Mo. App., St. L. 1977).

195. *Id.* at 856. Comments about the legislature in this paragraph are based on author Krauskopf's personal knowledge.

fusing to pay would not be available to enforce an order intended to punish for fault, the legislature limited the conduct consideration in the maintenance section to that of the person seeking maintenance. Decisions which preclude considering the obligor spouse's misconduct in setting maintenance are consistent with that legislative history. Consequently, one should view with suspicion statements that approve higher awards of maintenance in recognition of the obligor's misconduct.<sup>196</sup>

To be distinguished are situations where it is appropriate to consider the obligor's misconduct as it affects other issues. For example, unjustified refusal to reimburse for benefits received by the obligor may be a basis for restitution to the requesting spouse.<sup>197</sup> Also to be distinguished are situations where evidence is sparse concerning ability to pay because of the obligor's lack of candor in regard to his financial condition.<sup>198</sup> An important means of utilizing obligor misconduct is to demonstrate its effect on the obligor's ability to pay. For example, money spent on a paramour and her children is not a legitimate expense to reduce the obligor's ability to support the spouse and their own children.<sup>199</sup>

### 3. Other Relevant Factors: Cohabitation

Since section 452.335.2 states that any relevant factor may be considered by the court in determining amount and duration of maintenance, neither the requirements of subsection 1 nor the seven listed factors in subsection 2 are exclusive. Any fact which logically affects the need of a requesting spouse should be relevant. In *Brown v. Brown*,<sup>200</sup> the court held that neither cohabitation with another man during nor after the marriage affected the property or employment considerations of subsection 1. The court held that since there was no right to be supported by the cohabiting partner, the requesting spouse had no property interest in an expectation of support. The court also held that cohabitation following the dissolution did not affect the ability of the requesting spouse to be self-supporting through appropriate employment. However, the cohabitation could be considered within the "other relevant factor" clause of subsection 2 because the wife had testified that her cohabitant had been supporting her and that they planned to be married. The court held that was information highly relevant to her present and future economic needs. The *Brown* court discussed cases in other jurisdictions dealing with the effect of later cohabitation on alimony awards and agreed with the majority rule that cohabitation does not preclude maintenance automatically but is a relevant economic factor affecting the need for maintenance. The court reversed an \$8,000 in gross award for lack of supporting evidence, listing as contrary evi-

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196. *Abanathy v. Abanathy*, 657 S.W.2d 51, 52 (Mo. App., E.D. 1983).

197. *See Reasonable Needs, supra*, Specific or Temporary Needs.

198. *Bequette v. Bequette*, 563 S.W.2d 528, 531 (Mo. App., St. L. 1978).

199. *In re Marriage of Runez*, 666 S.W.2d 430 (Mo. App., S.D. 1983).

200. 673 S.W.2d 113 (Mo. App., W.D. 1984).

dence: cohabitation, only a six year marriage, no children, and division of property.

C. *Prototype Fact Combinations: Abuse of Discretion in Denial, Award, or Amount*

The petitioner's primary hurdle is establishing reasonable needs and the inability to meet them by property or earnings. Awards of maintenance seldom are reversed. Among only eight reversals found in the first decade under the 1974 law, all but one was based on lack of evidence of need for the award.<sup>201</sup> Assuming evidence in the record shows that the petitioner for maintenance does not have adequate income or property to cover expenses, the factors of subsection 2 become applicable. First, the court will determine the reasonable needs by considering the duration of the marriage and standard of living of the parties and the earning ability of the petitioner.<sup>202</sup> Second, the court will consider those same factors plus others, including the ability of the obligor to pay and conduct of the petitioner, to determine the amount and duration of maintenance. The various factors are balanced and weighed in a form of factor analysis that varies with the infinite variety of facts that exist in dissolution cases. However, study of decisions using the subsection 2 factors, after reasonable need has been established, reveals a distinct pattern of prototype combinations that illustrate when it is appropriate and inappropriate to deny maintenance, award small amounts of maintenance, or award significant amounts of periodic maintenance to a petitioner who has established reasonable needs.

1. Long-term Traditional Homemaker

When the petitioner has been a homemaker in a marriage of about twenty years or more, is approximately forty-five years old or older, and has not been employed during most of the marriage, awards of any amount are affirmed routinely. This is true even when the obligor will have to adjust his standard of living downward to a relatively equal level with that of the recipient in order to make the payments.<sup>203</sup> In the ten years between the effective date of the Act and 1984, there appears to be only one successful appeal by an obligor of an award of maintenance in the long-term traditional homemaker situation where need was established. In *Alvino v. Alvino*, the award was re-

201. See discussion and notes, *supra*, The Standard for Need.

202. See discussion, *supra*, Establishing Reasonable Needs, and Inability to Provide for Self.

203. See cases discussed, *supra*, Inability to Provide for Self, and Ability of Obligor to Pay. In the latter section, the denial of maintenance which was affirmed in *Brueggemann v. Brueggemann*, 551 S.W.2d 853 (Mo. App., St. L. 1977), is explained as due to the equalization of the ex-spouses' economic situations after the husband paid child support and mortgage payments on the wife's home. The indication in the Missouri Bar Family Law CLE that the husband had nearly twice her spendable income is not accurate, *supra* note 160.

versed based on the inability of the obligor to pay the award while meeting his own needs.<sup>204</sup> Otherwise, awards of maintenance have not been reversed.

Maintenance is compelled when the long-term homemaker prototype is enhanced by two additional facts. The fact of a high standard of living during the marriage and the fact of undoubted ability of the obligor to pay without sacrificing his own lifestyle have supported numerous substantial maintenance awards.<sup>205</sup> When the standard of living is high and ability to pay clear, appellate courts have reversed moderate amounts of maintenance as too low and have entered modifications to increase the amount of the award.<sup>206</sup> No denial of maintenance to a long-term homemaker has been affirmed when need and ability to pay have been shown.

The continued insistence on awarding maintenance to the long-term traditional homemaker is consistent with the rationale for maintenance as a remedy for reliance upon lifelong support from the income producer, particularly where such reliance caused a severe and irremediable reduction or elimination of earning capacity in the homemaker.<sup>207</sup> The first total departure at the trial level from continued application of this remedy for the long-term homemaker which appeared in the appellate records was *Geil v. Geil*,<sup>208</sup> decided in 1983. The trial court's denial of maintenance was reversed and an award of \$400 a month entered. The reversal suggests continued vigilance of the appellate courts to carry out the legislative intent to provide a remedy for the person who had relied economically on the other spouse.<sup>209</sup>

204. 659 S.W.2d 266 (Mo. App., E.D. 1983). See discussion, *supra*, Ability of Obligor to Pay. It should be noted that the appellate court did not consider any amount earned from his part-time work because there was no evidence of what that amount was. On the evidence, he was left with less for himself than each of the children and wife who were living together and presumably did not need as much per capita.

205. Childers v. Childers, 652 S.W.2d 311 (Mo. App., E.D. 1983) (\$1,300 a month affirmed); Sarandos v. Sarandos, 643 S.W.2d 854 (Mo. App., E.D. 1982) (\$1,500 a month affirmed as appropriate amount, but remanded to determine obligor's ability to pay); cf. Hoffman v. Hoffman, 676 S.W.2d 817 (Mo. 1984) (en banc) (maintenance exceeded \$4,000 per month). See discussion, *supra*, Establishing Reasonable Needs, Standard of Living and Duration.

206. Cregan v. Clark, 658 S.W.2d 924 (Mo. App., W.D. 1983) (20 year marriage, wife 41 years old, husband earned \$85,000 which exceeded his stated expenses by \$2,000 a month; increased \$500 a month to \$1,000 a month); *In re Marriage of Morris*, 588 S.W.2d 39 (Mo. App., W.D. 1979) (\$1,500 a month raised to \$1,900 a month).

207. See discussion, *supra*, Introduction.

208. 647 S.W.2d 161 (Mo. App., E.D. 1983).

209. Two decisions should be distinguished carefully. In *Metts v. Metts*, 625 S.W.2d 896 (Mo. App., E.D. 1981), the same judge who wrote the *Geil* opinion reversing a denial of maintenance, authored an opinion affirming a denial to a wife of 22 years. The explanation for *Metts* is that the wife defaulted and the husband introduced evidence that she was employable and had one million dollars in property. In *Colabianchi v. Colabianchi*, 646 S.W.2d 61 (Mo. 1983) (en banc), the Missouri Supreme Court affirmed a modest award of \$360 a month because the wife had established a need for only \$724 a month and testified that she earned \$430 a month. Both cases are

However, the *inadequacy* of the amount ordered in *Geil* suggests a possible lessening of appellate protection for the long-term homemaker in the Eastern District. The court in *Geil* did not mention numerous earlier decisions that articulate equalization of economic status of the parties and closing the gap between resources and needs as goals of maintenance, especially in the long-term homemaker situation. The recipient was a classic example of that prototype. She was forty-seven years old, had been unemployed during a twenty-five year marriage in which the husband had discouraged her from employment, had a minor child in her custody, had no income-producing property, and was taking typing and data processing courses but had tried unsuccessfully for a period of time to obtain employment. There was no evidence of misconduct on her part. The husband earned \$39,000 and his current expenses were due partially to supporting a woman and her children with whom he was living. The wife's income and expense statement listed no income and \$1,500 monthly expenses. She testified that she needed \$800 a month maintenance. The \$400 amount is shockingly inadequate. The court said it protected the long-term homemaker by granting maintenance as legislatively authorized but it awarded such a trifling sum that the only purpose of maintenance served was protection of the welfare rolls.<sup>210</sup> The effect resembles a magic show with a tragic twist. Homemakers are encouraged to remain home full-time to raise children and care for the family with the assurance that if they are displaced, maintenance will reimburse them; but when the time comes, the maintenance they expected magically disappears. When the *Geil* fact combination is compared to the past pattern of decisions and articulated guidelines, none of the previously recognized reasons for granting less than need were present.<sup>211</sup> If the decision presages a trend, it means the disappearance of meaningful maintenance. Since most, and perhaps all, of the appellate decisions increasing the amount of maintenance awarded have been from the Western District,<sup>212</sup> a

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simply failures of the wife to evidence adequately her needs.

210. A Florida court recently reversed an award of \$800 a month for a long-term homemaker whose husband earned \$60,000 annually saying it was "a paltry" amount not in keeping with the needs of the recipient. *Orr v. Orr*, 458 So. 2d 362 (Fla. Ct. App. 1984).

211. A possibly more unwarranted decision in 1984 suggests a disregard for the remedial purposes of maintenance. In *Steinmeyer v. Steinmeyer*, 669 S.W.2d 65 (Mo. App., E.D. 1984), the court upheld a time limit on maintenance saying that maintenance could have been denied entirely. The petitioner for maintenance was a healthy 40-year-old woman employed but earning significantly less than her needs. The opinion did not give other essential facts: length of marriage; standard of living during marriage; time out of employment while serving family; conduct of petitioner; obligor's income; or obligor's expenses. Without those facts it is impossible to assess on a principled basis whether maintenance could have been denied without abuse of discretion. This case is discussed, *supra*, Appropriate Employment, and, *infra*, Durational Limits.

212. *Cregan v. Clark*, 658 S.W.2d 924 (Mo. App., W.D. 1983); *In re Marriage of Pitluck*, 616 S.W.2d 861 (Mo. App., W.D. 1981); *McLay v. McLay*, 597 S.W.2d 714 (Mo. App., W.D. 1980); *In re Marriage of Morris*, 588 S.W.2d 39 (Mo. App., W.D. 1979).

split between the districts may have become evident on the adequacy of the amount of maintenance.<sup>213</sup>

## 2. Short-term Marriage

The prototype fact combination most in contrast to the long-term traditional homemaker is the less than ten year marriage with the petitioner under thirty-five years old, healthy and either continuously employed or not out of the work force for very long. Ordinarily, maintenance is not ordered in this situation. The courts often say, "Justice may not require a husband to assume full support of a young healthy woman to whom he was married for only a short period of time and who has not removed herself from employment for any substantial period of time."<sup>214</sup>

The dearth of these situations in the appellate records is surely because maintenance is seldom an issue between the parties. These homemakers will have lost far less in earning capacity due to the marriage than the long-term homemaker, will have contributed less to the well-being of the other spouse, and have a high probability of remarriage.<sup>215</sup> Consequently, the public policies underlying maintenance do not apply as strongly. However, there are a number of identifiable additional facts that will justify and even require maintenance at the conclusion of a short-term marriage.

### i. Age or illness and lack of skill

The short-term prototype is not present when the marriage is relatively short but the petitioner for maintenance is either older or ill and lacking in marketable skills. As discussed earlier, even a short marriage of an economically dependent older spouse causes the same type of economic reliance engendered in a long-term marriage.<sup>216</sup> Because of the advanced age of the dependent spouse, the loss of earning capacity is most likely permanent, or any chance to develop an earning capacity will shortly become irretrievable. The chances of remarriage and continuing to "earn a living" as a homemaker are also drastically reduced. Additionally, the potential obligor who marries an older, economically dependent person would know that this reliance is engendered by the marriage. Although the courts have not articulated this reason-

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213. For relevance of the long term traditional homemaker fact combination to limiting the duration of awards, *see* discussion, *infra*, Durational Limits.

214. *Pederson v. Pederson*, 599 S.W.2d 51, 54 (Mo. App., E.D. 1980); *Raines v. Raines*, 583 S.W.2d 564, 567 (Mo. App., E.D. 1979).

215. Weitzman states that a woman under the age of 30 has a 75% chance of remarriage. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards*, 28 UCLA L. REV. 1181, 1228-29 (1981) (citing generally, NAT'L CENTER FOR HEALTH STATISTICS, U.S. DEPT. HEALTH, MONTHLY VITAL STATISTICS REPORT (Supp. Sept. 12, 1980)).

216. *See* discussion *supra*, Support Self Through Appropriate Employment, Lack of Marketable Skills.

ing, the fact pattern of decisions affirming maintenance suggests that it actually is operating, especially when the older spouse is unskilled or ill.<sup>217</sup> Similar reasoning may be applicable when there is a physical condition that existed at the inception of the marriage and which now prevents gainful employment. In *McLay v. McLay*,<sup>218</sup> the appellate court increased maintenance to a wife suffering from progressive blindness existing at the time of marriage which prevented her from obtaining work other than baby-sitting during a marriage of twelve years. The situation has the same quality as the marriage to an older, economically dependent spouse. The income-producing spouse surely expected the wife to rely on his support and encouraged the reliance by marrying her knowing of her condition. Thus, age or ill health coupled with lack of employable skills justifiably change the short marriage prototype.<sup>219</sup>

## ii. Maintenance for education or training

A major basis for justifying maintenance to the young, healthy, employable spouse of a short-term marriage is so that she may obtain additional training or education, thus enabling her to become more self-sufficient.<sup>220</sup> The statutory factor requiring the court to consider the time necessary to acquire sufficient education or training to enable the party to find appropriate employment evidences the legislative intent that it may be just to obligate the other spouse for this purpose.

Two public policy justifications may be operating here. First, the marriage, even though short, may have interfered with the requesting spouse's opportunity to develop earning capacity as fully as possible, warranting the placement of some obligation on the other spouse to contribute to developing that earning capacity. Second, in the long run it is socially beneficial for persons to develop their earning capacity and productivity to the fullest and this is one incentive to do so.

The earliest decision involving rehabilitative maintenance is *Raines v. Raines*.<sup>221</sup> The recipient spouse appealed claiming inadequacy of the award. The approximately two year marriage of very young persons had lasted effectively for only fifteen to eighteen months. The wife was receiving welfare benefits. Although a child was born, the wife did not claim child care as reason for not working. The marriage had not removed her from employment for any

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217. See, e.g., *Ort v. Ort*, 652 S.W.2d 184 (Mo. App., E.D. 1983); *Sullivan v. Sullivan*, 555 S.W.2d 71 (Mo. App., K.C. 1977); *Kerns v. Kerns*, 552 S.W.2d 350 (Mo. App., K.C. 1977).

218. 597 S.W.2d 714 (Mo. App., W.D. 1980).

219. *Doerflinger v. Doerflinger*, 646 S.W.2d 798 (Mo. 1983) (en banc), does not suggest any lessening of appellate protection to the ill spouse. The spouse who suffered from multiple sclerosis did not appeal findings that her drinking prevented employability and that she could obtain work.

220. See discussion, *supra*, The Standard for Need, Specific or Temporary Needs.

221. 583 S.W.2d 564 (Mo. App., E.D. 1979).

substantial time. Furthermore, the husband's significant employment began after their separation so that the court noted it could not be considered a "partnership asset" to which the wife had contributed. The wife had requested maintenance so that she could attend college to study secretarial skills for six years, but the trial court awarded \$25.00 a week for two years. The appellate court affirmed. It agreed with the trial court that two years should be sufficient to obtain the type training she desired. More importantly, it affirmed only \$25.00 a week which was less than the husband could have afforded to pay and far less than her need. The court emphasized that the fact of marriage alone no longer gives rise to an obligation of full support as was the case under the old statute. The court said, "Of particular consequence . . . is the third statutory factor—length of the marriage."<sup>222</sup> The court's decision combines disapproval of support obligations to meet full needs with approval of rehabilitative maintenance in the prototypical marriage.

The leading case on maintenance for education or training is *Pederson v. Pederson*.<sup>223</sup> The husband appealed an award for the purpose of attending nursing school to a twenty-eight-year-old wife who had been employed throughout the six year marriage. The decision is important for two reasons. It is the first to affirm rehabilitative maintenance against the obligor's appeal. Second, it reversed the unlimited time of the award and entered a time limit corresponding with the expected time to complete schooling. The two parts of the decision together tell us that in the prototypical situation where maintenance would not otherwise be appropriate, it may be awarded for the specific and limited purpose of rehabilitative education.

### iii. Special equities

The appellate courts have reversed a number of denials of maintenance or durational limits on maintenance in cases that fit the prototype of a short marriage involving a young, healthy wife when there were added facts that made it particularly equitable for the obligor to pay maintenance. The appellate courts in these opinions do not say that a special equity exists, but analysis of the combination of added facts reveals a striking similarity in their key features. In *P.A.A. v. S.T.A.*,<sup>224</sup> the thirty-two-year-old wife had worked while the husband attended dental school, had worked in his dental office, and had done unusual labor on a farm they purchased, had had two children aged five and two at the time of the decree and had suffered emotionally after childbirth. Although the appellate court articulated the mother's need to care for the children as a reason for reversing a denial of maintenance, the fact pattern also reveals extraordinary effort on the part of the wife most of which benefited husband at the wife's expense. In *Phelps v. Phelps*,<sup>225</sup> the wife in a seven

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222. *Id.* at 567.

223. 599 S.W.2d 51 (Mo. App., E.D. 1980).

224. 592 S.W.2d 502 (Mo. App., S.D. 1979).

225. 620 S.W.2d 462 (Mo. App., W.D. 1981).



year marriage was a Vietnamese brought to this country as a military bride. For a long time while her husband was in the military, she had been unable to obtain employment. When she finally obtained a minimum wage job doing alterations, she was forced to quit because the husband insisted that she take a vacation with him during a time that the employer forbade vacations. She had not been able to complete the equivalency examinations for a high school degree because of family responsibilities. The facts reveal that the wife's unusual devotion to the husband and family was responsible for her economically vulnerable position.<sup>226</sup> The legally blind wife in *McLay*<sup>227</sup> surely was aided by the equities when the court considered that she had suffered four miscarriages partially due to husband's abuse and was working ninety hours a week baby-sitting to earn only \$24.00. Her progressive blindness, about which the husband knew when he married her, the number of miscarriages, and her efforts to earn something are all extraordinary tending to justify financial help from the husband.

### 3. The Medium Length Marriage

The prototype medium length marriage of ten to twenty years involves a petitioner for maintenance who is thirty-five to forty-five-years-old, who usually has custody of one or more teenaged children, whose chances of remarriage are only fifty to twenty-eight percent depending on her age,<sup>228</sup> who is in good health, and who has a job or can obtain one but whose earning capacity has been lessened seriously by being out of the job market for ten to fifteen years.<sup>229</sup> This is the most uncertain battleground of maintenance. This prototype differs from the long-term traditional homemaker whom almost everyone agrees is not capable of self support. The homemaker in the medium length marriage has more chance of obtaining some sort of employment and of developing some increase in earning capacity. This is the "displaced homemaker" who has some chance of rehabilitation and adjustment to unmarried life. But this prototype differs from the short-term marriage because the homemaker has lost significantly more earning capacity due to family responsibilities and there is less time to recoup it. In contrast to this prototype is the homemaker spouse in a medium-length first or second marriage who continued her employment during the marriage. Although homemaking responsibilities, especially maternity leaves, lessen earning capacity for this spouse, the decrease is not as severe as for the full-time homemaker. A group of decisions affirming the denial of maintenance are distinguishable from the prototype due to the fact of

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226. See also discussions, *supra*, Specific or Temporary Needs.

227. See *supra*, notes 207-08.

228. Weitzman states that a woman aged between age 30 and 40 has a 50% chance of remarriage, but if she is over 40 her chance of remarriage is only 28%. Weitzman, *supra*, note 215 at 1229.

229. See discussion and studies cited *supra*, Introduction, Theory and Discretion.

continued full-time employment during the marriage.<sup>230</sup>

However, the severity of the extended period of homemaking on lessened earning capacity and retirement benefits of the medium-length homemaker seldom is articulated by appellate courts. Most likely this information is not presented either at trial or in appellate briefs.<sup>231</sup> In view of the purpose of maintenance, the underlying question should be, "Just what amount and duration of maintenance is justly required to remedy or compensate for the loss of earning capacity due to foregone employment in the service of the family?" More specifically, the inquiry should be directed to what extent and for how long maintenance ought to fill the gap between what the former homemaker can earn and her reasonable expenses. If presented with the facts that the average homemaker loses 1.5% annually in earning capacity<sup>232</sup> and that a college-educated homemaker may lose as much as 4% annually,<sup>233</sup> courts might decide that a guideline of that much per year of marriage as a supplement to earnings would be reasonable indefinitely. Without information on the effect of foregone employment for ten to twenty years, judicial decisions must be made on common knowledge and value judgments which differ widely on this issue.

There seem to be relatively few appeals from trial court orders for periodic maintenance for spouses of medium-length marriages. There are a few significant cases which treat the situation more like the long-term marriage. Salient facts that indicate the appropriateness of substantial periodic maintenance are discussed immediately below. The more active battleground between 1980 and 1984 on maintenance in the medium-length marriage has been on the issue of limited duration maintenance. More often than not, the limits have been reversed on appeal. This suggests that it is appropriate to treat the duration of maintenance issue in the medium-length marriage more like that of the long-term marriage than like the short-term.<sup>234</sup>

i. Illness, rehabilitative maintenance or special equities

The special added facts that made maintenance appropriate in the short-term marriage warrant it in the medium length marriage, as well. Thus, illness

230. See *Satterfield v. Satterfield*, 635 S.W.2d 80 (Mo. App., E.D. 1982); *Wachter v. Wachter*, 645 S.W.2d 111 (Mo. App., E.D. 1982); *In re Marriage of Hartzell*, 634 S.W.2d 556 (Mo. App., E.D. 1982); *Worley v. Worley*, 615 S.W.2d 561 (Mo. App., E.D. 1981) (unclear if employment had continued throughout marriage).

231. Family economists could testify concerning opportunity costs. Formulas have been developed for making cost calculations. See Smith & Beninger, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201, 213 (1982) (citing I. SAWHILL, DEVELOPING NORMATIVE STANDARDS FOR CHILD SUPPORT AND ALIMONY PAYMENTS (1981)).

232. Mincer & Polachek, *Women's Earnings Reexamined*, 13 J. OF HUM. RESOURCES 118, 122-34 (1978).

233. Mincer & Polachek, *Family Investments in Human Capital: Earnings of Women* in ECONOMICS OF THE FAMILY (T. Schultz ed. 1974).

234. These cases are discussed, *infra*, Basis for Durational Limits.

of the wife in a ten year marriage led to a reversal of a time limit on maintenance granted in *Vogt v. Ketzner*.<sup>235</sup> Rehabilitative purposes could explain *Honeycutt v. Honeycutt*,<sup>236</sup> in which an award of periodic maintenance was affirmed to a wife in a sixteen year marriage who was attending college to obtain her degree. In addition, however, the court held it appropriate not to limit the award to the time while being rehabilitated. Special equities of the case justified maintenance even without the rehabilitative purpose. The wife had worked in various menial jobs to help support the husband while he obtained two college degrees. She had accompanied him overseas during military service which prevented her from developing earning capacity through education or employment. She then had and cared for their two sons and at the time of the decree was receiving welfare payments while trying to gain her education. These facts added to the prototype reveal a sequence of extraordinary responsibility which benefited the husband and family and prevented the development of her own capacities.

Another case indicating special equities is *In re Marriage of Runez*.<sup>237</sup> The wife in this twenty year marriage was a Filipino native whose husband married her while he was there in medical school. They had been in this country fifteen years but she still had some difficulty with English and had five children in her custody aged ten through sixteen. It is apparent that leaving her native land and having five children in quick succession had hampered and still was hampering her in developing earning ability or obtaining employment. The appellate court reversed the trial court's award of \$300 a month for thirty-six months by removing the durational limit and raising the amount to \$1,000 a month.

ii. High standard of living; ability to pay

A high marital standard of living and undoubted ability of the obligor to pay account for some awards in the medium-length marriage. *In re Marriage of Pitluck*<sup>238</sup> involved a thirty-eight year old wife in an eighteen year marriage involving a very high standard of living. She had two years of college but had not been employed during the marriage and had custody of two teenagers. There was no evidence of employability but there was some evidence concerning health problems due to stress. Her expenses for herself were \$1,060 monthly without insurance, mortgage, and home maintenance costs. The trial court awarded only \$350 a month which the husband who had an annual income of \$35,000 and expenses of \$1,290 a month could pay easily. The western district appellate court reversed and increased the maintenance to \$650.<sup>239</sup>

235. 634 S.W.2d 583 (Mo. App., E.D. 1982).

236. *In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983).

237. 666 S.W.2d 430 (Mo. App., S.D. 1983).

238. 616 S.W.2d 861 (Mo. App., W.D. 1981).

239. The contrast in amount of maintenance between *Pitluck* (\$650) and *Cregan v. Clark*, 658 S.W.2d 924 (Mo. App., W.D. 1983) (\$1,000), both by the same judge,

In *Childers v. Childers*,<sup>240</sup> the Eastern District affirmed \$1,300 a month to a wife of only thirteen years who was employed and earned \$553 a month. The salient fact seemed to be that the husband earned seven times as much as she and could pay easily. These cases indicate that, at least if it does not cause sacrifice to the obligor, it is appropriate for the obligor to contribute substantially to meeting the income/expense gap of the homemaker from a medium-length marriage.

### III. DURATIONAL LIMITS

#### A. *In Gross and Durational Limits Authorized*

In *Doerflinger v. Doerflinger*,<sup>241</sup> the Missouri Supreme Court said that section 452.335 covers the full range of support payments to a spouse, maintenance for an indefinite term, maintenance for a limited period and maintenance in gross. Maintenance for an indefinite term is traditional periodic maintenance based on evidence of need for day-to-day support. Maintenance for a limited period is periodic maintenance payable for a specified or limited time duration, sometimes called terminable maintenance. One type of limited maintenance is rehabilitative maintenance granted for purposes of obtaining education or training. In gross maintenance is a specified sum of money payable either in a lump sum or in installments.

The authority of courts under the new law to order maintenance in gross payable in a lump sum was litigated soon after passage of the new law. As discussed *supra*,<sup>242</sup> the early cases establishing the power to award in gross

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was probably due to the difference in the obligor's income, \$85,000 in *Cregan*, and the amount of expenses the recipient had established, \$3,500 monthly in *Cregan*.

240. 652 S.W.2d 311 (Mo. App., E.D. 1983).

241. 646 S.W.2d 798 (Mo. 1983) (en banc). The court so held in regard to awards of money for "support." An award of money in the nature of property division is authorized also, *Fort v. Fort*, 670 S.W.2d 173 (Mo. App., E.D. 1984), but is not the subject of this discussion. Many money awards are ambiguous in nature, arguably either maintenance or property division. For example, in *Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982) (en banc), the parties did not dispute the appropriateness of the trial court labeling a \$30,000 award to equalize property division as "maintenance in gross" and the Court upheld the award as part of property division. Some decisions indicate that the purpose of the order should determine whether it is maintenance or property division. For example, if the award represents part of the marital estate, it is property division and, in the absence of the usual need requirements for maintenance, could not be upheld as a maintenance award. *See, e.g., In re Marriage of Pehle*, 622 S.W. 2d 711 (Mo. App., E.D. 1981 ); *Fastnacht v. Fastnacht*, 616 S.W.2d 98 (Mo. App., W.D. 1981); *Rickelman v. Rickelman*, 625 S.W.2d 901 (Mo. App., E.D. 1981); *Spicer v. Spicer*, 585 S.W.2d 126 (Mo. App., S.D. 1979). Other decisions rely upon the trial court's label as maintenance and only determine whether the requisites for maintenance are present. *See, e.g., Goodrich v. Goodrich*, 667 S.W.2d 39 (Mo. App., S.D. 1984); *Smith v. Smith*, 561 S.W.2d 714 (Mo. App., K.C. 1978). *See also* discussion *supra*, Payment of Debts.

242. *See supra* Introduction, Statutory Structure.

amounts did not rule on the power of a court to limit maintenance. Ordinarily, they were cases in which the recipient had established some special need for the lump sum amount and the appeal was by the obligor claiming no power to impose such an obligation. Some courts held that section 452.080, which had authorized alimony in gross prior to 1974 and which was not repealed by the legislature, continued to allow in gross awards.<sup>243</sup> These early opinions said a policy reason for approving in gross awards against objection by the obligor was the value of severing ties between the divorced people and allowing them a new start without a continued monetary relation between them.<sup>244</sup> In *D.E.W. v. M.W.*,<sup>245</sup> the court referred to the continuance of section 452.080 but held that the language of new section 452.335 also authorized in gross awards. The Missouri Supreme Court in *Doerflinger*<sup>246</sup> stated that section 452.335 authorized in gross awards and added in footnote 3 its doubt that section 452.080 would ever be utilized because it would require proof that the wife was the injured and innocent party.<sup>247</sup> An in gross lump sum award ordered in combination with a periodic award was recognized as permissible in early litigation also.<sup>248</sup>

Appellate courts were the first to use an in gross order payable in installments over time rather than in a lump sum.<sup>249</sup> Although this is somewhat inconsistent with the desire to sever ties, it represents a compromise by allowing an extended but limited amount of time for payment to ease the burden on the payor. In later cases, trial judges followed the example and often ordered an in gross amount payable in installments. No questions about authority to allow installment payments were raised on appeal.<sup>250</sup>

The authority to order maintenance awards of limited duration was recognized in *In re Marriage of Powers*<sup>251</sup> as specifically granted by the statute. In other early opinions which recognized the power to limit the duration of periodic payments, with<sup>252</sup> and without<sup>253</sup> stairstepping or decreasing the amounts periodically, the authority to do so was not questioned by appealing parties.

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243. *Carr v. Carr*, 556 S.W.2d 511 (Mo. App., Spr. 1977); see also *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980).

244. *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977).

245. *Id.*

246. 646 S.W.2d 798 (Mo. 1983) (en banc).

247. *Id.* at 800 n.3.

248. *Sawtell v. Sawtell*, 569 S.W.2d 286 (Mo. App., K.C. 1978).

249. *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977); *Broyles v. Broyles*, 555 S.W.2d 696 (Mo. App., K.C. 1977).

250. *Rasmussen v. Rasmussen*, 627 S.W.2d 117 (Mo. App., W.D. 1982); *In re Marriage of Arnett*, 598 S.W.2d 166 (Mo. App., E.D. 1980).

251. 527 S.W.2d 949, 956 (Mo. App., St. L. 1975).

252. *Cain v. Cain*, 536 S.W.2d 866 (Mo. App., Spr. 1976) (appealing party questioned only amount of award, not decreasing or terminating features).

253. *Laney v. Laney*, 535 S.W.2d 510 (Mo. App., K.C. 1976) (appeal on modification, not on original order).

## B. Effect of In Gross and Limited Duration Awards

### 1. Not Modifiable

Section 452.370 permits modification of maintenance awards but “only as to installments accruing subsequent to the motion.” Therefore, under this statute, as was true under section 452.080, courts consistently held that an in gross award payable in a lump sum was not subject to modification.<sup>254</sup> Doubt continued for some time about an in gross amount payable in installments or a periodic amount payable for a limited term. In *Ethridge v. Ethridge*,<sup>255</sup> the court held, after the term for payment had elapsed, the duration of a limited maintenance award could not be modified. The reason was that section 452.370 refers only to modification of installments payable in the future and, once the term has expired, there are no future payments upon which a modification order would be operative.

In the most significant maintenance decision under the new Act, *Doerflinger v. Doerflinger*,<sup>256</sup> the Missouri Supreme Court ruled that limited term maintenance is reviewable only on appeal and is not subject to modification at any time for any reason.<sup>257</sup> The appellant wife was suffering from multiple sclerosis but, according to the trial court’s findings in the original proceeding, that would not be a great obstacle to obtaining full-time employment if she would refrain from the use of intoxicants. The trial court entered a judgment for \$900 a month maintenance for one year after further finding that her excessive drinking was volitional and that “the respondent should have a year to straighten out her life and become rehabilitated.”<sup>258</sup> Since there had been no appeal from the original judgment, there was no review of the adequacy of the evidence to sustain these findings. Instead, the wife, after eight months and before the term of payment had expired, filed a motion to modify to increase the amount of maintenance and to make it payable for an unspecified and ongoing time. She argued that limited term maintenance is not maintenance in gross and that any award of periodic payments partakes of the attributes of maintenance paid from time to time, thus permitting modification of any future installments under section 452.370.

The supreme court in *Doerflinger* said that neither a maintenance award ordered paid in a single installment nor an award of a predetermined amount payable in multiple installments during a pre-set term is subject to modification on a change of circumstances, but either can be reviewed only by appeal of the original judgment. The court’s reasoning is instructive. It clarified that

254. *Doerflinger v. Doerflinger*, 646 S.W.2d 798, 800 (Mo. 1983) (en banc).

255. 604 S.W.2d 789 (Mo. App., W.D. 1980).

256. 646 S.W.2d 798 (Mo. 1983) (en banc).

257. This holding was consistent with one of the earliest decisions from the Kansas City Court of Appeals, *Laney v. Laney*, 535 S.W.2d 510 (Mo. App., K.C. 1976), but it probably overruled a holding from the Eastern District, *Jacobs v. Jacobs*, 628 S.W.2d 729 (Mo. App., E.D. 1982). See discussion, *infra*, Termination on Remarriage.

258. 646 S.W.2d at 799.

the substantive question in the case was the finality of the adjudication limiting the maintenance obligation, and in that context, noted that the maintenance statute does not presume a continued dependency of a spouse, but encourages self-sufficiency through a final and limited award at the initial stage. The court stated that the common characteristic of both a lump sum in gross award and a limited duration award is that the trial court had rejected the necessity for an indefinite continuation of support.<sup>259</sup>

In an extended discussion, the supreme court in *Doerflinger* emphasized that a limited duration award was proper only if supported by sufficient evidence, subject to review on appeal. The *Doerflinger* situation illustrates the extreme effect of the court's non-modifiability holding. Mrs. Doerflinger, suffering from multiple sclerosis, was found to need at least \$900 a month in support at the time of the decree and her spouse was found able to pay it. Without regard to actual change in either her medical condition, her drinking, or the husband's ability to pay, all maintenance automatically ceased only a year later. Apparently, it was in recognition of the drastic effect of its holding on non-modifiability that the supreme court so carefully explained that, although the initial limitation on maintenance was authorized for the purpose of encouraging self-sufficiency, there must be adequate evidence to justify imposition of the limitation.

## 2. Termination on Remarriage

Section 452.370 provides that maintenance is "terminated upon . . . remarriage of the party receiving maintenance." A similar provision in the former law was that remarriage relieved the obligor from further payments without the necessity of court action.<sup>260</sup> In contrast, the obligation to pay a lump sum in gross award survives both remarriage and death.<sup>261</sup> Since the courts had held that an in gross sum payable in installments does not lose its in gross characteristics,<sup>262</sup> it is not surprising that the in gross installment payment obligation is not terminated by remarriage.<sup>263</sup> Following the decision in *Doerflinger*,<sup>264</sup> it was held that a limited duration monthly award of maintenance also survived remarriage. In *Mottel v. Mottel*,<sup>265</sup> the decree ordered \$400 a month for forty-eight months. When the recipient remarried, the obligor filed

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259. *Id.* at 801.

260. MO. REV. STAT. § 452.075 (1978).

261. *Terrell v. Terrell*, 582 S.W.2d 720 (Mo. App., E.D. 1979); *accord* *Swanson v. Swanson*, 464 S.W.2d 225 (Mo. 1971) (under former law); *cf.* *Gunkel v. Gunkel*, 633 S.W.2d 108 (Mo. App., E.D. 1982); *Jacobs v. Jacobs*, 628 S.W.2d 729 (Mo. App., E.D. 1982).

262. *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977).

263. *Gunkel v. Gunkel*, 633 S.W.2d 108 (Mo. App., E.D. 1982). *But see* *Desloge v. Desloge*, 617 S.W.2d 486 (Mo. App., W.D. 1981) (characterizing amount payable in installments as periodic and holding terminated by remarriage).

264. *Doerflinger v. Doerflinger*, 646 S.W.2d 798 (Mo. 1983) (en banc).

265. 664 S.W.2d 25 (Mo. App., E.D. 1984).

a motion to modify and the court held, quoting *Doerflinger*, that the obligation was equivalent to a lump sum award and not modifiable.<sup>266</sup> The decision, thereby, superseded a contrary holding in *Jacobs v. Jacobs*.<sup>267</sup> The *Mottel* decision extends the non-modifiability rule of *Doerflinger* to the remarriage situation where the statute had appeared to provide for automatic termination of the obligation. Assuming that it is appropriate to treat remarriage the same as other bases for modification, *Doerflinger* requires that remarriage have no effect on limited duration maintenance awards. This means that the limited duration award carries risks for not only the recipient whose need may extend beyond the term, but also for the obligor who otherwise would have been able to terminate his periodic obligation simply by showing remarriage of the recipient.

### 3. Award as Lien on Realty

Section 452.080 of the former law (which has not been repealed) provides that in gross alimony is automatically a lien on the obligor's real property. Courts which have assumed that section 452.080 is the source of the power to order in gross maintenance have stated that the automatic lien continues as a characteristic of in gross maintenance.<sup>268</sup> This would be true of the sum payable in installments as well as the periodic amount with limited duration under *Doerflinger's* statement that all three methods of payment are equivalent. However, there are two serious uncertainties about drawing such a conclusion. First, *Doerflinger* held the three methods equivalent only in regard to the finality of the order for purposes of modification. Second, *Doerflinger* held that section 452.335 was the authority for all types of maintenance orders and suggested that section 452.080 rarely would be utilized now.<sup>269</sup> If that is the case, the automatic lien provisions of section 452.080 would not apply to any award of maintenance, in gross or limited duration. A recipient desiring a lien probably should request the court to decree specifically a lien as security for any type of maintenance payment.<sup>270</sup>

#### C. Basis for Durational Limit

##### 1. Substantial Evidence Required

During the first decade under the 1974 law, Missouri appellate courts

266. *Id.* at 27.

267. 628 S.W.2d 729 (Mo. App., E.D. 1982).

268. *Gunkel v. Gunkel*, 633 S.W.2d 108, 109 (Mo. App., E.D. 1982); *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. App., St. L. 1977) (court gave need for additional security as a reason for utilizing the in gross form for maintenance).

269. *Doerflinger v. Doerflinger*, 646 S.W.2d 798, 800 n.3 (Mo. 1983) (en banc).

270. MO. REV. STAT. § 452.345 was amended in 1984 to permit the court to require security, bond, or other guarantee of payment for child support, maintenance or property division obligations.



affirmed twelve significant durational limits on maintenance,<sup>271</sup> the first being in 1978, and reversed approximately twenty-two limits<sup>272</sup> starting in 1975.<sup>273</sup> Because of the abuse of discretion standard for review, the large number of reversals of durational limits is particularly significant. This close monitoring by the appellate courts is understandable when both the situation in which the durational limit is utilized and the effect of the limit are clearly delineated. The situation is always that the party requesting maintenance has established need at the time of the decree, but the effect of the durational limit under the

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271. *Wilhelm v. Wilhelm*, 688 S.W.2d 381 (Mo. App., E.D. 1985); *Etling v. Etling*, 671 S.W.2d 825 (Mo. App., E.D. 1984); *Steinmeyer v. Steinmeyer*, 669 S.W.2d 65 (Mo. App., E.D. 1984); *McDowell v. McDowell*, 670 S.W.2d 518 (Mo. App., E.D. 1984); *Felkner v. Felkner*, 652 S.W.2d 174 (Mo. App., E.D. 1983); *Rasmussen v. Rasmussen*, 627 S.W.2d 117 (Mo. App., W.D. 1982); *Sansone v. Sansone*, 615 S.W.2d 670 (Mo. App., E.D. 1981); *In re Marriage of Kreienheder*, 610 S.W.2d 313 (Mo. App., E.D. 1980); *Anderson v. Anderson*, 605 S.W.2d 524 (Mo. App., E.D. 1980); *Pederson v. Pederson*, 599 S.W.2d 51 (Mo. App., E.D. 1980); *Raines v. Raines*, 583 S.W.2d 564 (Mo. App., E.D. 1979); *Hebron v. Hebron*, 566 S.W.2d 829 (Mo. App., St. L. 1978); *cf. Standridge v. Adams*, 636 S.W.2d 680 (Mo. App., W.D. 1982) (enforcement action).

272. *Clements v. Clements*, 688 S.W.2d 37 (Mo. App., E.D. 1985); *Hutchins v. Hutchins*, 687 S.W.2d 703 (Mo. App., E.D. 1985); *Hefti v. Hefti*, 682 S.W.2d 65 (Mo. App., E.D. 1984); *In re Marriage of Goodding*, 677 S.W.2d 332 (Mo. App., W.D. 1984); *Blount v. Blount*, 674 S.W.2d 612 (Mo. App., E.D. 1984); *In re Marriage of Runez*, 666 S.W.2d 430 (Mo. App., S.D. 1983); *Wasson v. Wasson*, 657 S.W.2d 683 (Mo. App., E.D. 1983); *Turner v. Turner*, 650 S.W.2d 662 (Mo. App., E.D. 1983); *Geil v. Geil*, 647 S.W.2d 161 (Mo. App., E.D. 1983); *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982); *Vogt v. Ketzner*, 634 S.W.2d 583 (Mo. App., E.D. 1982); *Tygett v. Tygett*, 639 S.W.2d 282 (Mo. App., E.D. 1982); *Murphy v. Murphy*, 613 S.W.2d 450 (Mo. App., E.D. 1981); *Royal v. Royal*, 617 S.W.2d 615 (Mo. App., W.D. 1981); *Phelps v. Phelps*, 620 S.W.2d 462 (Mo. App., W.D. 1981); *Wisdom v. Wisdom*, 613 S.W.2d 693 (Mo. App., S.D. 1981); *In re Marriage of Wofford*, 589 S.W.2d 323 (Mo. App., S.D. 1979); *Poague v. Poague*, 579 S.W.2d 822 (Mo. App., W.D. 1979); *Ruth v. Ruth*, 560 S.W.2d 897 (Mo. App., St. L. 1978); *In re Marriage of Valleroy*, 548 S.W.2d 857 (Mo. App., St. L. 1977); *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977); *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App., St. L. 1975); *see also In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983) (affirmed periodic without limit against obligor's argument for limit); *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. App., St. L. 1975) (rehabilitative subject to modification rather than limited).

273. In addition, there are a number of decisions that indicate nothing other than that it is appropriate to impose a lump sum or limited duration award on an obligor. These are cases in which the recipient either asked for the limited amount or accepted it without appeal. *See, e.g., Layton v. Layton*, 673 S.W.2d 462 (Mo. App., E.D. 1984); *Mills v. Mills*, 663 S.W.2d 369 (Mo. App., E.D. 1983); *In re Marriage of Sharp*, 630 S.W.2d 588 (Mo. App., W.D. 1982); *Elliott v. Elliott*, 621 S.W.2d 305 (Mo. App., W.D. 1981) (lump sum); *Miller v. Miller*, 553 S.W.2d 482 (Mo. App., St. L. 1977) (lump sum); *see also In re Marriage of Daniel*, 639 S.W.2d 650 (Mo. App., S.D. 1982) (limited duration); *Roth v. Roth*, 620 S.W.2d 454 (Mo. App., E.D. 1981) (limited duration); *J.A.A. v. A.D.A.*, 581 S.W.2d 889 (Mo. App., E.D. 1979) (limited duration); *Kerns v. Kerns*, 552 S.W.2d 350 (Mo. App., K.C. 1977) (limited duration).

non-modifiability rule of *Doerflinger*,<sup>274</sup> is the same as a delayed denial of maintenance, i.e., after the durational period runs, maintenance is denied forever. The supreme court in *Doerflinger* implied that it expected careful scrutiny of a durational limit when it stated unequivocally,

A limited award of maintenance follows an appraisal of future events. Whether a decision to limit maintenance is or is not appropriate in the circumstances depends not upon reassessment by hindsight, but upon whether there was *substantial evidence at the time [of the decree] to justify imposition of the limitation.*<sup>275</sup>

The requirement of substantial evidence to justify the limitation is in accord with the earliest appellate decision<sup>276</sup> reversing a limit on maintenance after adoption of the *Murphy v. Carron*<sup>277</sup> abuse of discretion standard for review, but the supreme court stated it affirmatively and more strongly than appellate courts in recent years usually have done.<sup>278</sup>

The court did not explain what it meant by "substantial evidence." It quoted an intermediate court of appeals opinion<sup>279</sup> to the effect that "speculation" will not suffice, but neither is "certainty" required to justify a time limit. At this point the court was discussing the probability necessary to meet the burden of persuasion. In any case involving a durational limit, petitioner would have established a basis for maintenance at the time of the decree and the effect of the limitation under *Doerflinger* would be to terminate that maintenance. Therefore, the court was addressing the burden of persuasion of the obligor. The appraisal of future events cannot be speculation but need not be a certainty. This suggests that the burden of persuasion remains the same as in a traditional jury tried case, i.e., the party with the burden of persuasion must present evidence to convince the trier that the existence of the challenged facts is more probable than not. In a recent non-maintenance case the supreme court held more clearly that the *Murphy v. Carron* standard of substantial evidence means evidence sufficient to sustain a belief that the facts were more probable than not.<sup>280</sup>

Ambiguous terminology in intermediate appellate court opinions supports this conclusion. There are many loose statements such as, "[t]he evidence must show circumstances would likely change"<sup>281</sup> and "[t]here must be some

274. 646 S.W.2d 798 (Mo. 1983) (en banc).

275. *Id.* at 802 (emphasis added).

276. *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977).

277. 536 S.W.2d 30 (Mo. 1976) (en banc).

278. *See, e.g., Steinmeyer v. Steinmeyer*, 669 S.W.2d 65, 67 (Mo. App., E.D. 1984) (stating the "decree . . . will be affirmed unless there is no substantial evidence to support it").

279. *Sansone v. Sansone*, 615 S.W.2d 670, 671 (Mo. App., E.D. 1981).

280. *Midstate Oil v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. 1984) (en banc) (requires evidence "which would have probative force on the issues").

281. *In re Marriage of Runez*, 666 S.W.2d 430 (Mo. App., S.D. 1983); *see also Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982) (noting no evidence

reasonable expectation"<sup>282</sup> of the result; but again and again, a statement recognizes the necessity that the likelihood be more probable than not. For example, courts have said that: it is not sufficient for the evidence to disclose "only the possibility"<sup>283</sup> of change; the court may consider "probable future prospects";<sup>284</sup> or the limitation was erroneous because there was "no reasonable probability"<sup>285</sup> of the justification occurring.

Since the supreme court's opinion in *Doerflinger* should be interpreted to mean that the appraisal of future events must be supported by evidence indicating it is more probable than not the justifying future events will occur, these statements connoting the traditional probability are correct and those which say the limitation is permissible if there is a "reasonable expectation"<sup>286</sup> of the justification are incorrect.

## 2. Ultimate Justifying Facts

### a. Ability to Meet Reasonable Needs

The supreme court did not address what ultimate facts must be shown by the substantial evidence in order to constitute a justification. From the beginning, appellate court opinions which reversed limits on duration in all three districts stated that to justify imposition of the durational limit, the evidence must establish the ultimate fact of ability on the petitioner's part to close the gap between income and need.<sup>287</sup> The St. Louis Court of Appeals in *In re Marriage of Powers*<sup>288</sup> said "her income shows no likelihood of *catching up with her living expenses* . . . . [T]he court should not speculate that in seven years the wife's income could meet her living expenses." *LoPiccolo v. LoPiccolo*<sup>289</sup> said, the record does not "constitute substantial evidence of petitioner's

"tending to show" the future event).

282. *McDowell v. McDowell*, 670 S.W.2d 518, 522 (Mo. App., E.D. 1984); *Sansone v. Sansone*, 615 S.W.2d 670, 671 (Mo. App., E.D. 1981).

283. *Blount v. Blount*, 674 S.W.2d 612 (Mo. App., E.D. 1984).

284. *In re Marriage of Runez*, 666 S.W.2d 430 (Mo. App., S.D. 1983).

285. *Vogt v. Ketzner*, 634 S.W.2d 583 (Mo. App., E.D. 1982).

286. *McDowell v. McDowell*, 670 S.W.2d 518, 522 (Mo. App., E.D. 1984). The "some reasonable expectation" language originated in dicta in *In re Marriage of Powers*, 527 S.W.2d 949, 956 (Mo. App., St. L. 1975), and never has been analyzed concerning the degree of probability necessary to impose a durational limit. *Sansone v. Sansone*, 615 S.W.2d 670, 671 (Mo. App., E.D. 1981), and *Doerflinger v. Doerflinger*, 646 S.W.2d 798, 801 (Mo. 1983) (en banc), state only that more than speculation and less than certainty is required.

287. The courts also have recognized that changes in other circumstances, notably the obligor's ability to pay, could justify a durational limit. However, only one case has been found that involved an alleged inability circumstance. *Moseley v. Moseley*, 642 S.W.2d 953 (Mo. App., S.D. 1982), reversed a limit reducing the amount of maintenance when the obligor reached age 65, stating that the evidence did not establish that he would not be able to pay the ordered amount at that time.

288. 527 S.W.2d 949, 955 (Mo. App., St. L. 1975) (emphasis added).

289. 547 S.W.2d 501, 505 (Mo. App., St. L. 1977) (emphasis added); *accord*

*future ability to provide for her reasonable needs.*" In *Phelps v. Phelps*,<sup>290</sup> the western district said that in the interest of social welfare and justice the husband has the duty to contribute such amount as will, supplemented by the wife's earnings, allow the wife to maintain the standard of living enjoyed at the time of dissolution. The southern district in *In re Marriage of Honeycutt*<sup>291</sup> quoted *Powers* that the court should not speculate that "the wife's income could meet her living expenses." These decisions cover the gamut of long-term,<sup>292</sup> medium-length,<sup>293</sup> and short-term marriages;<sup>294</sup> in all the requirement for a durational limit is substantial evidence showing ability to meet needs.

This test follows closely the tradition of utilizing motions to modify to assess whether changes in circumstances justify a change in the award. The test conforms well with the purpose of maintenance to remedy loss of earning capacity by compensating for it through meeting the gap between reasonable needs and the maximum income the recipient can produce. After a long-term marriage when it is fair to set reasonable needs at the level needed to maintain the standard of living of the marriage, reasonable needs are equal to living expenses. Thus, permitting durational limits only when the evidence shows the recipient otherwise will be able to meet living expenses is consistent with those cases ordering maintenance for the purpose of meeting the income/reasonable needs gap as fully as possible. To impose the time limit requires substantial evidence tending to show that the recipient's future income will cover expenses at least as well as the income plus the maintenance award meets them at time of the decree.

Obviously, "a meeting living expenses" test does not apply to the situation in which the recipient sought only rehabilitative maintenance in the first instance. The reasonable need for which maintenance was sought had a built-in duration to it. This is particularly evident in the short-term marriage where maintenance probably would not have been ordered other than for education or training. The two cases in which limited duration maintenance for rehabilitative purposes was first recognized are such reasonable needs cases. In *Raines v. Raines*,<sup>295</sup> the court affirmed a two year limit on maintenance for schooling

Murphy v. Murphy, 613 S.W.2d 450 (Mo. App., E.D. 1981).

290. 620 S.W.2d 462 (Mo. App., W.D. 1981) (reversed in gross award and entered nominal periodic order without discussion of limitations). The same court in the fall of 1984 held there is "no substantial evidence appellant will be able to meet her living expenses, therefore the provision for termination of maintenance must be reversed." *In re Marriage of Goodding*, 677 S.W.2d 332, 337 (Mo. App., W.D. 1984).

291. 649 S.W.2d 502, 504 (Mo. App., S.D. 1983) (affirming periodic against argument of obligor that a limit should have been imposed).

292. *Tygett v. Tygett*, 639 S.W.2d 282 (Mo. App., E.D. 1982).

293. *In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983); *LoPiccolo v. LoPiccolo*, 547 S.W.2d 501 (Mo. App., St. L. 1977).

294. *Murphy v. Murphy*, 613 S.W.2d 450 (Mo. App., E.D. 1981); *Phelps v. Phelps*, 620 S.W.2d 462 (Mo. App., W.D. 1981).

295. 583 S.W.2d 564 (Mo. App., E.D. 1979).

to a wife of a less than two year marriage stating that the length of the marriage was of particular consequence. In *Pederson v. Pederson*,<sup>296</sup> the appellate court imposed the durational limit because the wife had requested maintenance for schooling purposes and was otherwise self-sufficient after only a six year marriage. A similar case is *Standridge v. Adams*,<sup>297</sup> where the court affirmed maintenance conditioned on attendance at school. In contrast are situations where the evidence does not indicate that the period of education will enable the recipient to close the gap between what can be earned even with the schooling and reasonable needs.<sup>298</sup> The courts have recognized that if there are reasonable needs in addition to the rehabilitation, then a durational limit based on the rehabilitation period alone is not justified.

Because the underlying issue regarding limited duration maintenance is reasonable needs on the basis of all the relevant factors, a "meeting living expenses" test is not appropriate for a short-term marriage without special equities. In that situation, reasonable needs are not equivalent to living expenses, because the combination of factors that make it just for maintenance fully to meet needs either in terms of amount or duration is not present. For example, in the prototype short-term marriage, less maintenance per month and less total maintenance measured in durational terms may be reasonable simply because not much earning capacity had been lost nor much benefit conferred on the obligor nor had any extraordinary sacrifices or pressures upon the recipient been endured. That reasonable needs is the key to limited duration maintenance is illustrated graphically by *Rasmussen v. Rasmussen*.<sup>299</sup> The appellate court held that the main factor justifying an in gross award payable in two years rather than indefinite periodic maintenance was the misconduct of the recipient.<sup>300</sup> This analysis suggests that when the courts have stated a "meeting the gap" or living expenses test for durational maintenance they almost surely are referring to meeting a gap between income and reasonable needs.

#### b. "Markedly Different" or Impending Change

An expected difference or change in future financial circumstances in itself has not been a sufficient basis for limiting the duration of maintenance, in spite of language in the *Powers* opinion suggesting change as an alternative basis for justifying limits. The *Powers* court in analyzing the evidence before it, also, said that there was no evidence "the circumstances of the parties would be markedly different" and that all the evidence indicates the wife's

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296. 599 S.W.2d 51 (Mo. App., E.D. 1980).

297. 636 S.W.2d 680 (Mo. App., W.D. 1982).

298. *In re Marriage of Honeycutt*, 649 S.W.2d 502 (Mo. App., S.D. 1983); *Nixon v. Nixon*, 525 S.W.2d 835 (Mo. App., St. L. 1975).

299. 627 S.W.2d 117 (Mo. App., W.D. 1982).

300. *Id.* at 120.

financial prospects "will not improve dramatically."<sup>301</sup> The *Powers* court then compounded the confusion by stating affirmatively, "[a]wards of limited duration are entirely proper where the trial court has before it evidence of some impending change in the financial conditions of the parties."<sup>302</sup> This particular language, when considered without reference to the *Powers* court's use of the "meeting reasonable needs" test, carries a very different connotation. It suggests that if the evidence at the time of trial shows that a marked or dramatic change will occur in the financial prospects of the recipient (or the obligor), the impending change will warrant a predetermined denial of maintenance even though the change will not close the gap between income and reasonable needs.

The pattern of reversals and affirmances of durational limits demonstrates that substantial evidence of a marked difference in circumstances alone will not justify a limit on the duration of a maintenance award. The decisions instead indicate that the impending change or the marked difference must be in relation to the ability to meet reasonable needs. The large number of reversals of limited maintenance is in itself dramatic. *By the fall of 1984 every durational limit on maintenance to the prototype long-term traditional homemaker had been reversed.*<sup>303</sup> *There are no affirmances.* This is probably because impending change in the circumstances of an older, long-term homemaker whose lost earning capacity is beyond significant rehabilitation is not likely to indicate that she will meet her reasonable needs. For example, in *Royal v. Royal*,<sup>304</sup> the trial court had found that, on the basis of past employment, within a year of the decree the wife would be able to be employed. But the appellate court noted that past employment was inconclusive to establish that she could be *self-supporting*.<sup>305</sup> In *Tygett v. Tygett*,<sup>306</sup> the wife of a twenty-two year marriage just had finished a refresher course on secretarial skills, but the appellate court, mentioning her age and inexperience, reversed a two year limit, holding that there was not substantial evidence that she would be able to get a job that would enable her to meet her living expenses. In *Turner v. Turner*,<sup>307</sup> the appellate court reversed a two year limit on maintenance to a fifty-four-year-old woman who had a physical disability but who

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301. *In re Marriage of Powers*, 527 S.W.2d 949, 955 (Mo. App., St. L. 1975).

302. *Id.* at 956.

303. One possible aberration is *Hebron v. Hebron*, 566 S.W.2d 829 (Mo. App., W.D. 1978). However, the length of the marriage, 21 years, and the age of the wife, 42, were both at the lower end of the long-term group and the wife was atypical in that she had been successfully employed for a long period of years. She was working part-time at the time of trial because of a problem which the court was convinced was temporary. Thus, she could not claim that long years of homemaking rather than employment had decreased her earning ability significantly. *See also Wilhelm v. Wilhelm*, 688 S.W.2d 381 (Mo. App., E.D. 1985) (demonstrates self-sufficiency).

304. 617 S.W.2d 615 (Mo. App., W.D. 1981).

305. *Id.* at 620; *see also Hefti v. Hefti*, 682 S.W.2d 65 (Mo. App., E.D. 1984).

306. 639 S.W.2d 282 (Mo. App., E.D. 1982).

307. 650 S.W.2d 662 (Mo. App., E.D. 1983).

planned to attend school after a thirty-five year marriage, saying that there was no evidence she would be self-supporting.

*Blount v. Blount*<sup>308</sup> is a crucial 1984 decision in the eastern district. After quoting the "markedly different circumstances" language, the court stated that it was error to limit maintenance where evidence failed to disclose that the dependent spouse "will be self-supporting."<sup>309</sup> The court reversed a limit of four years based on the time that the youngest child would reach age eighteen. The evidence had shown the thirty-eight-year-old wife in a nineteen year marriage was in good health and that fifteen years earlier she had been employed as a secretary. The court noted that the standard of living had been high, the husband earned \$140,000 and could meet his own needs while meeting hers, and that the wife had no other source of income. The court said that whether the wife would be in good health and self-supporting in four years was unpredictable. It declared only the latter type of proof sufficient to limit the award. When the "markedly different" or "impending change" language of all these decisions is considered in view of their facts, the conclusion is inescapable that to limit the duration of maintenance, substantial evidence is required to show that at the end of the time, the recipient will be able to meet her reasonable needs.

### c. Employability

Five decisions from the eastern district affirming limits on maintenance suggest a new judicially created restriction on maintenance, at least in the medium-length marriage. By the fall of 1984 none of the cases affirming limits on maintenance concerned a long-term marriage. The eleven decisions which had affirmed limits on the duration of maintenance included two true rehabilitative maintenance cases,<sup>310</sup> one involving a wife who had been employed full-time for many years,<sup>311</sup> one justified by misconduct of the recipient,<sup>312</sup> one from a two year marriage granted until her needs stated in dollars were otherwise met,<sup>313</sup> and one, prior to *Doerflinger*, erroneously holding that in gross awards were different than limited duration awards.<sup>314</sup> The five remaining cases all involve medium-length marriages.

*Sansone v. Sansone*,<sup>315</sup> decided in 1981, involved a twelve year marriage,

308. 674 S.W.2d 612 (Mo. App., E.D. 1984).

309. *Id.* at 614.

310. Pederson v. Pederson, 599 S.W.2d 51 (Mo. App., E.D. 1980); Raines v. Raines, 583 S.W.2d 564 (Mo. App., E.D. 1979); *cf.* Standridge v. Adams, 636 S.W.2d 680 (Mo. App., W.D. 1982).

311. Hebron v. Hebron, 566 S.W.2d 829 (Mo. App., W.D. 1978); *see also* Wilhelm v. Wilhelm, 688 S.W.2d 381 (Mo. App., E.D. 1985) (wife left family and supported self for two years prior to decree).

312. Rasmussen v. Rasmussen, 627 S.W.2d 117 (Mo. App., W.D. 1982).

313. Anderson v. Anderson, 605 S.W.2d 524 (Mo. App., E.D. 1980).

314. *In re* Marriage of Kreienheder, 610 S.W.2d 313 (Mo. App., E.D. 1980).

315. 615 S.W.2d 670 (Mo. App., E.D. 1981).

and two children in the custody of the thirty-five-year-old wife, who was not employed out of the home during the marriage except for a brief period as a retail salesperson. This is the prototype medium-length marriage with a traditional full-time homemaker. The trial court's award of \$400 a month limited to one year was affirmed. The appellate opinion did not mention two of the statutory factors for determining maintenance: standard of living during the marriage and the obligor's earnings and ability to pay maintenance. After quoting from *Powers* concerning evidence of impending change, it stated the relevant evidence as being that the wife was trained as a real estate appraiser (completed a fifteen week course nine months prior to trial) and that there was a market for real estate appraisers. The market evidence was that there were job opportunities with a beginning salary at \$10,000 to \$12,000. The crucial portion of the opinion was the court's statements that the maintenance was "for a reasonable period so that wife could adjust to a new pattern of life and obtain employment" and that the evidence supported the conclusion "that within a year wife would have employment, if she sought it."<sup>316</sup> There was no mention of the *Powers* language about change which would indicate ability to meet reasonable needs and, indeed, there was no discussion whatever of reasonable needs. Without considering evidence of the marriage standard of living, no proper conclusion could be drawn on what were her reasonable needs or the extent to which the petitioner's earning capacity enabled her to meet them. Instead, the only evidence discussed was that pertaining to her ability to become employed. The implied assumption is that employability per se is the determinant of maintenance, i.e., employability precludes maintenance without regard to the extent that reasonable needs will be met. It follows that evidence of employability with a short period in which to obtain a job would justify denial of maintenance.

In 1984, the *Sansone* decision was cited in *McDowell v. McDowell*<sup>317</sup> for the following proposition: "If the evidence supports the finding that the wife is qualified for employment by physical ability and training and there is a reasonable expectation she will have employment during the period if she seeks it, the award of maintenance limited to that period is justified."<sup>318</sup> The *McDowell* marriage probably had lasted twelve to fourteen years since the wife was thirty-eight years old and there were three minor children. This woman previously had taught school for six years and had two college degrees. The trial court awarded \$1,000 a month for two years. Again, the opinion did not mention standard of living or reasonable needs but articulated that the ultimate question is whether circumstances of the parties will be markedly different. It held that it was not unreasonable to anticipate "an assumption by the wife of her own financial responsibility within a period of two years."<sup>319</sup> Clearly, the evidence would support a finding that the wife could be employed in two years.

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316. *Id.* at 671.

317. 670 S.W.2d 518 (Mo. App., E.D. 1984).

318. *Id.* at 522.

319. *Id.*



But, the opinion shifted from using as criteria for maintenance ability to meet reasonable needs to using as criteria employability alone.

Within a month *Steinmeyer v. Steinmeyer*<sup>320</sup> was decided, relying on *Sansone* for the "employment" and "adjustment" to a new pattern of life test. In *Steinmeyer*, the wife was forty years old with no health problems, had a thirteen year old daughter in custody, and had been employed for two years prior to the marital separation, earning about \$563 a month at the time of the decree. She was awarded \$230 a month child support and \$400 monthly maintenance for three years. Although her monthly expenses were indicated at \$1,242, leaving an unmet need of nearly \$500, the court said that the evidence would have supported a finding that she was able without assistance of the husband to supply her own needs. Therefore, the court said, "She cannot now complain that the trial judge granted her only three years to adjust to her new life."<sup>321</sup> The court did not state length of marriage, standard of living, or the husband's ability to pay. Employability alone became the test. Except for the highly questionable decision in *Geil v. Geil*,<sup>322</sup> previous authority would not have permitted denial of maintenance if the marriage had been long and the husband was able to pay. *Steinmeyer* could be even more questionable than the first two decisions because the marriage may have been twenty years or slightly longer in duration. In the long-term traditional homemaker marriage the body of precedent on reasonable needs and on limited duration suggest that employability alone never would be sufficient to deny or limit maintenance.

*Etlng v. Etlng*,<sup>323</sup> also decided in 1984, is an enigma with sparse facts and no reasoning stated. The trial court granted \$200 a month for twenty-four months for a total of \$4,800 rather than the wife's requested \$75 a week (approximately \$300 a month) for six to nine months for a total of \$2,700 to train as a medical assistant. The wife appealed and the award was affirmed, the court saying that the maintenance was "for a reasonable period so that wife could adjust to a new pattern of life and obtain gainful employment."<sup>324</sup> One hardly can question affirming an award that gave her more total dollars than she had requested, but the court's reasoning followed the newly formulated and restrictive "adjustment" purpose for maintenance that first surfaced in *Sansone*.

*Felkner v. Felkner*,<sup>325</sup> like *Etlng*, records so few facts that it is impossible to analyze it appropriately. In affirming a two year limit, the court said there was evidence to uphold a finding that the wife "is capable, after a period of

320. 669 S.W.2d 65 (Mo. App., E.D. 1984).

321. *Id.* at 68.

322. *Geil v. Geil*, 647 S.W.2d 161 (Mo. App., E.D. 1983), discussed *supra*, Prototype Fact Combinations, Long-term Traditional Homemaker.

323. 671 S.W.2d 825 (Mo. App., E.D. 1984).

324. *Id.* at 825-26.

325. 652 S.W.2d 174 (Mo. App., E.D. 1983).

training and adjustment, of supporting herself."<sup>326</sup> Without facts given, the "adjustment" phrase places the case in the *Sansone* line.

These five decisions utilize a new concept of maintenance under the Missouri statute which has not been enunciated elsewhere. The concept that employability precludes maintenance after a short "adjustment" period is an unwarranted departure from the legislative intent that all the statutory factors be considered in determining amount and duration of maintenance. Furthermore, the concept seriously deviates from innumerable precedents since 1974 that do weigh all the factors to arrive at a decision upon a combination of them.

The only possible rationale for these decisions within the parameters of the statute would be that in the medium-length marriage, reasonable needs could never exceed the amount which the homemaker wife is able to provide for herself within a short period after the marriage ends. Maintenance would become a short-term aid to adjusting to a lowered standard of living. It would be "adjustment maintenance." This would ignore the decrease in earning capacity during the ten to twenty years out of the employment market. Such a draconian effect would be contrary to the purpose of maintenance as a remedy for that decrease.

#### d. Resolution

The majority and dissenting opinions in *Blount v. Blount*<sup>327</sup> brought to a dramatic climax on the battleground of limited maintenance the conflicting interpretations of the nature and purpose of maintenance. The reversal of a four year limit represented a victory for the "reasonable needs" forces over the "employability" or "adjustment maintenance" forces. The majority opinion set out detailed evidence on all the factors that normally affect a finding of reasonable needs including the high standard of living during the marriage, the husband's \$140,000 income, and the fact that the wife had not been employed for fifteen years. It noted that the wife was wholly dependent on the husband and that the sufficiency of \$2,200 maintenance had not been appealed. The opinion then reviewed both the supreme court's statement in *Doerflinger* that there must be substantial evidence at the time of the decree to justify an imposition of a limitation and the markedly different language of *Powers*, and concluded that only evidence that appellant would be self-supporting in four years would justify the limit. The majority did not explain what it meant by "self-supporting," but its reference to the high standard of living and the \$2,200 amount suggests strongly that it was concerned with the gap between what she could earn and the amount which represented her reasonable needs at the time of the decree.

In contrast, the dissenting judge emphasized that, as soon as the youngest

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326. *Id.* at 176.

327. 674 S.W.2d 612 (Mo. App., E.D. 1984) (application for transfer to the Supreme Court denied). *See* discussion, *supra*, at note 308.

child was out of school, the wife would have no reason to remain home and that she was "skilled and experienced at secretarial work, which is one of the more valuable and important tasks in society."<sup>328</sup> He pointed out the great demand for secretaries and that the "wife would have four years' notice that her maintenance would end" during which she could seek further training. His concern was exclusively with her ability to become employed, not with whether a secretarial position could provide income sufficient to meet reasonable needs of \$2,200. The probabilities are that she could earn only \$500 to \$1,000 a month at that time.<sup>329</sup> The dissent would reduce her to a poverty level standard of living in four years even though the husband would be earning over \$140,000 partially due to her supportive efforts during the nineteen years of the marriage in which his earning capacity developed. In contrast, the dissent's apparent goal of providing secretaries for the needs of society and creating an incentive for this woman to be productive would be met simply by lowering the maintenance when she reasonably could be prepared for employment to the amount needed to meet the gap between what she could earn and her reasonable needs.<sup>330</sup> That would be incentive enough to seek employment and is why nearly all able-bodied displaced homemakers in Missouri reported opinions were employed or trying to obtain employment. The majority chose the "reasonable needs" route as the required basis for limiting the duration of maintenance, and did it in a manner that excludes either "marked difference" or "employability" as a sufficient basis for a durational limit.

The *Blount* decision leaves the law on limited maintenance still teetering uncertainly. The marriage in *Blount* had lasted nineteen years and the wife had been out of the work force fifteen years. Should the case be classed as a long-term marriage where no durational limit on maintenance yet has been upheld or as a medium-length marriage? If the latter, it would be consistent with those periodic maintenance cases that appear to treat the medium length marriage more like the long-term one, thus, recognizing the loss of earning capacity suffered there, also.<sup>331</sup> Perhaps most significant, neither the majority nor the dissenting opinion clarified what was the essential issue: should the reasonable needs of a dependent homemaker include meeting the gap between income and living expenses based on the marriage standard of living indefi-

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328. *Id.* at 615 (Reinhard, J., dissenting).

329. *See supra* notes 102, 105 and 110 (cases discussing amounts earned by women of comparable experience); *see also supra* notes 6-10 and accompanying text.

330. *See, e.g.,* Cregan v. Clark, 658 S.W.2d 924, 929 (Mo. App., W.D. 1983), stating that even with \$1,000 monthly maintenance, "Mrs. Clark would still have to supplement that income from personal earnings, and Mr. Clark's fears were unfounded that he would have to continue to support her in idleness and luxury." *See* discussion, *supra*, at notes 102-06.

331. The dissenting judge in *Blount* recently demonstrated his judicial temperament by writing an opinion reversing a durational limit after a sixteen year marriage in which he cites *Blount* to support his conclusion that the "evidentiary requirement seems to have resulted in a judicial preference for awards of unlimited maintenance." *Hutchins v. Hutchins*, 687 S.W.2d 703, 706 (Mo. App., E.D. 1985).

nately? It is obvious that the dissent, espousing the "employment" theory would say "No." But it is unclear what the majority meant by "self-supporting." Self-supporting could mean able to meet the gap between income and expenses to maintain the marriage standard of living. The amount of maintenance ordinarily ordered from an obligor easily able to pay, even when the income/living expense gap concept of reasonable needs is applied in the long-term marriage, almost never is adequate to meet that gap fully.<sup>332</sup> Thus, even with unlimited periodic maintenance, courts not only have been creating an incentive to seek employment, but also have been requiring an adjustment to a lower standard of living by the modest amounts awarded.<sup>333</sup> Under *Doerflinger*, once the durational limit is imposed, the maintenance ends. To terminate the help provided by an already inadequate award after a short period of time cannot be justified. The probabilities are that lost earning capacity in either a long-term or medium-length traditional marriage never can be recouped fully, and that some maintenance to supplement earnings, therefore, more often than not, can be justified indefinitely as a reasonable need.<sup>334</sup>

#### IV. CONCLUSION

For nearly ten years Missouri courts have favored awards of periodic maintenance of unlimited duration to homemakers from long-term and medium-length marriages and rehabilitative awards for training or education to shorter term homemakers who demonstrate need and ability to increase their skills. Reasonable need in the long-term marriage is measured by the standard of living of the marriage. Generally, the awards to the long-term homemaker seek to meet the gap between those needs and the amount the homemaker can provide from her own earnings and property. To a large extent, awards to homemakers in medium-length marriages also follow this pattern. As remedy for the opportunity costs of socially desirable homemaking this measurement for maintenance is appropriate.

However, the need gap seldom is met fully by the awards granted. Sometimes this is because the obligor does not have the means to pay. However, disparity in income between the ex-spouses in many cases indicates that the trend to protect the obligor's standard of living at the expense of ex-wives and children, which has been noted in numerous studies in the country<sup>335</sup> exists in

332. See cases discussed *supra* at note 105.

333. See, e.g., the amount ordered in *Geil*, 647 S.W.2d at 162.

334. Inheritance of income-producing property, remarriage, or a miraculously high paying employment opportunity can be presented as grounds for modification or termination. To qualify for income tax deductibility under the Tax Reform Act of 1984, § 422 amending I.R.C. § 71, if the amount payable in one year exceeds \$10,000, the payments must extend for at least six years and be terminable only by remarriage or death.

335. J. CASSETTY, *CHILD SUPPORT AND PUBLIC POLICY* 64, 65 (1978); D. CHAMBERS, *MAKING FATHERS PAY* (1979); Hoffman & Holmes, *Husbands, Wives, and Divorce in FIVE THOUSAND AMERICAN FAMILIES — PATTERNS OF ECONOMIC PROGRESS*

Missouri, as well. Better trial preparation to document a petitioner's need and opportunity costs suffered by her homemaking may rekindle consideration of the legislative aims and encourage courts to lessen the disparity in economic condition between the ex-spouses.

The most extreme indications of restrictions on maintenance which would change its societal purpose are: (1) amount of awards so far below needs, even though the obligor could pay more, that maintenance is converted from a remedy for irremediable sacrifices due to homemaking to merely a protection for taxpayers by substituting for welfare payments and, (2) duration of awards so limited in time that maintenance is converted from a remedy for diminished earning capacity to an aid in adjusting to a substantially lower standard of living. A tendency to restrict maintenance in these ways has appeared recently in cases involving medium-length marriages. Decisions which reverse inadequate maintenance amounts and which reverse durational limits in the absence of substantial evidence that the recipient will be able to meet needs should be applauded. Never are the awards so munificent that able-bodied recipients lose incentive to be productive employees. Rather, they supplement the meager amounts that can be earned. By assuring those awards, the appellate courts further the legislative intent to protect the homemaking role by continuing maintenance as a remedy for contributions and sacrifices for the welfare of the family.

As the issues of amount and duration of maintenance arise in the future, particularly in the medium-length marriage, courts should consider not only the legislative intent, but also the broader social impact of extremely inadequate maintenance awards. Most of the medium-length marriages have minor children who remain in the custody of the mother. Impoverishment of women and children is a nationwide problem of serious concern. Between 1960 and 1981 the percentage of the total population in poverty decreased to approximately fourteen percent, but the number of persons in impoverished households headed by women increased fifty-four percent while those headed by poor men decreased fifty percent.<sup>336</sup> Custodial women, unlike poor men, are less able to escape poverty<sup>337</sup> because of the burden of child care, the extra

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(1976); Seal, *A Decade of No-Fault Divorce*, FAM. ADVOC. (Spring 1979). On the basis of per capita funds available to meet needs, in California women and children experienced a 73% decline in standard of living while men experienced a 42% increase in money available for their needs after dissolution. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1266 (1981).

336. U.S. COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION NO. 78, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN 2 (1983); see also Kessler, *Crisis in Child Support*, 20 TRIAL 28 (1984); Testimony of Lt. Gov. Leo T. McCarthy reported in CALIFORNIA WOMEN 1 (June/July 1983) (citing the 1981 National Advisory Commission on Economic Opportunity).

337. Testimony of Dr. Diana Pearce, Director of Research, Center for Policy Review, Catholic University Law School, reported in CALIFORNIA WOMEN 1 (June/July 1983). She recommended that child care and job training were essentials to allevi-

cost of children seldom covered adequately by child support,<sup>338</sup> and because the labor market is not as advantageous for women as for men.<sup>339</sup>

The classic study by Weitzman in California documented the adverse effects on both women and children who were impoverished as a result of the marriage dissolution while the men enjoyed improved financial condition. She concluded:

[T]hese minimal spousal support awards created severe pressures and hardships for newly divorced women . . . impelling them into low-level jobs to meet short-term necessities at the sacrifice of long-term benefits for themselves, their children, and even their former husbands.

These economic changes have drastic psychosocial effects on children. The sharp decline in their mothers' standard of living forces residential moves, with resulting changes of schools, teachers, neighbors, and friends. Mothers pressured to earn money have less time and energy to devote to their children, just when the children need their mothers most. Moreover, when the discrepancy in standard of living between children and father is great, children are likely to feel angry and resentful and to share their mothers' feeling of deprivation and injustice.<sup>340</sup>

In addition to recommendations concerning economic protection for children, Weitzman recommended generous and protracted spousal support awards for younger women while they acquire an education sufficient to utilize their abilities fully. Many homemakers in the medium-length marriage would fall within this group. Weitzman's other recommendation concerns maintenance related to older divorced women whose earning capacities had been impaired in marriages of long duration. This would include some older homemakers from the medium-length marriage who are beyond significant improvement in earning ability. She said:

[They] need support rules that equalize the net income available to both spouses after divorce. Old-fashioned norms of redistributive justice and simple

ate the special reasons for women's poverty; *see also* U.S. COMM'N ON CIVIL RIGHTS, CLEARINGHOUSE PUBLICATION NO. 67, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN 5 (1981) (explaining that "role overload"—carrying the full burden of child care and full time employment—saps energy and time, thus locking single mothers into a cycle of low paying jobs, citing D. Burlage, *Divorced and Separated Mothers: Combining the Responsibilities of Breadwinning and Childrearing* 209-11 (1978) (Ph. D. diss., Harvard Univ.)).

338. The mean amount of child support paid nationally in 1981 to divorced women with children (all numbers of children) was \$2,220. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: SERIES P-23, No. 124, CHILD SUPPORT AND ALIMONY: 1981 3 Table B (1983).

339. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 673, THE FEMALE-MALE EARNINGS GAP: A REVIEW OF EMPLOYMENT AND EARNINGS ISSUES 4-5 (1982); WOMEN'S WORK: UNDERVALUED, UNDERPAID, NATIONAL COMMISSION ON WORKING WOMEN (1982).

340. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1265-66 (1981).

fairness seem more appropriate than current norms of postdivorce self-sufficiency for such women. One of the greatest inequities in the current law is the almost punitive treatment of divorced wives after long-duration marriages. They, like widows, deserve some form of survivor benefits.<sup>341</sup>

Theory, statutory language, and precedent will allow courts to utilize maintenance in these ways. Hopefully, we will follow the path of compensation rather than punishment for homemaking. Only if we eschew the social good of homemaking and childrearing or ignore its economic effects and the intent of the legislature, could we decide otherwise in good conscience.

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341. *Id.* at 1267.