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## SPOUSAL MAINTENANCE IN MISSOURI: THE OLD AND THE NEW

### I. INTRODUCTION

The purpose of this comment is to examine the new Missouri "no fault" divorce statute which went into effect on January 1, 1975, and to determine its impact on awards of spousal maintenance. In addition to sweeping changes in the grounds and procedures for dissolving a marriage, the new statute will have a substantial effect on the granting of maintenance. Following a brief discussion of the prior Missouri law of alimony, the maintenance section of the new Missouri statute<sup>1</sup> will be examined point by point. The impact of the new maintenance provision will then be considered. Due to the recentness of the enactment of the Missouri statute it will be necessary to rely heavily upon interpretations from other states having similar statutes.

### II. PRIOR MISSOURI LAW

The traditional rule in most states was that alimony could be awarded only to the wife. Although evidence of need and ability to pay were considered, alimony was usually granted absent misconduct on the part of the wife. This attitude toward the granting of alimony was based on the traditional rule that upon marriage the husband undertook a legal obligation to support his wife. This obligation was not terminated by divorce, but was satisfied thereafter by payment of alimony.<sup>2</sup>

Missouri courts also permitted awards of alimony only to the wife, but contrary to the general rule, the granting of such was not based on the husband's continuing duty of support. Marriage was considered a contract which obligated the husband to support his wife for their mutual lives. Divorce was a rescission of this contract based on a breach by one party. The rights and obligations of both parties under the marriage contract were thereby terminated. Alimony was an allowance to compensate the wife for the loss of her contractual right to support.<sup>3</sup>

Even under prior Missouri law, a wife did not have an absolute right to receive alimony. It was sometimes stated that a divorced wife capable of providing for herself could not insist that her husband maintain her in "idleness and luxury"<sup>4</sup> simply because he was found to be the guilty party. The granting of alimony was determined in each case in light of the particular circumstances.<sup>5</sup> Alimony was usually awarded to an "innocent and injured" wife when reasonable to do so.<sup>6</sup>

1. § 452.355, RSMo 1973 Supp.

2. 24 AM. JUR. 2d, *Divorce and Separation* §§ 514, 521 (1966).

3. *Nelson v. Nelson*, 282 Mo. 412, 421, 221 S.W. 1066, 1069 (1920); *Knebel v. Knebel*, 189 S.W.2d 464, 467-68 (St. L. Mo. App. 1945). *But see Bowzer v. Bowzer*, 236 Mo. App. 514, 522, 155 S.W.2d 530, 534 (K.C. Ct. App. 1941).

4. *Shilkett v. Shilkett*, 285 S.W.2d 67, 70 (Spr. Mo. App. 1955).

5. *Id.*

6. *Adkins v. Adkins*, 325 S.W.2d 364, 367 (K.C. Mo. App. 1959).

Under prior Missouri law the husband was required to pay alimony, within his financial ability, sufficient to maintain the wife in her pre-divorce standard of living. The phrase "husband's financial ability" meant that alimony should not exceed the amount that he could pay without undue hardship. The husband was entitled to retain an amount adequate to support himself on a standard similar to that of the wife.<sup>7</sup> To be more concise, the husband was not to be impoverished in order to support the wife at the pre-divorce standard of living.<sup>8</sup>

The proper yardstick for the measurement of alimony was the husband's earning capacity, not his actual income at the time of divorce.<sup>9</sup> The husband's temporary inability to pay was no bar to alimony. Present and past earnings as well as future prospects were evidence of earning capacity.<sup>10</sup>

Although any income of the wife was considered in determining the amount of alimony, she had no affirmative duty to seek work. Another rule, often expounded but even more frequently breached, was that the husband's misconduct was not to be considered as the basis for increasing the amount of alimony.<sup>11</sup>

### III. THE NEW MISSOURI MAINTENANCE STATUTE

#### A. Types of New Maintenance Statutes

Missouri is only one of several states that have recently enacted "no fault" divorce laws containing new provisions concerning maintenance. The new provisions are of two basic types. Florida and Iowa, for example, have generally worded statutes, which leave to the courts the determination of criteria for granting awards of maintenance.<sup>12</sup> Other states such as Mis-

7. H. CLARK, LAW OF DOMESTIC RELATIONS 444 (1968).

8. *Mortensen v. Mortensen*, 469 S.W.2d 852, 855 (K.C. Mo. App. 1971).

9. *Weiss v. Weiss*, 392 S.W.2d 646, 647 (St. L. Mo. App. 1965).

10. *Id.*; *Rutlader v. Rutlader*, 411 S.W.2d 826, 829 (K.C. Mo. App. 1967). Missouri courts compiled the following extensive list of factors relevant to an award of alimony: (1) the financial status of the parties: *Spivack v. Spivack*, 283 S.W.2d 137, 142 (Spr. Mo. App. 1955); (2) their stations in life: *id.*; (3) income, obligations, and necessities of each: *id.*; (4) the extent of their individual estates, particularly property given by the husband to the wife: *Rutlader v. Rutlader*, *supra* at 830; *Patterson v. Patterson*, 215 S.W.2d 761, 767 (Spr. Mo. App. 1948); (5) contributions of each spouse to property accumulated during the marriage: *Knebel v. Knebel*, 189 S.W.2d 464, 467 (St. L. Mo. App. 1945); (6) any rights acquired by the wife in her husband's realty by virtue of the marriage—*e.g.*, dower: *Cogburn v. Cogburn*, 256 S.W.2d 836, 840 (Spr. Mo. App. 1953); (7) the ages and health of the parties: *Spivack v. Spivack*, *supra* at 142; (8) their education and employment or business experience: *Adkins v. Adkins*, 325 S.W.2d 366 (K.C. Mo. App. 1959); (9) the ability of each to follow gainful occupations: *Spivack v. Spivack*, *supra* at 142; (10) probable future prospects of each: *id.*; (11) children and their custodial provisions: *Mortensen v. Mortensen*, 469 S.W.2d 852, 854 (K.C. Mo. App. 1971); (12) ages of the children: *Sieckmann v. Sieckmann*, 429 S.W.2d 784, 787 (St. L. Mo. App. 1968); (13) duration of the marriage and whether it was one of convenience or one of affection: *Spivack v. Spivack*, *supra* at 142; and (14) conduct of the parties, particularly with regard to the causes of the divorce: *id.*

11. *McM. v. McM.*, 506 S.W.2d 14, 16-17 (Mo. App., D.K.C. 1974).

12. FLA. STAT. ANN. § 61.08 (Supp. 1974-75) provides:

http://www.marshpawling.com/dissolution/1974-75/ In a proceeding for dissolution of marriage, the court may grant

souri, Kentucky, and Oregon, lay down a nonexclusive list of relevant factors to be considered in determining the appropriateness and amount of a maintenance award.<sup>13</sup> The difference between the two types of statutes appears to be solely one of form. The courts applying the generally worded statutes have judicially adopted criteria<sup>14</sup> similar to those enumerated in the more specific statutes.

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

- (2) In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.

IOWA CODE ANN. § 598.21 (Supp. 1975-76) provides: "When a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified."

13. § 452.335, RSMo 1973 Supp., provides:

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 find 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;
- (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.

Ky. REV. STAT. § 403.200 (Supp. 1974), which is also based on section 308 of the Uniform Marriage and Divorce Act, is similar but makes no mention of the consideration of fault. The Uniform Act itself specifically excludes any consideration of fault. Oregon has its own list of criteria not derived from the Uniform Act, but also excluding fault. ORE. REV. STAT. § 107.105 (Supp. 1974).

14. Iowa uses separate lists of premarital and postmarital criteria found in *Schantz v. Schantz*, 163 N.W.2d 398 (Iowa, 1968). However, fault was stricken from consideration in *In re Marriage of Williams*, 199 N.W.2d 359 (Iowa, 1972).

### B. Criteria for Awarding Maintenance

In general, the statutes contemplate that, if possible, the division of property will provide for the needs of both spouses.<sup>15</sup> Missouri,<sup>16</sup> and the other states whose statutes are based on the Uniform Marriage and Divorce Act, provide that prior to considering the enumerated factors relevant to the amount of maintenance, the court must find that the spouse seeking maintenance cannot support himself by "appropriate employment"<sup>17</sup> or out of his property.<sup>18</sup> In the absence of such a finding, the court is not authorized to make any award of maintenance whatsoever.<sup>19</sup> If the court determines that the requesting spouse lacks sufficient property to provide adequate support, it must then determine that spouse's earning ability.<sup>20</sup>

Under the new Missouri statute, an able requesting spouse is not only required to support himself, he also has an affirmative duty to acquire the skills necessary to obtain suitable employment.<sup>21</sup> Where the spouse has a proven ability to meet his established needs, a maintenance award is improper.<sup>22</sup> However, if the spouse seeking maintenance is unable to hold a job due to physical or mental infirmities, the court may properly grant permanent maintenance.<sup>23</sup>

The new law does not restrict maintenance to those situations where the requesting spouse is unable to obtain employment.<sup>24</sup> In *Casper v. Casper*<sup>25</sup> the court faced the problem of a wife who was able to support herself, but only at a level below her previous standard of living. The court reasoned that one who is able to maintain only the bare necessities of life is not required to forfeit all right to maintenance. The court should first determine the proper amount necessary to support the requesting spouse according to the standard of living during the marriage. That spouse's reasonable earning capacity should then be deducted from this amount in order to arrive at the amount of the final award. The *Casper* court may have considered the standard of living during the marriage in determining whether to grant maintenance. The marital standard of living is listed not as a criterion for determining whether to award mainte-

15. *Farmer v. Farmer*, 506 S.W.2d 109 (Ky. 1974).

16. § 452.335.1, RSMo 1973 Supp.

17. The term "appropriate employment" is not defined in the Missouri statute. However, the note to section 308 of the Uniform Marriage and Divorce Act suggests that appropriate employment means "employment appropriate to his skills and interests." In addition, in determining what kind of employment is appropriate the court should consider his age, health, social standing, and any other relevant factors.

18. *See In re Marriage of Powers*, 527 S.W.2d 949, 954 (Mo. App., D. St. L. 1975).

19. § 452.335.1 (2), RSMo 1973 Supp.

20. *Ruhland, Maintenance and Support*, 29 J. Mo. B. 516 (1973).

21. § 452.335.2 (2), RSMo 1973 Supp.

22. *Weston v. Weston*, 251 So. 2d 315 (Fla. App. 1971).

23. *Bob v. Bob*, 310 So. 2d 328, 329-30 (Fla. App. 1975); *Dash v. Dash*, 284 So. 2d 407, 408-09 (Fla. App. 1973).

24. *Lash v. Lash*, 307 So. 2d 241, 242 (Fla. App. 1975).

25. 110 S.W.2d 253 (Ky. 1974).

nance, but as a factor to be considered in determining the amount of the award. Nevertheless, consideration of the marital standard of living in determining whether to award maintenance would be proper because this standard is quite relevant in determining the reasonable needs of the requesting spouse.

The Missouri statute, and others based on the Uniform Act, specifically state that maintenance is proper where the requesting spouse is the custodian of children whose "condition or circumstances" make it appropriate that their custodian not work outside the home.<sup>26</sup> The drafters of the Arizona statute wisely modified this provision to expressly make the child's age a factor which would make it inappropriate for the custodian to seek outside work.<sup>27</sup> Although the Missouri statute does not make a specific reference to the age of a child, the language is certainly subject to the interpretation that a child's age is a "condition or circumstance" within the meaning of the statute.<sup>28</sup>

### C. Factors for Determining the Amount of Maintenance

The relevant factors listed in section 452.335.2, RSMo 1975 Supp., are to be considered only in determining the amount and duration of a maintenance award, and not the initial appropriateness of such.<sup>29</sup> It should be re-emphasized here that the listed criteria are not exclusive. The court must consider *all* relevant factors including those listed.

The requesting spouse's financial resources, property as well as earning ability, must be considered in determining the amount and duration of maintenance.<sup>30</sup> Recognizing the fact that a spouse may lack sufficient training to earn an adequate income, or may no longer be qualified to return to a pre-marriage occupation, the drafters of the new statutes provided for limited duration or "rehabilitative" maintenance to allow the spouse time in which to obtain the training necessary to resume a previous profession or enter a new career.<sup>31</sup> In *In re Marriage of Beeh*<sup>32</sup> the court awarded maintenance for a period of time sufficient to enable the wife to get a master's degree needed to resume a career as a nursing teacher. In *Bohanan v. Bohanan*<sup>33</sup> the court awarded maintenance for one year to allow the wife time to "brush up" and requalify as a stenographer. In another case, the court awarded maintenance to a forty-one year old unskilled wife for a period of six years to enable her to develop job skills and become employable.<sup>34</sup> Where a wife earned \$6000 per year but needed to return to school to maximize her employment potential, the court

26. § 452.335.1 (2), RSMo 1973 Supp.

27. ARIZ. REV. STAT. § 25-39 A.2 (Supp. 1973).

28. *Chapman v. Chapman*, 498 S.W.2d 134, 136 (Ky. 1973).

29. § 452.335.2 (1), RSMo 1973 Supp.

30. § 452.335.2, RSMo 1973 Supp.

31. See § 452.335.2 (2), RSMo 1973 Supp.

32. 214 N.W.2d 170 (Iowa 1974).

33. 6 Ore. App. 141, 487 P.2d 113 (1971).

34. *In re Marriage of Aasum*, 17 Ore. App. 638, 523 P.2d 581, 583 (1974).

affirmed an award of maintenance to terminate at the end of the school year.<sup>35</sup>

Although the standard of living enjoyed by the parties during the marriage is an important factor,<sup>36</sup> the court should be cautious in the determination of such. In *Bob v. Bob*<sup>37</sup> an award of alimony was reversed because of the trial court's erroneous findings as to the pre-dissolution standard of living. Large financial contributions by the wife's parents had created a standard of living far beyond that which the husband alone could have provided. The proper measure was that which would enable the wife to maintain a standard which they could have maintained without contribution from third parties.<sup>38</sup>

Occasionally the court will award less than necessary to maintain the supported spouse at a previous standard of living that was unusually high, even though the supporting spouse has the ability to pay. In *Kennedy v. Kennedy*<sup>39</sup> the court refused to increase the trial court's award of \$500 per month for alimony and child support where the wife had considerable property and earned \$20,000 per year even though the husband's income far exceeded that of the wife. The court apparently felt that she was capable of supporting herself at an adequate standard although not equal to that the husband was capable of providing.

The length of the marriage is another factor to be considered in determining the amount of a maintenance award. Where the marriage is short, there is generally little change in the position of the parties during the marriage. As aptly put by the Iowa Supreme Court in *Behrle v. Behrle*,<sup>40</sup> the parties usually start with only earning ability and end with the same. However, in a long marriage there are many other things to consider. In *Oppenheimer v. Oppenheimer*<sup>41</sup> the court reasoned that the length of the marriage was important because of two underlying factors: the contribution of the requesting spouse to the marriage and reluctance to award maintenance to an adventuress. The requesting spouse's contribution to the marriage, including any contribution as a homemaker, should be considered.<sup>42</sup> The length of the marriage also has relevance to the requesting spouse's ability to recover opportunities foregone because of the marriage. In addition to job training, experience, and security, these foregone opportunities may include retirement benefits and accumulated earnings that result from continuous employment. The duration of the marriage also

35. *In re Marriage of Scheer*, 13 Ore. App. 551, 513 P.2d 174 (1973).

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

37. *Bob v. Bob*, 310 So. 2d 328, 330 (Fla. App. 1975).

38. *Id.*

39. 303 So. 2d 629, 630 (Fla. App. 1974).

40. 228 N.W.2d 25, 27 (Iowa 1975).

41. 22 Ariz. App. 238, 526 P.2d 762 (1974).

42. *In re Marriage of Aasum*, 17 Ore. App. 658, 660, 523 P.2d 581, 583

directly correlates to the requesting spouse's ability to obtain future employment, or the training and education necessary to obtain such.<sup>43</sup>

The age and health, both physical and mental, of the requesting spouse are important primarily because they pertain to the ability to be or to become self-supporting. An older spouse who has long been a homemaker would find it more difficult to acquire the skills necessary to become economically self-sufficient than would a younger spouse. In addition, age and/or infirmities may restrict or totally negate an older spouse's ability to be self-supporting. These factors are also relevant in determining the amount of maintenance because an older person, or one who has physical or mental ailments, may have substantial medical expenses.

The ability of the supporting spouse to pay is an extremely important limiting factor in this area. As was the rule under the prior Missouri law, the court should not award maintenance in excess of the supporting spouse's ability to pay even though this amount may be less than needed by the supported spouse.<sup>44</sup> The supporting spouse should be left an amount adequate to support himself on a standard similar to that of the supported spouse.<sup>45</sup> The court must recognize that in few cases will the income be sufficient to support adequately two households. Although the desired award is that which will enable the supported spouse to enjoy a standard of living similar to that enjoyed during the marriage, the supporting spouse has an equal right to live at that standard. Therefore, if the income is inadequate to independently support each spouse at such a level, both must suffer a reduction in their standard of living.<sup>46</sup> An additional concern should be the avoidance of an award so large as to deprive the supporting spouse of his incentive to maintain gainful employment.<sup>47</sup>

Although the court must consider whether there are children in the home before granting a maintenance award, children and their circumstances are not listed as factors relevant to the duration and amount of the award. Nevertheless, the courts will no doubt recognize that children and their ages and conditions should be considered in shaping the award. The fact that there are children in the home who need a fulltime custodian may persuade the court that it would be advantageous for the custodial spouse not to work. There are two views as to the length of the award where there are children in the home. Some states, such as Oregon, will award maintenance only until the youngest child enters school.<sup>48</sup> The theory underlying this approach is that once the children are in school the custodian will be free to seek employment. Other states,

43. *In re Marriage of Kitson*, 17 Ore. App. 648, 655, 523 P.2d 575, 578-79 (1974).

44. *Bob v. Bob*, 310 So. 2d 328, 329-30 (Fla. App. 1975); *Dash v. Dash*, 284 So. 2d 407, 408-09 (Fla. App. 1973); *Thigpen v. Thigpen*, 277 So. 2d 583, 586 (Fla. App. 1973).

45. H. CLARK, *supra* note 7, at 444. See notes 7-10 *supra*.

46. See *Wright v. Wright*, 13 Ore. App. 101, 508 P.2d 829 (1973).

47. *Shapiro v. Shapiro*, 238 S.W.2d 886, 891 (St. L. Mo. App. 1951); *Schwent v. Schwent*, 209 S.W.2d 546, 547 (St. L. Mo. App. 1948).

48. *Wright v. Wright*, 13 Ore. App. 101, 508 P.2d 829 (1973).



such as Iowa, award maintenance until the children have all finished high school.<sup>49</sup>

Few authorities would dispute the relevance of the above factors or the propriety of their consideration in determining the amount and duration of a maintenance award. However, there is much disagreement as to the role of fault in making such a determination. This discord is based on differing conceptions of the purpose of the "no fault" divorce statutes. In *In re Marriage of Williams*<sup>50</sup> the Iowa Supreme Court reasoned that to allow consideration of fault in alimony proceedings would defeat the purpose of "no fault" divorce statutes—*i.e.*, the reduction of hostility and trauma connected with marital failure. Allowing maintenance to be awarded on fault grounds would increase both the disruptive impact of the divorce and the mutual bitterness of the parties.<sup>51</sup>

Professor Robert Levy believes that fault as a criterion for awarding alimony is inconsistent with the realities of marriage and divorce. He is of the opinion that the consideration of fault permits one party to exact an economic premium which has no relation to the parties' respective financial positions.<sup>52</sup> Considerations of fault are generally based on the erroneous assumption that the breakdown of a marriage can be the sole fault of one party. Generally, both parties contribute to the breakdown of the marriage and the grounds for divorce are a result of the breakdown of the marriage rather than the cause of it.<sup>53</sup> At least one state, Iowa refuses to allow consideration of fault even though not expressly prohibited by statute.<sup>54</sup> The Uniform Marriage and Divorce Act specifically excludes consideration of the conduct of either spouse.<sup>55</sup> Oregon has adopted a similar provision.<sup>56</sup>

Other authorities, however, argue that the purpose of "no fault" divorce laws is merely to prevent withholding a divorce from a couple whose marriage is no longer viable. Once the divorce is allowed, this purpose is satisfied. Therefore, there is no reason to keep fault out at the maintenance stage of the proceedings. The proponents of this view oppose the complete elimination of fault and would retain its use to deny maintenance where conduct makes an award grossly unfair.<sup>57</sup> Michigan, after enacting "no fault" grounds for divorce, still permits consideration of fault for alimony purposes.<sup>58</sup>

Florida has not eliminated fault and specifically permits consideration

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

50. 199 N.W.2d 339, 345 (Iowa 1972).

51. H. CLARK, *supra* note 7, at 441-42.

52. R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 150 (1968).

53. 199 N.W.2d at 345.

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

55. UNIFORM MARRIAGE AND DIVORCE ACT § 308 (b).

56. KY. REV. STAT. § 403.200 (1) (Supp. 1973); ORE. REV. STAT. § 107.105 (Supp. 1974).

57. Note, 53 NEB. L. REV. 126, 135-36 (1974).

58. Note, 42 U. CINN. L. REV. 127, 131 (1973).

of adultery.<sup>59</sup> Under the new Kentucky statute, which omits any mention of fault, the courts do not consider fault as to whether maintenance may be awarded, but do consider it in determining the amount of the award.<sup>60</sup> This position is far from logical. Missouri's new maintenance provision permits consideration of the conduct of the spouse seeking maintenance. This provision permits a denial of maintenance where the conduct of the requesting spouse makes such an award inequitable.<sup>61</sup>

Nowhere does the Missouri statute prohibit consideration of the supporting spouse's conduct in determining the amount of maintenance to be awarded. Although not listed as a relevant factor, it could conceivably be considered, due to the fact that the list is nonexclusive.<sup>62</sup> However, by listing the conduct of the spouse seeking maintenance but not mentioning the conduct of the supporting spouse, the statute's drafters may have intended to rely on the maxim *expressio unius est exclusio alterius*<sup>63</sup> to prevent judicial consideration of the conduct of the supporting spouse. Courts, though, have always considered themselves free to disregard canons of construction in order to reach a desired result. Therefore, absent a ruling from the Missouri Supreme Court applying the above mentioned maxim to this situation and excluding consideration of such conduct, the legislative attempt to prevent such consideration may not be totally effective. Furthermore, the language of the applicable section would seem to permit consideration of the requesting spouse's good conduct, as well as bad. Permitting consideration of the requesting spouse's good conduct may enable consideration of the supporting spouse's bad conduct to come in the back door.<sup>64</sup> By showing that the requesting spouse's conduct was above reproach, the inference would be that he could not possibly have been responsible for the breakdown of the marriage. Therefore, the supporting spouse must have been at fault. This inference could, no doubt, affect the court's decision. For this reason evidence of good conduct should be excluded.

#### D. Maintenance for Either Spouse

Under the new statutes either spouse is authorized to receive maintenance. However, it is likely to be many years before courts rid themselves of the deeply rooted notion that the husband is to be the chief provider for the family and begin awarding maintenance to men. Few

59. FLA. STAT. ANN. § 61.08 (1) (Supp. 1974-75).

60. *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. App. 1973).

61. § 452.335.2 (7), RSMo 1973 Supp.

62. § 452.335.2, RSMo 1973 Supp.

63. "When certain persons or things are specified in a law . . . an intention to exclude all others from its operation may be inferred." BLACK'S LAW DICTIONARY 692 (4th ed. 1951).

64. Iowa courts permit introduction of good conduct, but not bad conduct. *In re Marriage of Williams*, 199 N.W.2d 339, 351 (Iowa 1971) (dissenting opinion). One Oregon court suggested that the valuable service performed by the wife in keeping and raising children should be considered. *In re Marriage of Kitson*, 17

men have dared to ask for maintenance and in the extremely rare cases in which it has been granted, the husband invariably has been incapacitated<sup>65</sup>

### E. Termination of Maintenance

Under pre-"no fault" statutes, where alimony was based on the husband's continuing duty of support, most states held that alimony automatically terminated upon the remarriage of the wife. By remarrying she acquired a new right to support.<sup>66</sup> The state of Iowa has indicated that although alimony will normally terminate upon remarriage, extraordinary circumstances may justify its continuance.<sup>67</sup> Florida courts continue to terminate alimony upon the remarriage of the supported spouse. This rule is extended even to rehabilitative alimony<sup>68</sup> and a lump sum award to be paid in installments.<sup>69</sup> Although the Florida statute contains no relevant provision, the court in *Sheffield v. Sheffield*<sup>70</sup> held that alimony did not terminate when the former wife began living with a man. This ruling was apparently based on the traditional concept of the husband's duty of support and the theory that marriage provides legal rights not found in an adulterous relationship.<sup>71</sup> The Missouri statute<sup>72</sup> provides that, unless agreed otherwise, the obligation for future maintenance payments terminates on the remarriage of the supported spouse. The statute is silent as to termination when the supported spouse enters into an adulterous relationship. Therefore, the above mentioned Florida case should be good precedent for Missouri in such a situation.

Alimony has traditionally been considered to terminate upon the death of either party.<sup>73</sup> However, in *Shepherd v. Shepherd*<sup>74</sup> the Kentucky Court of Appeals permitted a wife to recover a maintenance allowance from her husband's estate. The divorce decree, by providing that maintenance should continue until the wife's death or further orders of the court, implied that payment should continue beyond the husband's lifetime. At least in Kentucky, maintenance does not terminate as a matter

65. A prime example of the situation where courts will grant a husband alimony is *Kerr v. Kerr*, 182 Cal. App. 2d 12, 5 Cal. Rptr. 630 (1960). There, although using language suggesting a broader view, the court granted alimony to a husband who had suffered a nervous breakdown and could not work. For a case denying alimony to a husband, but where it might have been granted had the wife been seeking alimony, see *Lefler v. Lefler*, 264 So. 2d 112 (Fla. App. 1972).

66. R. LEVY, *supra* note 51, at 155.

67. *In re Woodward*, 229 N.W.2d 274, 280 (Iowa 1975).

68. Rehabilitative alimony is an award to a spouse for a limited period, during which time that spouse is to acquire or regain skills sufficient to enable him to adequately support himself. See *Lash v. Lash*, 307 So. 2d 241, 242 (Fla. App. 1975).

69. *Blackmon v. Blackmon*, 307 So. 2d 887, 888-89 (Fla. App. 1974).

70. 310 So. 2d 410, 413 (Fla. App. 1975).

71. *Id.*

72. § 452-370.2, RSMo 1973 Supp.

73. See H. CLARK, *supra* note 7, at 461-63.

74. 521 S.W.2d 74, 75-76 (Ky. App. 1975).

of law upon the death of the paying spouse. Missouri courts will probably follow *Shepherd*. In *Catron v. Catron*<sup>75</sup> the Missouri Court of Appeals, Kansas City District, approved the trial court's ruling that payments to the wife in lieu of alimony were to continue after the husband's death. The payments were required by a separation agreement which provided that they were to be made until the death or remarriage of the wife.

#### IV. IMPACT OF THE NEW STATUTE

The impact of the new Missouri maintenance provision is difficult to assess. The factors relevant to determining the appropriateness and amount of maintenance are basically the same as under the old law. However, under the new statute the court must first determine the existence of need before proceeding to considerations of duration and amount. The biggest difference between the new and old laws will probably be conceptual. Courts will think of maintenance less as compensation to a divorced spouse and more as a means of supporting one unable to provide adequately for himself. In considering a grant of maintenance, courts should not rely on the approach to women's occupational abilities taken by the United States Supreme Court in *Kahn v. Shevin*.<sup>76</sup> On the basis of elaborate statistics, the Court held that women as a class were less able to support themselves than men, and therefore, a Florida statute providing a special tax benefit for widows, but not for widowers, did not violate equal protection.<sup>77</sup> Such an approach should not be controlling in a judicial determination whether and how much maintenance should be awarded. The courts should look objectively to the facts of each individual case and should not rely solely on any generalized presumptions as to women's abilities to support themselves. The fundamental consideration should be whether the particular requesting spouse has the ability to be self-supporting, or to acquire the skills necessary to become such.

The most significant impact of the new maintenance provision will be in the consideration of conduct. Under the prior law, one spouse could use the other's fault as an economic bludgeon. By threatening to pursue an extortionate award of maintenance under the old law, a wife was often able to coerce the husband into acceding to her demands for custody and other matters. The courts will probably recognize that by specifically listing the conduct of the requesting spouse, the legislature intended conduct of the supporting spouse to be excluded, and therefore will not permit conduct of the supporting spouse to be considered. The most common use of conduct will be to deny maintenance to a spouse whose actions are so reprehensible that an award of maintenance would be inequitable.

As judicial experience under the new law accumulates, the courts will be more likely to award temporary rehabilitative maintenance than permanent maintenance. This inclination will continue so long as the number

75. 492 S.W.2d 172, 177-78 (Mo. App., D.K.C. 1973).

76. 416 U.S. 351 (1974).

of women in the job market continues to increase, particularly if and when women's earning power approaches that of men. The courts are free to award maintenance for a limited time, because the statute authorizes orders in such amounts and for such periods of time as the court deems just.<sup>78</sup> However, awards for a limited period should be based upon a reasonable expectation that some impending change in the financial positions of the parties will occur. Awards should not be based on "speculation as to the future condition of the parties."<sup>79</sup>

#### V. CONCLUSION

Although the new Missouri maintenance provision was designed to treat male and female spouses equally and to award maintenance in each case based solely upon the needs of the particular spouses involved, it is unlikely to have such a sweeping initial effect. Old ideas and prejudices die slowly. It will probably be many years before courts completely abandon the notion that the husband is to be the provider and that the wife should be entitled to his support as a matter of course. However, with the passing of time, courts will gradually reach the point desired by the drafters of the new statutes. Just how long this process will take remains to be seen.

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78. § 452.335.2, RSMo 1973 Supp.

79. *In re Marriage of Powers*, 527 S.W.2d 949, 965 (Mo. App., D. St. L. 1975).  
<http://scholarship.law.missouri.edu/mlr/vol41/iss4/5>