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Alimony for Men -- The Changing Law

Pamela Joy Smith

NOTE

ALIMONY FOR MEN—THE CHANGING LAW

PAMELA JOY SMITH

I. INTRODUCTION

In most areas of the United States, until recently, it has been the general practice to grant alimony to a wife obtaining a divorce or separation.[1] The practice of granting alimony to the wife and not to the husband arose out of the common law duty of the husband to support his wife.[2] "Alimony," defined as the support flowing from husband to wife, is a derivation of "alimonia," a Latin word meaning sustenance and support.[3] Although the word "alimony" literally includes only support for the wife, in practice it usually also includes child support.[4]

Prior to 1857, the English ecclesiastical courts only granted divorces which authorized a couple to live separately although they were still bound in marriage. The wife was dependent upon her husband for support because the law gave him control over her property and because there were few, if any, job opportunities for married women.[5] Since a husband had the ability to be self-supporting, and since a wife was dependent upon her husband for support, it followed that in the event of a divorce there was no basis to grant an award of alimony to the husband.

Despite the fact that in America courts have always granted divorces that completely dissolve the marital bonds, the English practice of granting alimony has been followed here since colonial times. Even with the advent of the married women's property acts and other "equal rights" laws, courts generally have refused to impose a duty of support on the wife when there is no statutory basis for the duty.[6] American courts have justified the granting of alimony as either a method of penalizing the guilty husband or a means of preventing the wife from becoming a charge of the state. It is also seen as a means of easing the wife's transition from married to single status.[7]

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1. *See* P. CALLAHAN, THE LAW OF SEPARATION AND DIVORCE 91 (1967).
2. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 448 (1968).
3. *See* P. CALLAHAN, *supra* note 1, at 91.
4. *See id.* at 92. There is a tax advantage for the paying spouse to break family support into child support and alimony in that the latter is tax deductible. *See* I.R.C. § 215(a).
5. *See* H. CLARK, *supra* note 2, at 420.
6. II C. VERNIER, AMERICAN FAMILY LAWS 304 (1971).
7. *See* H. CLARK, *supra* note 2, at 421-22, 442.

Courts give paramount consideration to need and fairness when granting alimony. The need for alimony may be due to one or more causes: (1) the restricted earning potential of the spouse who must provide daily child care services for the children in his or her custody; (2) one spouse's limited freedom in the role model of homemaker during the marriage which has prevented him or her from procuring assets or strengthening wage earning capacity; (3) any physical or emotional disabilities that either spouse may have.[8] The consideration of fairness involves moral judgments about the parties, such as what each contributed in terms of behavior and opportunity or role during the marriage.[9]

In the past, many states used the husband's means and earning ability as the yardstick to determine the amount of alimony, regardless of the wife's independent financial situation.[10] However, in recent years the courts have taken a more realistic view when awarding alimony to a woman by considering the monies and capital available to the wife from sources other than her husband.[11] With the growing awareness of equal rights and the changing social attitudes, alimony is currently undergoing a rapid transition. The United States Supreme Court's decision in *Orr v. Orr*[12] clearly reflects this atmosphere of change.

A final divorce decree dissolving the marriage of William and Lillian Orr was entered on February 26, 1974, directing Mr. Orr to pay Mrs. Orr alimony of $1,240 per month.[13] Two years later, Mrs. Orr initiated a contempt proceeding, alleging that Mr. Orr was in arrears in his alimony payments. Mr. Orr challenged the Alabama alimony statutes which provide the courts the authority to award alimony to wives without providing for a corresponding authority to award alimony to husbands.[14]

The trial court denied Mr. Orr's motion challenging the constitutionality of Alabama's alimony statutes, and Mr. Orr appealed. The Court of Civil Appeals held that Alabama's alimony statutes were

8. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSE, SEX DISCRIMINATION AND THE LAW, CAUSES AND REMEDIES 694 (1975).

9. *Id.* at 695. Babcock emphasizes that American courts look to which spouse is at fault in causing the divorce. For example, most courts will deal harshly with a male adulterer by requiring him to pay alimony to his ex-wife. The courts seek to discourage such conduct and thereby try to enforce the strength of the institution of marriage. However, the courts base most awards of alimony on need and on the other spouse's ability to pay.

10. *See* P. CALLAHAN, *supra* note 1, at 93.

11. *See* H. CLARK, *supra* note 2, at 444.

12. 99 S. Ct. 1102 (1979).

13. 351 So. 2d 904, 906-07 (Ala. Civ. App.), *cert. quashed as improvidently granted*, 351 So. 2d 906 (Ala. 1977), *prob. juris. noted*, 436 U.S. 924 (1978), *rev'd*, 99 S. Ct. 1102 (1979).

14. 351 So. 2d at 904.

not unconstitutional.[15] Relying on *Kahn v. Shevin,*[16] and endorsing a similar statutory disposition in the Georgia Supreme Court's *Murphy v. Murphy,*[17] the Alabama Court of Civil Appeals noted that "[i]t is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed."[18] The Supreme Court of Alabama quashed Mr. Orr's petition for writ of certiorari.[19]

The United States Supreme Court noted probable jurisdiction[20] and addressed three preliminary questions of a jurisdictional nature which had not been previously raised. The Supreme Court found that Mr. Orr had standing and that his challenge was not untimely. Further, since the Alabama courts had not based their decisions on the fact that Mr. Orr's alimony obligation was part of a stipulation agreement between the parties, there were no independent and adequate state grounds which could prevent the Supreme Court from having the power to entertain the constitutional question presented.[21]

The Court held that the authorization to impose alimony obligations on husbands, but not on wives, violates the equal protection clause of the fourteenth amendment. The Court reached its determination by reasoning that the classification by gender did not serve any important governmental objectives and that the classification was not substantially related to the achievement of those objectives.[22] The three possible governmental objectives that the statute might have served were: (1) the announcement of Alabama's preference that the wife play a dependent role in the family; (2) the use of sex roles in determining the spouse's need; and (3) the compensation of women for the discrimination during their marriage which supposedly left them financially dependent on their husbands. The Court considered each objective individually and determined that

15. *Id.* at 905.

16. 416 U.S. 351 (1974). In *Kahn,* the Court held that a state tax law which granted widows but not widowers an annual $500 property tax exemption "[was] not arbitrary although it 'discriminate[s] in favor of a certain class . . . [because] the discrimination is founded upon a reasonable distinction, or difference in the state policy.' " *Id.* at 355 (quoting Allied Stores v. Bowers, 358 U.S. 522, 528 (1959)).

17. 206 S.E.2d 458 (Ga. 1974), *cert. denied,* 421 U.S. 929 (1975). In *Murphy,* the Georgia Supreme Court held that a Georgia divorce statute similar to the Alabama divorce statute in *Orr* did not violate the fifth or fourteenth amendments of the United States Constitution or the relevant state constitutional provisions. *Id.* at 460.

18. 351 So. 2d at 905.

19. *Id.* at 906.

20. 436 U.S. 924 (1978), *rev'd,* 99 S. Ct. 1102 (1979).

21. 99 S. Ct. at 1107-11 (1979).

22. *Id.* at 1111-14.

all three were without merit.[23]

Relying on *Stanton v. Stanton*,[24] the Court noted that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[25] Therefore, the governmental objective of allocating the family responsibilities, under which the wife plays a dependent role, could not sustain the statute. The Court decided that "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women,"[26] these factors did not justify the features of Alabama's statutory scheme because the Alabama statutes provide for hearings to consider a party's financial condition before an award of alimony is made.[27]

The Court further held that the gender classification of the statute produced perverse results. Instead of granting alimony only to the needy spouse, as would a gender neutral law, the Alabama scheme would permit a financially independent wife to receive alimony from the husband who may not be as financially well off as she. The Court reasoned that the stereotypical role of women as being dependent on men is perpetuated by legislative classifications such as the Alabama alimony statute. Such legislative classifications produce results which are antithetical to the results which the equal protection clause seeks to create, and thus must be held unconstitutional.[28]

Although the Supreme Court held that the Alabama alimony statutes were unconstitutional, the Alabama court on remand could determine whether Mr. Orr must continue to pay alimony to Mrs. Orr on some other grounds.[29] To provide a better understanding of the significance of *Orr* this note will first examine some of the historical case law dealing with the allocation of alimony, and then some of the most recent United States Supreme Court decisions dealing with gender-based classifications. Finally, it will refocus on the alimony issue through a discussion of relevant Florida law.

II. A HISTORICAL PERSPECTIVE OF AMERICAN CASE LAW DEALING WITH ALIMONY ALLOCATION

Historically, in the absence of statutory authority, a husband

23. *Id.*
24. 421 U.S. 7 (1975).
25. 99 S. Ct. at 1112 (quoting 421 U.S. at 14-15).
26. *Id.* at 1112-13.
27. *Id.* at 1113.
28. *Id.*
29. *Id.* at 1114.

could not be awarded permanent alimony from his wife.[30] The courts usually rationalized this by recognizing the common law notion that it was a husband's obligation and duty to support his wife.[31] However, some states deviated from this practice, explicitly providing by statute for alimony awards to husbands.[32] The general principles which governed the determination of whether the wife was entitled to alimony in a divorce case were also applied in determining whether the husband would be granted an award from the wife's estate in the form of alimony.[33] Furthermore, some courts concluded that their legislatures intended to make alimony statutes equally applicable to both parties, especially where all the property was in the wife's name.[34]

In the absence of statutes which provided alimony for husbands, many courts were reluctant to award husbands alimony because courts did not want to substitute their social and economic beliefs for the judgment of legislative bodies.[35] Yet, the Pennsylvania courts did not hesitate to substitute their social and economic beliefs for the judgment of their legislative body. Although the Pennsylvania Legislature had passed an Equal Rights Amendment to its state constitution, the divorce statute which provided alimony only for women was not changed. Thus, the Pennsylvania Supreme Court held the divorce statute to be unconstitutional in that it violated the very premise upon which the Equal Rights Amendment rests.[36]

One New York court has held that New York's alimony statute, providing alimony for women but not for men, is unconstitutional

30. *E.g.*, Davies v. Davies, 113 So. 2d 250 (Fla. 3d Dist. Ct. App. 1959) (husband denied alimony because of lack of statutory authority, even though his wife had caused him such physical harm during their marriage that he was no longer able to earn a living); Laweing v. Laweing, 21 S.W.2d 2 (Mo. Ct. App. 1929) (husband had no right to alimony). *See generally* Annot., 66 A.L.R. 2d 880 (1959).

31. *E.g.*, Wetmore v. Markoe, 196 U.S. 68 (1904) (arrears of alimony not discharged in bankruptcy proceeding because law imposes a duty on a husband to support his wife and children). *See generally* 24 AM. JUR. 2d *Divorce & Separation* § 524 (1966).

32. *E.g.*, McLean v. McLean, 290 N.W. 913 (N.D. 1940) (wife has duty to support her husband when he is unable to care for himself and the wife has the financial ability to do so); Sharkey v. Sharkey, 137 N.E.2d 575 (Ohio Ct. App. 1955) (alimony award to husband upheld where the wife had neglected her husband and had been cruel to him). *See generally* 24 AM. JUR. 2d *Divorce & Separation* § 527 n.17 (1966).

33. Topor v. Topor, 192 N.E. 52 (Mass. 1934) (wife was ordered to convey her interest in two parcels of land to her husband where the court considered needs and abilities of the parties).

34. *E.g.*, Barnett v. Barnett, 13 P.2d 104 (Okla. 1932) (granting husband a reasonable portion of wife's separate property upon divorce, to provide a means of support for him and their minor children).

35. *E.g.*, Murphy v. Murphy, 206 S.E.2d 458 (Ga. 1974) (holding that Georgia statute allowing only wife alimony was constitutional, and that any change must come from the state legislature, not the courts).

36. Henderson v. Henderson, 327 A.2d 60 (Pa. 1974).

because there is no rational basis for the distinction and because no compelling state interest requires that men categorically be denied alimony.[37] The New York court reasoned that in order to sustain a rational basis, a legislature could not make categorical assumptions in a statute which would indicate arbitrary value judgments of male-female roles.[38] Additionally, this court reasoned that through the use of statutory distinctions based on sex, economic discrimination between men and women may actually increase.[39]

As a result of changing social attitudes concerning equality of the sexes, conflicting views appeared in cases dealing with alimony. Thus, the Supreme Court in *Orr* found it necessary to address the issue of alimony and the equality of the sexes. However, this issue could only be resolved after the Court arrived at an equal protection analysis for gender-based classifications.

III. THE SUPREME COURT'S TREATMENT OF EQUAL PROTECTION CHALLENGES TO GENDER-BASED CLASSIFICATIONS IN THE 1970's

Gender-based classifications have been constitutionally challenged in the United States Supreme Court for over a century. Prior to 1971, the Court consistently found that there was no denial of equal protection where a statute set forth gender-based classifications. During the 1970's, although some gender-based classifications were upheld, others were invalidated by the Court.[40] Because the Court has failed to adopt a single equal protection analysis for all constitutional challenges to gender-based classifications, *Orr* is a significant decision. It is essential to analyze some of the recent United States Supreme Court decisions dealing with equal protection and gender-based classifications to better understand the Court's rationale in *Orr* and its intended scope.

Reed v. Reed[41] was the first case in which the Court found state

37. Thaler v. Thaler, 391 N.Y.S.2d 331, 335 (N.Y. Sup. Ct.), *rev'd on other grounds*, 396 N.Y.S.2d 815 (App. Div. 1977) (holding that alimony should not have been granted to the husband in this case and declining to discuss the constitutionality of New York's divorce statute); *cf.* Stern v. Stern, 332 A.2d 78, 83 (Conn. 1973) (holding that the Connecticut statute allowing alimony only for women does not violate the equal protection clause, as the husband failed to prove that the statute was unreasonable or arbitrary).

38. Thaler v. Thaler, 391 N.Y.S.2d 331, 337 (N.Y. Sup. Ct.), *rev'd on other grounds*, 396 N.Y.S.2d 815 (App. Div. 1977).

39. 391 N.Y.S.2d at 339.

40. Gender-based classifications were upheld in Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). Gender-based classifications were invalidated in Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

41. 404 U.S. 71 (1971).

law using gender-based classifications to be violative of the fourteenth amendment's equal protection clause. In *Reed*, the Court analyzed a mandatory provision of the Idaho Probate Code giving preference to men over similarly situated women for appointment as administrator of a decedent's estate. Administrative convenience for the probate courts was the only state interest put forth in support of the provision. The Court noted that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[42] Further, the Court observed that by giving a mandatory preference to members of one sex over the other, just to avoid a hearing on the merits, the legislature was using an arbitrary choice that was forbidden by the equal protection clause of the fourteenth amendment.[43]

Two years later the Court decided *Frontiero v. Richardson*,[44] involving a statutory scheme which provided that wives of uniformed servicemen were presumed dependents, for purposes of servicemen obtaining increased benefits and allowances. To become eligible for the same benefits and allowances, a uniformed servicewoman had to prove that her husband was dependent on her. The Court held that such a distinction based solely on administrative convenience could not be upheld because it violated the due process clause of the fifth amendment.[45] Although *Frontiero* appeared to bring gender-based classifications under the compelling interest test of equal protection, *Frontiero* had a limited effect because a plurality of the Court declined to characterize sex as a suspect class.[46]

After *Frontiero*, the United States Supreme Court, in *Kahn v. Shevin*[47] upheld a Florida statute granting an annual $500 property tax exemption to widows, but not to widowers. The Court found the classification "widow" valid because it furthered the legitimate state purpose "of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[48] In analyzing this gender-based statutory scheme, the *Kahn* Court did not find itself bound by *Frontiero's* use of the compelling interest test. Rather, it became apparent that gender-based

42. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
43. 404 U.S. at 76.
44. 411 U.S. 677 (1973).
45. *Id.* at 690-91.
46. The plurality consisted of Justice Powell, Chief Justice Burger, and Justice Blackmun. *See* 411 U.S. at 691.
47. 416 U.S. 351 (1974).
48. *Id.* at 355.

classifications created for a remedial effect would be subject to less stringent scrutiny than other gender-based classifications.[49]

The United States Supreme Court applied a minimal scrutiny test similar to that used in *Kahn* in *Schlesinger v. Ballard.*[50] The *Ballard* Court upheld the different statutory classification and treatment for promotions of male and female naval officers because restrictions imposed on women's participation in combat and sea duties did not afford them the same opportunities for career advancement as the male line officers. The Court distinguished *Ballard* from *Frontiero* and *Reed* in that the schemes in *Frontiero* and *Reed* were based solely upon administrative convenience.[51] Further, in both *Reed* and *Frontiero,* the challenged sex classifications were premised on stereotypical generalizations. In *Reed,* the underlying assumption of the statutory scheme was that men made better estate administrators than similarly situated women. In *Frontiero,* the underlying assumption of the statutory scheme was that females are normally dependent upon their husbands. In *Ballard,* however, the female and male officers were not similarly situated because female officers were restricted from participating in combat and sea duty, while male officers were not so restricted. Further, the statutory scheme in *Ballard* provided for promotions which served the Navy's needs.[52]

After *Ballard,* the United States Supreme Court indicated that it would look to the statute's objectives in determining whether its gender distinctions violated equal protection in *Weinberger v. Wiesenfeld.*[53] The Court invalidated a provision of the Social Security Act which granted benefits to the widow and the couple's children based on the earnings of their deceased husband and father but did not provide for similar benefits being granted to a widower. The Court reasoned that such a provision was based on the assumption that a male worker's earnings constitute a more significant contribution to a family's support than do a female worker's earnings.[54] Since the purpose was not premised upon any special disadvantage peculiar to women, it could not justify a gender-based distinction.[55]

Similarly, in *Stanton v. Stanton,*[56] the United States Supreme

49. *See generally* Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding California's disability insurance statute that excluded expenses for normal pregnancy and childbirth).

50. 419 U.S. 498 (1975).

51. *Id.* at 505-08.

52. *Id.* at 506-08.

53. 420 U.S. 636 (1975).

54. *Id.* at 643.

55. *Id.* at 648.

56. 421 U.S. 7 (1975). (The appellee in *Stanton* had been ordered to make monthly support payments for his children. When the appellee's daughter obtained the age of eight-

Court invalidated a state statute which set the age of majority at twenty-one for males and at eighteen for females. The Court held that this statutory provision in the context of child support violated the equal protection clause of the fourteenth amendment because there was no rational basis for the sex-based age classification.

The United States Supreme Court finally succeeded in defining an appropriate standard to determine whether a gender classification statute would be upheld in *Craig v. Boren*.[57] The standard, the so-called "substantial relationship test," announced in *Craig* requires that a gender-based classification serve important governmental objectives and be substantially related to the achievement of those objectives in order to pass constitutional scrutiny.[58] The Court applied this standard in holding unconstitutional an Oklahoma statute which prohibited the sale of alcohol to males under the age of twenty-one and to females under the age of eighteen.

In two subsequent cases dealing with gender-based classifications, *Califano v. Goldfarb*,[59] and *Califano v. Webster*,[60] the United States Supreme Court utilized the *Craig* standard. The Court in *Goldfarb* held unconstitutional a gender-based distinction between widows and widowers for survivors' benefits under the Social Security Act. Under the Act, a widower received benefits only if he had received at least half of his support from his wife, whereas the widow received benefits regardless of her degree of dependency on her husband. In contrast, the Court in *Webster* upheld the sex distinction used in section 215 of the Social Security Act[61] to compute old age benefits, which resulted in slightly higher benefits for a retired female wage earner than for a similarly situated retired male wage earner. The Court reasoned that the statutory scheme in *Webster* was not violative of the due process clause because it served the important governmental objective of reducing economic disparities between men and women caused by sex-based discrimination.[62]

The *Orr* Court utilized the "substantially related" test set forth in *Webster* and *Craig* to invalidate the Alabama statutory scheme. It is interesting to observe that the Court could have followed *Kahn* and held that the reason for granting alimony to women and not men could help cure the disparity between the economic capabili-

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een, appellee discontinued the support payments.)

57. 429 U.S. 190 (1976).

58. *Id.*

59. 430 U.S. 199 (1977).

60. 430 U.S. 313 (1977).

61. Act of Aug. 28, 1950, Pub. L. No. 734, 64 Stat. 506 (1950) (current version at 42 U.S.C. § 415 (1970)).

62. 430 U.S. at 320.

ties of a man and a woman.[63] In addition, the *Orr* Court could have made a pertinent analogy to *Kahn:* the plight of a divorcee may be similar to that of a widow in that a wife who is dependent on her husband's support is thrown into the same job market regardless of whether the woman is a widow or divorcee. As a result of *Orr,* a more definitive test can now be utilized by the Court in determining the constitutionality of a gender-based statute.

IV. FLORIDA CASE LAW PERTAINING TO ALIMONY

Florida case law pertaining to alimony developed in harmony with the case law in other jurisdictions.[64] In Florida, alimony was also considered a common law obligation of a husband to support his wife.[65] When determining what alimony was to be awarded to the wife, Florida courts generally looked at the wife's needs and the husband's ability to pay.[66]

In 1971, Florida adopted no-fault divorce which provided for a means of dissolution of marriage without either party having to allege or prove fault on the part of the other.[67] More importantly, for the first time, a husband was furnished with a statutory basis which enabled him to seek and obtain an alimony award from his wife.[68] Regardless which spouse is granted alimony, the basic nature and purpose of the award remains the same.[69] Thus, as a result of the no-fault divorce and the statutory basis for an alimony award to either spouse, both parties to the marriage share equal rights and obligations in the marriage relationship as well as the burdens in the event of a dissolution.[70]

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63. Economic capabilities include a spouse's earning capacity as well as any capital he or she may have as a result of a gift or inheritance.

64. *See* Gill v. Gill, 145 So. 758 (Fla. 1933) (the court reasoned that a husband will be required to support his wife if, during their marriage, he has impaired her ability to earn a living); Thompson v. Thompson, 98 So. 589 (Fla. 1923) (the court noted that under the then current Florida statutes, the wife could get maintenance from her husband only if the live-apart arrangement is not her fault); Phinney v. Phinney, 82 So. 357 (Fla. 1919) (under the then current Florida statutes the wife could not be awarded permanent alimony when the husband brought suit for divorce and when the divorce was granted due to the fault of the wife).

65. Jacobs v. Jacobs, 50 So. 2d 169, 173 (Fla. 1951).

66. *See generally* Jacobs v. Jacobs, 50 So. 2d 169 (Fla. 1951); Chaires v. Chaires, 10 Fla. 308 (Fla. 1864); Pfohl v. Pfohl, 345 So. 2d 371 (Fla. 3d Dist. Ct. App. 1977).

67. Ch. 71-241, 1971 Fla. Laws 1319 (current version at FLA. STAT. ch. 61 (Supp. 1978)).

68. FLA. STAT. § 61.08 (Supp. 1978); *see* Lefler v. Lefler, 264 So. 2d 112 (Fla. 4th Dist. Ct. App. 1972).

69. *See, e.g.,* Ross v. Ross, 341 So. 2d 833 (Fla. 3d Dist. Ct. App.), *cert. denied,* 354 So. 2d 984 (1977) (alimony is for the support of a former marriage partner); Dash v. Dash, 284 So. 2d 407 (Fla. 3d Dist. Ct. App. 1973) (alimony provides nourishment and the necessities of life to a former spouse).

70. Thigpen v. Thigpen, 277 So. 2d 583, 585 (Fla. 1st Dist. Ct. App. 1973).

Today, Florida is one of thirty-four states which makes the right to alimony or separate maintenance explicitly sex neutral.[71] Section 61.08, Florida Statutes, provides: "(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party . . . ."[72] Until this statute was amended in 1978, the statute did not provide any particular guidelines or criteria for determining a proper award of alimony. Therefore, many courts considered such diverse factors as: the length of the marriage; the number of children; the relative health and physical condition of the parties; the extent of the wife's contribution to her husband's career; the conduct or misconduct of the parties during their marriage; and finally any change in either spouse's financial condition.[73]

The Florida Legislature amended section 61.08 of the Florida Statutes in 1978 to include certain guidelines which the courts could utilize in determining an award of alimony.[74] In addition to considering any factor necessary to render justice between the parties, Florida courts can consider the standard of living established during the marriage, the length of the marriage, the age and condition of both parties, each party's financial resources, the necessary time required for either party to obtain education or training for employment purposes, and each party's contribution to the marriage.[75]

Although Florida's alimony statute is sex neutral, the courts continue to evaluate the husband's ability to pay and the wife's needs to determine how much, if any, alimony should be awarded.[76] There are only three reported cases since 1970 in which the Florida courts have awarded alimony to the husband.[77] Temporary relief was

71. 4 FAM. L. REP. (BNA) 3001 (Nov. 1, 1977).

72. (Supp. 1978).

73. *E.g.*, McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th Dist. Ct. App. 1977); Gordon v. Gordon, 335 So. 2d 321 (Fla. 4th Dist. Ct. App. 1976).

When the wife is seeking alimony, the courts not only determine the husband's ability to pay by his income but they also consider the husband's capital assets and the standard of living shared by the parties. Sisson v. Sisson, 336 So. 2d 1129 (Fla. 1976) (where the court, quoting Firestone v. Firestone, 263 So. 2d 223 (Fla. 1972), stated that consideration should also be given to the husband's capital assets); Kast v. Kast, 351 So. 2d 1060 (Fla. 4th Dist. Ct. App. 1977) (where the court in considering the husband's ability to pay and the needs of the wife also looked at the wife's standard of living during the marriage); Hausman v. Hausman, 330 So. 2d 833 (Fla. 3d Dist. Ct. App. 1976).

74. Ch. 78-339, 1978 Fla. Laws 944 (codified at FLA. STAT. § 61.08 (Supp. 1978)).

75. FLA. STAT. § 61.08 (Supp. 1978).

76. Many courts still consider that if the husband has the ability, he should provide his divorced wife with her needs. *See, e.g.*, George v. George, 360 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1977); Storer v. Storer, 353 So. 2d 152 (Fla. 3d Dist. Ct. App. 1977); Kast v. Kast, 351 So. 2d 1060, 1061 (Fla. 4th Dist. Ct. App. 1977); Caracristi v. Caracristi, 324 So. 2d 634 (Fla. 2d Dist. Ct. App. 1976).

77. Pfohl v. Pfohl, 345 So. 2d 371 (Fla. 3d Dist. Ct. App. 1977); Wynne v. Wynne, 342 So. 2d 556 (Fla. 3d Dist. Ct. App. 1977); Yohem v. Yohem, 295 So. 2d 656 (Fla. 4th Dist. Ct. App. 1974). Two additional cases granting alimony to the husband which were reversed in

awarded to the husband in *Yohem v. Yohem,*[78] where the district court noted that under the new dissolution of marriage law, either spouse has an equal right to seek alimony or support. In *Yohem,* the husband was granted $17,000 from the wife's savings account because the wife was in a better financial condition to pay than was the husband.

Permanent alimony was awarded to the husband in *Wynne v. Wynne.*[79] The district court held that such an award was not an abuse of discretion. A lump-sum alimony award and a rehabilitative alimony award to the husband was upheld in *Pfohl v. Pfohl.*[80] The *Pfohl* court noted that during the majority of the Pfohl's nine-year marriage, Mrs. Pfohl had been the sole supporter of her husband and family. Further, it was at Mrs. Pfohl's insistence that her husband had terminated his employment, after a year and one-half of marriage, so that he could devote more time and attention to his family.[81] The court observed that the question of alimony usually arises in a nontraditional type marriage, where the wife is the sole supporter of the family. Therefore, the *Pfohl* court considered the high standard of living to which the husband had become accustomed as well as the husband's need for alimony coupled with the apparent ability of the wife to so provide.[82]

Although the Florida statute allowing either spouse to be granted alimony is a radical departure from the common law obligation of the husband to support his wife, the Florida alimony statute is in harmony with the changing views of our society and of the law. Thus, the Florida courts are now striving to enforce sexual equality of the spouses in marriage and its subsequent dissolution. Unless a spouse lacks the capacity to be self-supporting, Florida courts are hesitant to award that spouse alimony.[83]

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district courts of appeal are Palmer v. Palmer, 330 So. 2d 839 (Fla. 2d Dist. Ct. App. 1976); and Lefler v. Lefler, 264 So. 2d 112 (Fla. 4th Dist. Ct. App. 1972). *Palmer* recognizes that alimony cannot be granted to both spouses. *Lefler* recognizes that the purpose of alimony remains the same regardless which spouse is granted alimony.

78. 295 So. 2d 656 (Fla. 4th Dist. Ct. App. 1974).

79. 342 So. 2d 556 (Fla. 3d Dist. Ct. App. 1977).

80. 345 So. 2d 371 (Fla. 3d Dist. Ct. App. 1977). Lump sum alimony is a payment of a definite sum and is usually in the nature of a property settlement. Rehabilitative alimony is a payment which enables a spouse to seek education or training so that that particular spouse can become self-supporting. *Id.* at 378.

81. 345 So. 2d at 377.

82. *Id.* at 376.

83. *See generally* George v. George, 360 So. 2d 1107, 1109 (Fla. 3d Dist. Ct. App. 1978) (where both the husband and wife earned approximately the same annual salary the court considered the present needs of the wife and the ability of the husband to meet those needs and determined that the evidence did not support the wife's present need for the amount of alimony allowed); Spotts v. Spotts, 355 So. 2d 228, 229-30 (Fla. 1st Dist. Ct. App. 1978)

V. CONCLUSION

As of 1977, thirty-four states had provisions which enabled either spouse the right to be granted alimony awards. In contrast, fifteen other states had provisions which enabled only the wife the right to receive alimony.[84] As a result of the recent Supreme Court opinion rendered in *Orr*, it is anticipated that these states will invalidate their alimony statutes and provide that either spouse may be awarded alimony. These states will no longer be able to sustain statutes which grant only women alimony on the ground that it is the state's preference for wives to be dependent on their husbands in the allocation of family responsibilities. Furthermore, a state will not be able to claim that it is assisting needy spouses by using sex as a proxy for need, nor can it justify the statute on the ground that it removes the economic disparity between men and women.[85]

Another alternative that these fifteen states may consider is deleting awards of alimony altogether. Yet, this alternative is not likely to be chosen. Alimony usually includes payment of support to the custodial parent who has the child-bearing responsibilities and is unable to realize a full earning capacity. In addition, the paying spouse receives a tax advantage in that alimony is a tax deduction.[86]

The concept of alimony has drastically changed from the historical view that alimony was the common law obligation of the husband to support his wife. Until recent years, a divorced wife had little prospect of working to support herself. However, with the advent of equal opportunities, many women have been able to acquire higher paying jobs or advanced educational opportunities. As these opportunities for women near a level of equality with their male counterparts, women will have the ability to be self-supporting. To this extent there is less need for wives to receive alimony payments from their husbands. In addition, as a result of *Orr*, we will see a balance struck between cases where the obligor is a wife and in cases where the obligor is a husband.

Although courts and legislatures have been slow to respond to changing social attitudes, the law is now taking a more realistic view

(court considered present financial condition of both parties in determining that the lower court had abused its discretion by awarding the wife an unusually high amount in lump-sum alimony); Bateman v. Bateman, 301 So. 2d 472 (Fla. 1st Dist. Ct. App. 1974) (in light of the wife's health and earning capacity, it was not error for the trial court to deny the wife permanent alimony).

84. 4 FAM. L. REP. (BNA) 3001 (Nov. 1, 1977).

85. 99 S. Ct. at 1102 (1979).

86. I.R.C. § 215(a). The importance of this tax deduction depends on the tax bracket of the paying spouse, as well as the amount of the alimony.

in considering that women and men are equal partners in the marriage and in the event of dissolution, both should share the responsibilities and the burdens. *Orr*, as well as the changing social attitudes of our country, provide an environment conducive to a revolution in and a readjustment of our alimony and divorce laws.