Case Comment

Separation Agreements and the Modification of Alimony Awards in Ohio: *Wolfe v. Wolfe*

I. INTRODUCTION

Until recently, when an Ohio court granted an alimony award for support by incorporating a prior separation agreement, the award was generally not subject to subsequent judicial modification.[1] This rule deprived Ohio courts of jurisdiction to deal with financial inequities arising after the time of the divorce decree as a result of changed circumstances.

In *Wolfe v. Wolfe*[2] the Ohio Supreme Court altered the existing Ohio rule barring modification of alimony payments that are based on prior agreements, by adopting the rule followed by a majority of states.[3] That rule allows modification of alimony awards incorporating separation agreements, but only to the extent that such awards represent support payments. In *Wolfe* the Ohio Supreme Court held that Ohio trial courts retain jurisdiction to modify alimony awards for support on a showing of changed circumstances, but that alimony awards representing property settlements are not subject to modification.

This Case Comment will discuss the law in Ohio prior to the *Wolfe* decision and the rationale of the Supreme Court of Ohio for discarding that prior law in *Wolfe*.[4] In addition, it will discuss some

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1. Mozden v. Mozden, 162 Ohio St. 169, 122 N.E.2d 295 (1954); Newman v. Newman, 161 Ohio St. 247, 118 N.E.2d 649 (1954); Law v. Law, 64 Ohio St. 369, 60 N.E. 560 (1901). For a discussion of the exceptions to the general rule, see section II.B. *infra.*

2. 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976).

3. Only a few states follow the approach of barring modification of alimony awards based on separation agreements. Seaton v. Seaton, 221 Ark. 778, 255 S.W.2d 954 (1953) (modifiability depends on the formality of the contract); Beebe v. Beebe, 526 P.2d 1348 (Colo. Ct. App. 1974); Rush v. Rush, 82 Nev. 59, 410 P.2d 757 (1966); Stanfield v. Stanfield, 22 Okla. 1574, 98 P. 334 (1908). Two states have construed statutes to bar modification of such awards. Cheek v. Kelly, 212 Kan. 820, 512 P.2d 355 (1973); Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975). For cases illustrating the majority rule, see for example, Stevens v. Stevens, 233 Md. 279, 196 A.2d 447 (1964); Prime v. Prime, 172 Or. 34, 139 P.2d 550 (1943).

4. This Case Comment will deal only with alimony awards that accompany a decree of divorce. It will not deal with awards for alimony only. (Both provided for in OHIO REV. CODE ANN. §§ 3105.17-.18 (Page Supp. 1975)). When the award is for alimony only, "[T]he court necessarily has in view that the marital contract still exists; that the parties are still bound by all its mutual obligations; that they may become reconciled and the grounds and the desire for the allowance may be wiped out at any time. A decree in such a case is continually subject to modification, while in rendering a decree for divorce and alimony the court determines the ultimate relation of the parties and fixes the amount and the mode of payment of any money or property allowance to the wife." Gilbert v. Gilbert, 83 Ohio St. 265, 269, 94 N.E. 421, 422 (1911). An award for alimony alone may be modified not only as to future payments, but also

questions raised by the *Wolfe* decision: whether ambiguous alimony awards should be interpreted as property settlements or as payments for support; the impact of *Wolfe* on drafting separation agreements in Ohio; and whether provisions in separation agreements prohibiting subsequent modification of alimony awards will be given effect by Ohio courts.

II. PRE-*Wolfe* LAW IN OHIO

A. *The General Rule Barring Modification*

Prior to *Wolfe*, the general rule in Ohio was that an alimony award incorporating a separation agreement—whether a property division or for support—could not be judicially modified after a decree of divorce. The theoretical basis for the rule was the principle that contract rights established in a separation agreement should not be impaired.[5] Because contract rights were considered inviolable, judicial modification of an alimony award incorporating a separation agreement that would impair such rights was not permitted.

The rule barring modification had its genesis in the 1885 case of *Olney v. Watts*.[6] In *Olney* the former husband[7] sought modification of the alimony award on the ground that his ex-wife had remarried and therefore had ample means of support. The trial court sustained the wife's demurrer, but the Supreme Court of Ohio reversed and held that the husband had stated a good cause of action. The court noted that the decree awarding alimony had not incorporated a separation agreement:

> If the decree, as to the amount of alimony to be paid the defendant, was the result of an agreement of the parties, and simply confirmed by the court, and that appeared by the direct averments of the petition, we would not say that the court erred in sustaining the demurrer. But this nowhere appears by direct averment.[8]

Although this language in *Olney* was dictum, the Supreme Court

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retrospectively as to past-due payments. Pace v. Pace, 41 Ohio App. 130, 180 N.E. 81 (1931), *aff'd*, 125 Ohio St. 53, 180 N.E. 547 (1932). This Case Comment will also not treat alimony pendente lite. (Authorized by OHIO R. CIV. P. 75(N)).

5. *See* Note, *Modifiability of Alimony and Support Decrees in Ohio*, 36 U. CIN. L. REV. 487, 489 n.13 (1967); 20 OHIO ST. L.J. 694, 695 (1959). *See also* Tullis v. Tullis, 138 Ohio St. 187, 34 N.E.2d 212 (1941) (concerning modification of child support provisions of a separation agreement incorporated into the decree).

6. 43 Ohio St. 499, 3 N.E. 354 (1885).

7. Under Ohio law, the court may grant alimony to either party. OHIO REV. CODE ANN. §§ 3105.17-.18 (Page Supp. 1976) ("Either party to the marriage may file a complaint for divorce or for alimony . . . ."). But in the majority of cases, and in all the cases cited in this Case Comment, the wife is the party to whom the alimony is awarded. For purposes of hypothetical discussions in this Case Comment, it will be assumed that the court has granted the alimony award to the wife.

8. 43 Ohio St. at 507, 3 N.E. at 355.

of Ohio subsequently adopted it in *Law v. Law*.[9] In *Law* the trial court granted a reduction in alimony payments because of circumstances arising after the entry of the divorce and alimony decree. The Ohio Supreme Court reversed, distinguishing *Olney* on the ground that in *Law*, unlike *Olney*, the terms of the alimony decree had been agreed to by the parties in a prior separation agreement. The Supreme Court held that in such a case the terms of alimony were not subject to modification by the trial court upon the petition of one party.

In *Newman v. Newman*[10] the Ohio Supreme Court reaffirmed its decision in *Law* holding that alimony decrees incorporating prior written separation agreements were not subject to modification. This rule was extended in *Mozden v. Mozden*[11] to bar modification of alimony decrees based on oral agreements of the parties.

Although the rule barring modification was based on the notion of the inviolability of contractual rights, the Ohio Supreme Court did not consistently treat separation agreements incorporated into divorce decrees as inviolable contracts. In *Holloway v. Holloway*,[12] for example, the court held that, for the purposes of contempt proceedings, a separation agreement was superseded by a decree of divorce and alimony. At that time, it was well settled in Ohio that failure to comply with the decree awarding alimony was punishable by contempt,[13] but contempt proceedings could not be based merely upon a contract or separation agreement providing for support payments.[14] In *Holloway*, however, the separation agreement was incorporated into the divorce and alimony decree. The court held that the alimony award could be enforced by contempt proceedings because the separation agreement had been superseded by the decree when it was incorporated into the decree.

Tullis v. Tullis[15] also illustrates the inconsistent approach taken by the Ohio Supreme Court toward separation agreements incorporated into divorce decrees. In *Tullis* the parties had entered into a separation agreement which provided for child support payments. The supreme court held that the provisions of the decree, which incorporated the separation agreement, could be modified to permit an increase in child support payments, but that the payments could not be reduced. To allow a reduction in payments, the court stated, would impair the obligations established by the contract of separation. If a reduction in child support payments would impair contract rights, one

9. 64 Ohio St. 369, 60 N.E. 560 (1901).
10. 161 Ohio St. 247, 118 N.E.2d 649 (1954).
11. 162 Ohio St. 169, 122 N.E.2d 295 (1954).
12. 130 Ohio St. 214, 198 N.E. 579 (1935).
13. *E.g.*, State *ex rel.* Cook v. Cook, 66 Ohio St. 566, 64 N.E. 567 (1902).
14. *E.g.*, Ackerson v. Ackerson, 24 Ohio L. Abs. 684 (Ct. App. 1937).
15. 138 Ohio St. 187, 34 N.E.2d 212 (1941).

might question why an increase in payments would not also impair those rights.[16] The refusal to decrease child support payments, however, was justified on the basis of a public policy of protecting children.[17] Nevertheless, *Tullis* demonstrates that the court has not always treated contract rights as inviolable.

These inconsistencies notwithstanding, the rule barring modification of alimony awards incorporating separation agreements was generally premised on the notion that contractual rights could not be violated, and thus it applied to both support payments and property settlements. For the purpose of the rule's applicability, the characterization of the alimony award was irrelevant, since contractual support rights logically were on a par with contractual rights in a property division. The fact that parties did not always distinguish between support payments and property settlements[18] thus presented no problem, since the rule was uniformly applied to both types of alimony awards.

B. *Pre*-Wolfe *Exceptions to the General Rule*

Because of the hardship sometimes occasioned by the rule barring modification, three exceptions to it arose prior to *Wolfe*. One such exception was established by the case of *Hunt v. Hunt*.[19] In 1954 a divorce decree and support award, which incorporated an agreement of the parties, was granted to Mrs. Hunt. In 1956 Mrs. Hunt remarried, and Mr. Hunt thereafter successfully moved for modification of the support payments because of this change in circumstance. The Ohio Supreme Court affirmed the trial court's cancellation of all further alimony payments, stating that its decision was based on public policy:

> [I]t is contrary to good public policy to require a divorced wife's former husband to continue to make alimony payments to her after her subsequent marriage to another man capable of supporting her[;] . . . such marriage constitutes an election on her part to be supported by her new husband and an abandonment of the provision for permanent ali-

16. If the separation agreement in *Tullis* is viewed as a third party beneficiary contract, it is clear that the *Tullis* rule does not impair the contract rights of the third party beneficiary, the child. The child's payments should not be reduced without the child's consent; however, the child's consent to an increase in payments could be presumed. *See* Note, *Modifiability of Alimony and Support Decrees in Ohio*, 36 U. CIN. L. REV. 487, 491 (1967). Nevertheless, permitting child support payments to be increased enlarges the obligation of the child's father under the separation agreement, and thus impairs his contract rights.

17. The rationale of the *Tullis* decision was severely criticized. *See* Note, *Power of Court to Modify Decree for Support Which Incorporates Agreement of Parties*, 8 OHIO ST. L.J. 111 (1942); Note, *Modifiability of Alimony and Support Decrees in Ohio*, 36 U. CIN. L. REV. 487 (1967). The Ohio Supreme Court specifically overruled *Tullis* in Peters v. Peters, 14 Ohio St. 2d 268, 237 N.E.2d 902 (1968), and held that trial courts have continuing jurisdiction to either increase or decrease child support payments.

18. *See, e.g.*, Wolfe v. Wolfe, 46 Ohio St. 2d 399, 421, 350 N.E.2d 413, 427: "[C]ourts and parties have frequently failed to delineate whether the award was for sustenance or constituted a property division for the reason such delineation was not considered important."

19. 169 Ohio St. 276, 159 N.E.2d 430 (1959).

> mony from her divorced husband, and reservation of jurisdiction is implied so that the equitable power of the court may be invoked to modify its order accordingly.[20]

A subsequent case, *Dailey v. Dailey*,[21] however, made clear that the remarriage exception did not apply when the alimony award represented a property division. Thus, under the *Hunt* exception, the characterization of the award as a support payment was crucial. Remarriage by the ex-wife permitted modification only of a support award based on a separation agreement, but not an award that represented a property division.

The second exception to the general rule barring modification of alimony awards based upon agreements of the parties permitted modification when the trial court *expressly* reserved jurisdiction in the divorce and alimony decree. When jurisdiction was expressly reserved—for example, by the use of language in either the divorce decree or in the separation agreement such as "until the further order of the court"—the alimony award could be modified in a future proceeding before that court.[22] The third exception, noted by the Ohio Supreme Court in *Law*, permitted an alimony award to be set aside under what is now rule 60(B) of the Ohio Rules of Civil Procedure[23] for mistake, misrepresentation, or fraud, even if the award was based upon an agreement of the parties.[24]

Thus, prior to *Wolfe*, an Ohio court had jurisdiction to modify an alimony award based on a separation agreement in only a few circumstances. The *Wolfe* court changed this situation by expanding the possibilities for obtaining modification of support awards.

III. WOLFE V. WOLFE

A. *The Facts*

In *Wolfe* the husband and wife executed a separation agreement pursuant to which Mrs. Wolfe would receive $35,000 per year "for her support and maintenance." These payments were to cease when Mrs. Wolfe remarried or died. The separation agreement also provided that Mrs. Wolfe would receive the sum of $350,000 "as a division of property." On January 2, 1968, a decree of divorce was awarded to Mrs.

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20. *Id.* at 288-89, 159 N.E.2d at 439.

21. 171 Ohio St. 133, 167 N.E.2d 906 (1960).

22. Folz v. Folz, 42 Ohio App. 135, 181 N.E. 658 (1932); *see* Williams v. Williams, 112 Ohio App. 412, 176 N.E.2d 288 (1959).

23. Previously OHIO REV. CODE ANN. § 2325.01 (Page Supp. 1976).

24. It is not clear whether the exception for express reservation of jurisdiction, or the rule 60(B) exception, would permit modification of a property settlement award as well as a support award. It seems reasonable to assume, however, that at least as to the rule 60(B) exception, modification of a property settlement award would be permitted.

Wolfe. Like many divorce decrees, it incorporated by reference the terms of the separation agreement.

Mr. Wolfe paid the property settlement of $350,000 and, until December 1973, made all required monthly support payments. On December 18, 1973, however, he presented a motion to the Franklin County Common Pleas Court, Division of Domestic Relations, requesting that he be relieved of making further support payments. The basis for this motion was his former wife's post-divorce unchastity. It appeared that after the divorce Mrs. Wolfe had become involved in an intimate relationship with a man whom she allowed to live at her home. The man apparently made no contributions toward expenses while he resided with Mrs. Wolfe. Mrs. Wolfe, in addition to paying all living expenses, bought him clothing, paid his travel expenses, and loaned money to him.[25]

The trial court found that no common-law marriage existed between Mrs. Wolfe and the man; thus the support payments could not be terminated on the ground that Mrs. Wolfe had "remarried" within the meaning of the separation agreement. Nevertheless, the trial court entered an order relieving Mr. Wolfe of all further support payments. Its decision rested upon its finding that Mrs. Wolfe was "in fact, attempting to enjoy all the benefits of marriage by cohabiting with another man and yet not entering into an actual marriage in order to avoid the loss of alimony."[26] In conformity with prior Ohio law, the court of appeals reversed the trial court, stating that since there had been "no reservation of jurisdiction in the trial court,"[27] the general rule prohibiting modification of an alimony award based on a separation agreement applied.

B. *The Decision*

The Supreme Court of Ohio confronted two basic questions in *Wolfe*. First, did the trial court have jurisdiction to modify a support decree incorporating a separation agreement? Second, if the trial court had such jurisdiction, did the court, considering the change in circumstances presented by the facts in *Wolfe*, abuse its discretion in terminating the support payments? The supreme court held that the trial court did have jurisdiction to modify the support award, and that it did not abuse its discretion in terminating the alimony payments.

1. *Jurisdiction to Modify the Alimony Award*

The principal significance of the *Wolfe* decision lies in the supreme court's holding on the jurisdictional issue:

25. 46 Ohio St. 2d at 400-01, 350 N.E.2d at 415.

26. *Id.* at 401, 350 N.E.2d at 416.

27. *Id.*

> [W]here an alimony award is for support only, is for an indefinite amount, and where there is no property settlement, or if there is such a settlement, the support award is independent thereof, the jurisdiction of the court to modify will be implied in the decree irrespective [of the fact] that such support order is based upon an agreement of the parties.[28]

The court used a merger rationale to justify this holding, stating that a separation agreement "loses its nature as a contract the moment it is adopted by the court and merged into the decree by incorporation."[29] According to the court, the merger rationale "is not only more legally and intellectually defensible than any other suggested, but, also, has been the view adopted previously by this court."[30] The "view adopted previously by this court" was said to be that of the *Holloway* case,[31] in which the Ohio Supreme Court held that for purposes of contempt proceedings a separation agreement merges into the decree upon its incorporation.

Other rationales for sustaining jurisdiction to modify the support award were available. For example, some courts have used the theory that the incorporated agreement is not binding on the court but is merely "advisory" to it, and therefore that the agreement does not affect the power of the court to modify the decree.[32] Other courts have simply relied on public policy in deciding that the separation agreement is superseded by the decree.[33] It is not clear whether the Ohio Supreme Court's choice of the merger rationale over the other two rationales will have any practical effect on future case law. All the rationales provide courts with jurisdiction to modify alimony awards that incorporate separation agreements. The choice of rationale, however, may be important for the purpose of determining what effect, if any, to give a provision in a separation agreement specifically prohibiting future modification of the alimony award.[34]

Use of the merger rationale does show that *Wolfe* is not simply

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28. *Id.* at 419, 350 N.E.2d at 426. There is reason to believe that the court's holding in *Wolfe* also applies to dissolution proceedings, in which support awards are based on separation agreements, since "[a] decree of dissolution of marriage has the same effect upon the property rights of the parties including rights of dower and inheritance as a decree of divorce." OHIO REV. CODE ANN. § 3105.65 (Page Supp. 1976). *Wolfe's* applicability may be questioned, however, because of the following provision in the dissolution statutes: "The court has full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, and visitation." This provision may be interpreted as an expression of legislative intent that support awards granted in dissolution proceedings not be subject to modification, under the doctrine of statutory interpretation *expressio unius est exclusio alterius.*

29. 46 Ohio St. 2d at 417, 350 N.E.2d at 425.

30. *Id.*

31. *See* text accompanying notes 12-14 *supra.*

32. *E.g.*, Collister v. Collister, 1 Utah 2d 34, 261 P.2d 944 (1953).

33. *E.g.*, Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940).

34. *See* section IV.C. *infra.*

an extension of the *Hunt* case.[35] *Hunt* used a public policy rationale to permit modification of an alimony award incorporating a separation agreement on the basis of the wife's remarriage. Although *Wolfe* involved conduct bordering on common-law marriage, the decision in *Wolfe* allowing modification of the support award was not based upon possible policy considerations arising from that circumstance.[36] Paragraph 4 of the case syllabus states that "[a] separation agreement of the parties loses its nature as a contract the moment it is adopted by the court and incorporated into a decree of divorce,"[37] indicating that, under the merger rationale, support awards may be modifiable irrespective of what specific facts the parties later allege as the change in circumstance.

2. *Sufficient Changes in Circumstances*

Having decided that the support award was subject to modification, the Ohio Supreme Court had to decide whether the facts in *Wolfe* constituted a sufficient change in circumstances to warrant modification. Prior to *Wolfe*, Ohio courts addressed this question in the context of awards in which the court had expressly reserved jurisdiction. In those cases it was generally held that a motion for modification must be based on new facts, not on circumstances which were or might have been pleaded at the time of the divorce.[38] If an alimony award was modified once, it could not be modified again unless there was another change in circumstances.[39] The change in circumstances could not be of a temporary nature,[40] or of a sort which could have been anticipated at the time of the divorce.[41] Finally, the change in circumstances had to be material and not purposely brought about by the complaining party.[42]

As the Ohio Supreme Court noted in *Wolfe*, alimony awards are frequently modified in situations "where the economic situation of either or both of the parties drastically changes."[43] Such a situation was presented in the Ohio case of *Ward v. Ward*.[44] In *Ward* the trial court at the time of the divorce reserved jurisdiction to modify the alimony award in a future proceeding upon a showing of a change in

35. *See* text accompanying notes 19-20 *supra*.

36. *Cf.* Fahrer v. Fahrer, 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973) (termination of support award permitted where former wife entered into a relationship in another state which would constitute a common-law marriage in Ohio).

37. 46 Ohio St. 2d at 399, 350 N.E.2d at 415.

38. *E.g.*, Olney v. Watts, 43 Ohio St. 499, 3 N.E. 354 (1885).

39. Blank v. Blank, 55 Ohio App. 388, 9 N.E.2d 868 (1937).

40. Stauffer v. Stauffer, 4 Ohio App. 2d 339, 212 N.E.2d 622 (1965).

41. *Id.*; Conant v. Conant, 16 Ohio N.P. (n.s.) 72 (C.P. 1914).

42. Nash v. Nash, 77 Ohio App. 155, 65 N.E.2d 728 (1945).

43. Wolfe v. Wolfe, 46 Ohio St. 2d 399, 419, 350 N.E.2d 413, 426 (1976).

44. 104 Ohio App. 105, 140 N.E.2d 906 (1956).

the financial status of the wife. The subsequent ill health of the wife, which prevented her from supporting herself, was held to be a sufficient change in her financial status and an adequate basis for the court to allow an increase in the support payments.

In *Wolfe* the unusual basis for the motion to modify the alimony award was the ex-wife's post-divorce unchastity. Though it is a matter of disagreement among the states,[45] in some jurisdictions post-divorce unchastity upon the part of the former wife apparently is per se a sufficient ground for modification of an alimony award.[46] In *Wolfe*, however, the Ohio Supreme Court did not consider post-divorce unchastity in itself a sufficient ground for modifying the support award: "We are of the view that such unchastity as disclosed in the record before us does not per se require, by reason of public policy, a full termination of an alimony award. It is, however, a circumstance that could and should be considered as to modification or termination."[47] The court quoted a passage from a New Jersey case, *Garlinger v. Garlinger*, to indicate what effect the circumstance of post-divorce unchastity could have in a modification proceeding.

> [W]here a former wife chooses to cohabit with a paramour, whether in her abode or his, or otherwise consorts with him, the issue may well arise whether, in the circumstances, she has further need for the alimony. If it is shown that the wife is being supported in whole or in part by the paramour, the former husband may come into court for a determination of whether the alimony should be terminated or reduced. Similarly, if the paramour resides in the wife's home without contributing anything toward the purchase of food or the payment of normal household bills, then there may be a reasonable inference that the wife's alimony is being used, at least in part, for the benefit of the paramour, in which case it could be argued with force that the amount thereof should be modified accordingly. In short, the inquiry is whether the former wife's illicit relationship with another man, apart from the misconduct *per se*, has produced a change of circumstances sufficient to entitle the former husband to relief.[48]

The supreme court then held that the trial court had not abused its discretion in terminating the support payments.

To the extent that the court focused on the economic situation of the parties, the rule that post-divorce unchastity is not per se a ground for terminating support payments is sound since post-divorce

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45. *See*, Annot., 6 A.L.R.2d 859 (1949).

46. *E.g.*, Otani v. Otani, 29 Hawaii 866 (1927); Weber v. Weber, 153 Wis. 132, 140 N.W. 1052 (1913).

47. 46 Ohio St. 2d at 420, 350 N.E.2d at 426.

48. *Id.* at 420-21, 350 N.E.2d at 426-27. Paragraph 3 of the syllabus of *Wolfe* gives further indication of the role that the circumstance of post-divorce unchastity will play in modification proceedings: "Post-divorce unchastity upon the part of the former wife is not grounds for automatically terminating the alimony award but may be considered in a subsequent modification proceeding insofar as it is relevant to the issues of continued need for such alimony and the amount." 46 Ohio St. 2d at 399, 350 N.E.2d at 415 (syllabus 3).

unchastity in and of itself would have no effect on the economic situation of the former wife. The court's reliance on *Garlinger* indicates that, in permitting Mrs. Wolfe's support award to be terminated, the court was influenced by the fact that Mrs. Wolfe's lover derived some economic benefits from their relationship. In effect, Mr. Wolfe was contributing to the support of Mrs. Wolfe's lover. Although the support award may have been equitable at the time of the divorce,[49] the fact that Mrs. Wolfe had money to spend on her lover may have indicated to that court that the support award was excessive, thereby justifying modification of Mrs. Wolfe's support award.

The Ohio Supreme Court, however, did not specifically focus on the excessiveness of the support payments, and it permitted the support payments to be terminated rather than modified.[50] The court cited no evidence in the record indicating that Mrs. Wolfe's financial situation had changed subsequent to the divorce to the extent that she no longer needed *any* support, or that Mr. Wolfe could no longer afford to pay support.[51] Arguably, then, there was no economic justification for terminating the support payments. Thus, it seems that in terminating the support award, the Ohio Supreme Court may have been concerned with moral considerations as well as economic considerations.[52]

To the extent that moral considerations may play a role in deciding whether support awards will be modified, the court's decision not to adopt a rule permitting modification of a support award upon the sole ground of post-divorce unchastity[53] is preferable since it reflects contemporary society's increasing tolerance of sexual relations outside

49. "We may assume that it [the support award] is fair at the moment of its execution, and that it continues to be fair at the time of divorce if the parties offer it for inclusion and merger into the decree." 46 Ohio St. 2d at 418, 350 N.E.2d at 425.

50. The supreme court in *Wolfe*, however, held that "[i]n light of the total circumstances appearing in the record it does not *clearly appear* that such termination constituted an abuse of discretion. Additionally, the issue of abuse of discretion was not presented in this court or in the Court of Appeals." 46 Ohio St. 2d at 421, 350 N.E.2d at 427 (emphasis added). One might infer from these statements that Mrs. Wolfe had failed on appeal to carry the burden of proving abuse of discretion, and that if the issue had been properly presented to the supreme court, the court might only have permitted the support award to be modified rather than terminated.

51. The court may have assumed that Mrs. Wolfe now has another means of support—that her lover will support her. There is no clear indication in *Wolfe*, however, that the court made this assumption.

52. Justice Brown's concurring opinion supports this conclusion. Justice Brown based his opinion on the reasoning of the trial court: " '[I]t would be against public policy for a court to enforce an alimony order where the wife, who was receiving the alimony, lived only with another person." 46 Ohio St. 2d at 423, 350 N.E.2d at 428 (Brown, J., concurring).

53. Paragraph 3 of the syllabus states: "Post-divorce unchastity upon the part of the former wife is not grounds for *automatically* terminating the alimony award . . . ." 46 Ohio St. 2d at 399, 350 N.E.2d at 415 (syllabus 3) (emphasis added). It could be argued that by using the word "automatically," the court left open the possibility that modification may be allowed in a future case solely because of the post-divorce unchastity of the former wife. For example, some courts in other jurisdictions have indicated in dictum that although modification will not generally be permitted on the sole basis of post-divorce unchastity, modification of the alimony award will be allowed if the conduct is deemed "flagrant." *See, e.g.*, Christiano v. Christiano, 131 Conn. 589, 41 A.2d 779 (1945); Atkinson v. Atkinson, 13 Md. App. 65, 281 A.2d 407 (1971).

marriage. The court's decision that termination may be permitted when a paramour receives an economic benefit from the ex-husband's support payments to his ex-wife may reflect a moral judgment that, while extramarital sexual relations are not sufficiently "immoral" to justify punishing the ex-wife by cutting off support, an ex-husband should not be required to "subsidize" those relations by supporting his ex-wife's paramour.

IV. QUESTIONS UNANSWERED BY *Wolfe*

A. *Ambiguous Alimony Awards*

Although the distinction between alimony awards for support and alimony awards representing property divisions was not always important in the past, after *Wolfe* the distinction is critical. *Wolfe* permits modification only of support payments; property settlements are still not subject to modification.[54] Thus, after *Wolfe*, attorneys who draft separation agreements and courts that incorporate these agreements into divorce decrees must clearly indicate the character of the alimony award.

The rule enunciated by the Ohio Supreme Court in *Wolfe* permitting modification of alimony awards for support even if the award incorporated a separation agreement will not apply retroactively.[55] The court stated that "immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case."[56] The court's decision to apply *Wolfe* prospectively only was made with the unspoken assumption that attorneys and courts will in the future clearly delineate whether alimony awards represent property settlements or payments for support. But even if the court's assumption proves to be largely correct, it is unlikely that the problem presented by ambiguous alimony awards will entirely disappear. The question then may arise as to how Ohio courts should deal with future alimony awards that do not clearly indicate the character of the mandated payments.

1. *Alimony Awards for Definite Amounts of Money*

In summarizing its holding in *Wolfe*, the supreme court stated that "where an alimony award is for support only, [and] is for *an indefinite* amount,"[57] it is subject to modification. This conjunctive

54. Paragraph 1 of the syllabus in *Wolfe* states: "An alimony award which constitutes a division of the marital assets and liabilities is not subject to modification under the continuing jurisdiction of the court." 46 Ohio St. 2d at 399, 350 N.E.2d at 414 (syllabus 1).

55. 46 Ohio St. 2d at 421-22, 350 N.E.2d at 427.

56. *Id.* at 421, 350 N.E.2d at 427.

57. *Id.* at 419, 350 N.E.2d at 426 (emphasis added). At one point in the opinion, however, the court questioned the practice of granting alimony awards for an indefinite amount, stating: "Certainly there is no legislative contemplation or authorization that an ex-husband be

language, by negative implication, seems to preclude modification whenever the alimony payments are for a definite amount of money, *i.e.*, in gross.[58] The inference could be drawn that the court believes alimony awards for definite amounts of money represent property settlements and are thus nonmodifiable. The court's summary could also be read more broadly to preclude modification of alimony in gross payments even when the intent of the parties is clear, from parol evidence or the separation agreement itself, that the payments are to be for support.

One might, however, question the validity of precluding modification of an alimony award for a definite amount of money in cases in which the parties clearly intended the payments to be for the ex-wife's support. For example, it is possible that a former husband could desire to rid himself of the continuing obligation to his former wife as soon as possible, and that a specific dollar amount could actuarially be determined as adequate to support the former wife for the remainder of her life. The former husband might pay this specific amount in one lump sum, or in installments over a definite period of time.

Such an alimony award is functionally no different from a support award for an indefinite amount of money. In both situations, the parties intended the funds to be used for the wife's support. In both situations, financial inequities may arise after the time of the divorce as a result of changed circumstances, making the support award unfairly high or low. It would seem logical that trial courts should have continuing jurisdiction to deal with such inequities in either situation.

Thus, despite the literal language in *Wolfe*, the Ohio Supreme Court should allow modification of an alimony award for a definite amount, so long as it can be shown that the parties clearly intended the payments as support. A number of states allow modification in such situations,[59] and at least one Ohio appellate court has recently decided that alimony awards for definite amounts of money are not necessarily property settlements. In *Jones v. Jones*[60] the ex-wife remarried after the divorce, and her former husband sought to have the alimony payments terminated on the authority of the remarriage ex-

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ordered to pay periodically a sum determined by what he can afford, for an indefinite period of time." *Id.*, at 411, 350 N.E.2d at 421.

58. Payments in gross are those made in one lump sum, or in installments over a definite period of time. An implication that alimony payments for definite amounts of money are not subject to modification because they represent property settlements is not consistent with some early Ohio cases that allowed modification of alimony awards for definite amounts of money. *See, e.g.*, Olney v. Watts, 43 Ohio St. 499, 3 N.E. 354 (1885); Sager v. Sager, 5 Ohio App. 489 (1916); Baker v. Baker, 4 Ohio App. 170 (1915). None of these cases, however, involved modification of an alimony award based upon a separation agreement.

59. *E.g.*, Adams v. Adams, 29 Cal. 2d 621, 177 P.2d 265 (1947); Barraclough v. Barraclough, 100 Utah 196, 111 P.2d 792 (1941); Fleckenstein v. Fleckenstein, 59 Wash. 2d 131, 366 P.2d 688 (1961).

60. No. 76AP-456 (Franklin County Ct. App. Nov. 9, 1976).

ception to nonmodifiability established in *Hunt*. The alimony award was for payments of alimony in gross; the wife was to receive the sum of $48,800 payable in monthly installments of $400 each month for a period of 122 months. The issue in *Jones* was whether those payments constituted a property settlement or payments for support. The court found that "it makes no difference whether the alimony payments are to be made indefinitely or are to be made for a specified period of time, so long as the purpose of the payments are for the sustenance of the plaintiff so long as they are to be made."[61] The court further said that parol evidence is admissible to determine the intent of the parties.

The result in *Jones* is significant because *Jones* was rendered after the supreme court had implied in *Wolfe* that alimony awards for a definite amount of money should be treated as property settlements and thus are not subject to modification. Although modification in *Jones* was sought under the authority of *Hunt*, the court was aware of the *Wolfe* decision because the court cited *Wolfe* in its opinion.[62]

On the other hand, a presumption that alimony awards for definite amounts of money represent property settlements seems to be valid when, even after parol evidence has been admitted to determine the parties' intent, the character of the award is still ambiguous. Since awards for definite amounts of money and property settlements are similar on their face—*i.e.* both are payments of fixed amounts of money—it would seem reasonable to presume that ambiguous alimony awards for definite amounts of money are property settlements.

2. *Alimony Awards for Indefinite Amounts of Money*

Alimony awards for indefinite amounts of money are awards that do not provide for payment in one lump sum or in installments over a fixed period of time. Instead, the husband must make periodic payments for an indefinite amount of time, usually until the wife dies or remarries. An alimony award for an indefinite amount of money is not necessarily for support and sustenance.[63] The conjunctive language used in the Ohio Supreme Court's textual summary in *Wolfe* —"where an alimony award is for support only, [and] is for an indefinite amount"[64]—indicates that an award for an indefinite amount is not necessarily synonymous with an award for support.

The supreme court in *Wolfe* did not directly consider the question of how Ohio courts should deal with ambiguous alimony awards for in-

61. *Id.* at 7.

62. *Id.* at 4-5.

63. For cases in which the alimony award for an indefinite amount was treated as a property settlement, see Sullivan v. Sullivan, 215 Ala. 627, 111 So. 911 (1927); Ettlinger v. Ettlinger, 3 Cal. 2d 172, 44 P.2d 540 (1935); Salomon v. Salomon, 196 So.2d 111 (Fla. 1967); Kimball v. Kimball, 83 Idaho 12, 356 P.2d 919 (1960); Richey v. Richey, 389 S.W.2d 914 (Ky. 1965); Campbell v. Campbell, 66 Wash. 2d 177, 401 P.2d 651 (1965).

64. 46 Ohio St.2d at 419, 350 N.E.2d at 426.

definite amounts of money, presumably because of the court's assumption that attorneys and courts will clearly indicate in the future whether alimony awards represent property settlements or payments for support. Nevertheless, the court's attitude toward this problem can be inferred from the court's discussion of the history and nature of alimony.

The court in *Wolfe* noted that the practice of granting alimony arose from the husband's common-law duty to support his wife. Alimony was theoretically available only when the husband and wife were separated but still legally married.[65] The Ohio judiciary, however, consistently granted alimony as an incident to absolute divorce,[66] probably out of a desire to offset the inequitable effects of early property laws on women. In view of this historical background, the *Wolfe* court stated:

> [W]e end our quest for an ascertainable and legitimate basis for post-marital alimony, properly so-called [*i.e.*, support payments], because we are confident that modern legal principles cannot harbor such an anachronistic notion. Rather it is our considered opinion that most awards of property incident to a final divorce are readjustments of the party's property rights . . . .[67]

The court in *Wolfe* implied that the prime concern at the time of

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65. Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROB. 197, 198-99 (1939). Divorces were not granted at English common law. They could be obtained only in the Ecclesiastical courts or by special act of Parliament. The common practice in the Ecclesiastical courts was to grant a divorce *a mensa et thoro* (*i.e.*, a legal separation). The Ecclesiastical courts granted "alimony" (support) to the wife upon the basis of the husband's common-law duty to support the wife. Such awards were justifiable in theory because the marriage relationship still existed. But when it became a common practice in Ohio and elsewhere to grant absolute divorces, which terminated the marriage relationship and the duty of support, courts continued to grant support awards despite the fact that the theoretical basis for such awards no longer existed.

66. *E.g.*, Piatt v. Piatt, 9 Ohio 37 (1839).

67. 46 Ohio St. 2d at 410-11, 350 N.E.2d at 421. Although the court's discussion of the history and nature of alimony is not always clear, it seems at times that the court questions the entire practice of granting alimony awards for support, as its reference to the practice of granting such awards as an "anachronistic notion" indicates. The court also quoted the following statement from a Washington case: "When the wife has the ability to earn a living, it is not the policy of the law of this state to give her a perpetual lien on her divorced husband's future income." *Id.* at 419, n.36, 350 N.E.2d at 425-26, n.36, quoting Morgan v. Morgan, 59 Wash. 2d 639, 642, 369 P.2d 516, 518 (1962).

In its apparent desire to cast doubt on the validity of support awards, the court seems to have either misread or ignored the Ohio alimony statute, OHIO REV. CODE ANN. §§ 3105.18 (Page Supp. 1976). The supreme court stated, "Only after a division of property is made, is the court statutorily authorized to consider whether an additional amount is needed for sustenance, and for what period will such necessity persist." 46 Ohio St. 2d at 414, 350 N.E.2d at 423. There is no support for this statement in § 3105.18. This statement also conflicts with the language used by the court in summarizing its holding: "[W]here an alimony award is for support only, is for an indefinite amount, *and where there is no property settlement* . . . ." *Id.* at 419, 350 N.E.2d at 426 (emphasis added). These statements by the Ohio Supreme Court should not be accepted at face value. They are relevant, however, insofar as they indicate the court's belief that most alimony awards represent property settlements, and inferentially, that ambiguous alimony awards should be presumed to be property settlements.

the divorce should be to achieve a just and equitable property settlement.[68]

> The court does not decree alimony as a debt to the wife, or as damages to be paid to her by her late husband, but as a part of the estate standing in his name in which she has a right to share, fixed by the court in its discretion and thus appropriated to her, and to which she thereupon becomes legally entitled.
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> . . . The court must approach the [divorce] proceeding much like a suit in partition or an action to dissolve, windup and distribute the assets and liabilities of a partnership.[69]

If the supreme court believes that a trial court's primary concern at the time of divorce is to achieve a just and equitable property settlement,[70] one could infer that a trial court would be wise to first consider the possibility that the alimony award represents a property settlement when it is confronted with a petition to modify an ambiguous alimony award for an indefinite amount of money.

It could be argued, nevertheless, that the court's decision to limit *Wolfe* to prospective application demonstrates that the court will *not* be inclined to view ambiguous alimony awards as property settlements. *Wolfe* did not change the prior Ohio law that property settlements are not subject to subsequent judicial modification. Since many separation agreements drafted in the past did not distinguish between support payments and property settlements, a presumption that an ambiguous agreement represents a property settlement would theoretically result in the modification of very few separation agreements drafted prior to *Wolfe*. Thus, if the court will view ambiguous agreements as property settlements, *Wolfe* could have been applied retroactively with relatively little disruption of the status of agreements drafted in the past, as far as modifiability is concerned.

If the court intended that ambiguous awards should be presumed to be support payments, a much greater opportunity for modifiability would exist. If *Wolfe* were applied retroactively under such circumstances, Ohio courts could be inundated with petitions seeking modification of ambiguous separation agreements. The Ohio Supreme Court may have decided to apply *Wolfe* prospectively only because of the fear of this potentially massive litigation.[71]

This argument, however, fails to take into account the fact that potentially massive litigation could result from retroactive applica-

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68. For a proposed method of reaching equitable property settlements, see Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAMILY L.Q. 169 (1974).

69. 46 Ohio St. 2d at 412-13, 350 N.E.2d at 422.

70. For other statements of the court that suggest this belief, see note 67 *supra*.

71. *See* 46 Ohio St. 2d at 421-22, 350 N.E.2d at 427: "[W]e perceive that immeasurable difficulties will arise in attempting to judicially determine the character of the award in a given case. Therefore while we apply the rule here because the separation is clearly manifested, our holding herein is to be applied prospectively only . . . ."

tion of *Wolfe* even if the court is inclined to view ambiguous alimony awards as property settlements. A large number of suits for modification could still be expected from former spouses attempting to show that the alimony award is not ambiguous and that it is for support. It may be legitimately inferred that the court applied *Wolfe* prospectively to avoid *this* potential for litigation. Thus, the court's decision to limit *Wolfe* to prospective application is not inconsistent with a disposition to view ambiguous alimony awards as property settlements.

After *Wolfe*, therefore, the characterization of an alimony award as a support agreement is crucial to its modifiability,[72] and it should be clearly designated as such. Since the Ohio Supreme Court is apparently disposed to view ambiguous alimony awards as property settlements, however, the impact of *Wolfe* may not be as great as it appears to be, at least for future alimony awards that are ambiguous. When confronted with petitions for modification of alimony awards, the trial court should keep in mind this attitude of the supreme court, and not be too quick to characterize an ambiguous award as an award of support subject to modification.

B. *Impact on Drafting of Separation Agreements in Ohio*

The Ohio Supreme Court's decision in *Wolfe* is a message to attorneys in Ohio who draft separation agreements to clearly indicate in a separation agreement whether the award of alimony represents a property settlement or an allowance for sustenance and support. It is also a message to Ohio's trial judges to be alert for ambiguous alimony agreements. If the trial court judge feels the character of the alimony award is not clear from the language of the separation agreement, he should place his findings about the character of the award in the decree before incorporating the separation agreement. Alternatively, the judge should instruct the parties to re-draft the separation agreement so as to clearly indicate the character of the alimony award.

In the typical property settlement situation all the real and personal property owned by the husband and wife should be listed in the separation agreement, and an attempt to achieve an equitable division should be made. In the more complicated situation where, for example, the ex-wife helped put her ex-husband through college, the ex-wife might be said to have acquired a property interest in her ex-husband's future income.[73] This property interest should be clearly

72. *But see* Mendelson v. Mendelson, 123 Ohio St. 11, 173 N.E. 615 (1930) "which opines that an unincorporated separation agreement is not extinguished by a divorce decree." Wolfe v. Wolfe, 46 Ohio St. 2d at 417 n.31, 350 N.E.2d at 425 n.31. Presumably, if the separation agreement is not merged into the divorce decree, the trial court would not retain implied jurisdiction to modify it.

73. Two courts have held that a former husband's potential earning capacity, though aided and enhanced by his former spouse, is not property subject to division at the time of divorce. In re Marriage of Graham, 555 P.2d 527 (Colo. Ct. App. 1976); Stern v. Stern, 66

indicated in the separation agreement. and the negotiated compensation for this property interest should be clearly identified. Finally, if additional payments are intended by the parties to provide for the support of the former wife, they should also be clearly identified.

By explicitly indicating the underlying character of the alimony award in a separation agreement, the attorney will enable the parties to the agreement to control whether modification of the alimony award is possible in the event of a substantial change in circumstances subsequent to the divorce without the expense and inconvenience of litigation to determine the character of the award. Clearly indicating the character of the alimony award in the separation agreement should also alleviate to a great extent the danger of malpractice actions by clients whose intent with respect to modification of alimony awards has been thwarted by ambiguous drafting.

C. *Agreement of the Parties Prohibiting Future Modification*

In *Wolfe* the separation agreement did not contain a provision prohibiting future modification of the alimony award either generally or in specific circumstances. Thus, the supreme court did not determine the effect to be given such a provision. When this issue has been confronted, however, it has generally been held that such provisions do not alter the power of the court to modify the decree.[74] If the *Wolfe* court had employed the rationale that the incorporated separation agreement is not binding on the court but is merely advisory to it, or if the court had used a public policy rationale,[75] it would have little difficulty in deciding to give no effect to these provisions. Under the first rationale, the provision prohibiting future modification is not binding on the court, and under the latter rationale, the court could rely on public policy to disregard the provision.

In contrast, the rationale adopted in *Wolfe*, that the separation agreement merges into the decree by incorporation, presents some conceptual difficulties for a court that wishes to give no effect to such a provision. To disregard such a provision would require the court to ignore part of the earlier decree. At least one state that gives no effect to such provisions in separation agreements, however, has adopted the merger rationale as the basis for permitting modification of support awards incorporating separation agreements.[76] It is likely that Ohio courts will similarly decide to give no effect to such provisions, be-

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N.J. 340, 331 A.2d 257 (1975). These courts, however, did not consider this issue in the context of a separation agreement which grants the former wife a property interest in the ex-husband's future income. Further, both courts conceded that in such a situation the ex-husband's potential earning capacity is a factor to be considered in arriving at an equitable property division.

74. *E.g.*, Simpson v. Superior Court, 87 Ariz. 350, 351 P.2d 179 (1960).

75. *See* text accompanying notes 32-33 *supra.*

76. Block v. Block, 281 Ala. 214, 201 So. 2d 51 (1967).

cause to give effect to them would be to allow the parties to a divorce and alimony decree to deprive courts, through contractual provisions, of jurisdiction to modify alimony awards, the same principle rejected by the court in *Wolfe*.

An interesting question arises when the parties to the separation agreement expressly prohibit modification in specific circumstances. It is generally said that a motion for modification must be based on a change in circumstances that was not anticipated at the time of the divorce.[77] If the parties explicitly anticipated the change in circumstance that forms the basis for a motion to modify the support payments, logically modification should not be permitted. Although modification has been permitted despite such a specific provision in the separation agreement,[78] there has been no consideration of the anticipation argument. Thus, whether such an argument will be successful remains to be seen.

V. CONCLUSION

Under *Wolfe v. Wolfe* alimony awards for support that incorporate separation agreements are now subject to modification in Ohio. *Wolfe,* however, left unchanged the general rule that property settlements cannot be modified. Ohio courts now have jurisdiction to deal to a greater extent with financial inequities arising after the incorporation of the separation agreement into the divorce and alimony decree. But, as evidenced by the *Wolfe* case, the change in circumstances necessary to warrant modification of the alimony award is not limited strictly to changes in the financial situation of the parties. Although apparently modification of a support award will not be permitted on the sole ground of the former spouse's post-divorce unchastity, such misconduct coupled with the fact that the paramour has derived an economic benefit from the support payments is a sufficient change in circumstances to warrant modification.

Wolfe delivers a message to attorneys in Ohio to clearly indicate in a separation agreement whether the award of alimony represents a property settlement or an allowance for support. If an attorney fails to clearly indicate the character of an alimony award in a separation agreement, the trial judge should resolve this ambiguity before incorporating the agreement into the divorce decree. Given the fact that the Ohio Supreme Court has indicated that it may view ambiguous alimony awards as property settlements, failure to resolve any

77. *E.g.*, Conant v. Conant, 16 Ohio N.P. (n.s.) 72 (Cuyahoga County C.P. 1914).

78. *See, e.g.*, Adler v. Adler, 373 Ill. 361, 26 N.E.2d 504, *cert. denied*, 311 U.S. 670 (1940); Mark v. Mark, 248 Minn. 446, 80 N.W.2d 621 (1957).

ambiguity in the alimony award may result in its nonmodifiability. Thus, the impact of *Wolfe* may not be as great as it appears to be, at least for future alimony awards that are ambiguous.

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