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William Tabac

Cleveland State University, w.tabac@csuohio.edu

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ALIMONY AND CHILD SUPPORT IN OHIO: NEW DIRECTIONS AFTER DISSOLUTION

WILLIAM LOUIS TABAC*

RECENT DECISIONS BY THE OHIO SUPREME COURT will undoubtedly have significant impact upon post-dissolution alimony and child support.¹ In rejecting basic premises upon which domestic relations courts have historically ordered such payments, the court has set new directions. Traditional notions of sex-based roles in the support of the family have been set aside and new standards, based upon the needs of the parties and the factual circumstances in particular cases, have been established. As a result, the husband's statutory duty to support his wife and children during marriage² will no longer govern his responsibilities toward the family following dissolution,³ and neither parent will be required to support the children beyond the age of majority.⁴

These trends represent significant advances in the development of Ohio matrimonial law. To acquaint the practitioner with these advances, and to suggest some of the implications of current judicial thinking, this Article will review several problem areas in the determination of post-dissolution alimony and child support.

I. HISTORICAL DEVELOPMENT OF ALIMONY AND CHILD SUPPORT

Under Ohio law, the husband has a statutory obligation to furnish support to his wife.⁵ Although state laws which impose obligations on the basis of sex are increasingly the subject of attack, virtually every state has a similar rule.⁶ This obligation derives from the historical evolution of the husband-wife relationship. At common law, an unmarried woman was regarded as a full person who could make contracts, own property, and be sued for torts. Once married, her situation changed drastically. A married woman was regarded as incompetent to

* B.A., Case Western Reserve University; J.D., George Washington University; Professor, Cleveland State University, Cleveland-Marshall College of Law.

¹ The Ohio Supreme Court decisions which provide the focus for discussion in this Article include: *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976) (alimony); *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976) (child support); *Rosenfeld v. Rosenfeld*, 47 Ohio St. 2d 12, 351 N.E.2d 181 (1976) (child support). Also related are court of appeals decisions in *State v. Oppenheimer*, 46 Ohio App. 2d 241, 348 N.E.2d 731 (1975), and *Hill v. Hill*, 40 Ohio App. 2d 1, 317 N.E.2d 250 (1973).

² OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1976).

³ Throughout this paper "dissolution" will be used as a generic term to embrace both divorce, OHIO REV. CODE ANN. §§ 3105.01-.18 (Page Supp. 1976) and dissolution of marriage, OHIO REV. CODE ANN. §§ 3105.61-.65 (Page Supp. 1976), the two methods by which Ohio citizens may terminate their marriage.

⁴ OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1976).

⁵ *Id.*

⁶ The rule is typically based upon the husband's obligation to furnish "necessaries" to his family. *See, e.g.*, D.C. CODE § 30-211 (1973); W. VA. CODE § 48-3-24 (1976); OKLA. STAT. ANN. tit. 32, § 10 (West 1976); N.D. CENT. CODE § 14-07-10 (1971).

enter contracts and to be sued for her torts. Although she could retain ownership over real property, the rights to personal property and the profits derived from realty were vested in the husband by operation of law.⁷

The view that the husband is the natural ruler of the family was reflected in still another common law rule. It was uniformly held that the husband should be responsible for the management of marital property since he was the principal contributor toward its accumulation.⁸ To protect the wife, the same courts held that she should be permitted to count on her husband for support, hence the common law duty of the husband to support his wife.⁹

The common law rule¹⁰ obligating a husband to support his wife led to the recognition of a similar obligation to the children. While the husband was left to his devices to earn money and accumulate property to subsidize the marriage, the wife would keep house and care for the children. Since the wife was executing the traditional mother's responsibility by staying home and not working, the husband was also assigned the duty of supporting the children, a duty, then, that was a natural concomitant of his obligation to support his wife.¹¹

These obligations were said to continue after dissolution of the marriage and were enforced, through agreement of the parties or court order, by way of alimony and child support. The "winding up" or alimony phase of the marriage might take one of the following forms:

- (1) a single transfer of a specified amount of cash, property, or both, commonly referred to as a "lump sum property settlement."¹²

⁷ 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 403-409 (2d ed. 1898, reissued 1968); Radin, *The Common Law of The Family*, 6 NAT'L L. LIB., LEGAL REL. 79, 175 (1939); H. CLARK, *LAW OF DOMESTIC RELATIONS* 220 (1968).

⁸ 2 F. POLLOCK & F. MAITLAND, *supra* note 7, at 405-06; H. CLARK, *supra* note 7, at 219-220.

⁹ See note 7 *supra*.

¹⁰ The civil law approaches these matters from a somewhat different direction. The marriage is viewed as a partnership in which both partners contribute economically to the marital regime. See generally C. FOOTE, L. LEVY & S. SANDERS, *FAMILY LAW* 317-321 (1976). The form of the marital contribution — money, household services, or other contribution — is not controlling, since in the civil law or community property view the contribution of both parties is necessary for the accumulation of a marital estate. Thus, upon dissolution of the marriage the wife is entitled to a share in the marital property, a share which in some community property states amounts to fifty percent. See, e.g., TEX. FAM. CODE ANN., tit. 1, § 3.63 (Vernon 1975); ILL. ANN. STAT. ch. 40, § 18 (Smith-Hurd 1976); MINN. STAT. ANN. § 518.58 (West Supp. 1977); MICH. COMP. LAWS ANN. § 552.19 (Supp. 1977). In Colorado the marital property is divided in such proportions as the court deems just after examining several relevant factors, such as "the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker; . . . the value of the property set apart to each spouse; . . . [and] the economic circumstances of each spouse at the time the division of property is to become effective." COLO. REV. STAT. § 14-10-113 (Supp. 1977). At least one community property state has equalized the responsibility for management of the marital estate, so that the husband and wife have an identical right to dispose of marital property. CAL. CIV. CODE § 5125 (West Supp. 1977).

¹¹ In Ohio, the husband's duty to furnish support to his children is defined in the same statutory section which defines his obligations toward his wife. OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1976).

¹² This type of 'transfer may be worded in the separation agreement as follows:
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(2) a periodic transfer of a specified amount of cash, property, or both, commonly referred to as a "lump sum property settlement payable in installments."¹³

(3) a periodic cash transfer terminable on some uncertain but specified event or events commonly referred to as "alimony."¹⁴

(4) a single transfer of a specified amount of cash, property, or both, plus a periodic cash transfer, terminable on some uncertain but specified event or events, commonly referred to as a "lump sum property settlement and alimony."¹⁵

(5) a periodic transfer of a specified amount of cash, property, or both, plus a periodic cash transfer, terminable on some uncertain but specified event or events, commonly referred to as a "property settlement payable in installments and alimony."¹⁶

"SUPPORT OF WIFE. In full and complete settlement and satisfaction of any and all past, present, and future claims and rights of the wife for support and maintenance, or alimony, husband has paid and delivered to wife the sum of \$____, receipt of which is hereby acknowledged." MILLIGAN, WEST'S OHIO PRACTICE § 3028 (1975).

¹³ The agreement would typically state: "SUPPORT OF WIFE. In full and complete settlement and satisfaction of any and all past, present, and future claims and rights of the wife for support and maintenance, or for alimony, husband agrees to pay to wife the sum of \$____, in equal monthly installments of \$____, commencing for the first such monthly installment on the____day of ____, 19__, and continuing thereafter until the entire amount is paid in full. The unpaid balance shall be payable without interest, provided that if the husband defaults in any such payment that payment shall bear interest at____% per annum, computed annually, being____% per month." *Id.* § 3030.

¹⁴ The agreement may be worded: "SUPPORT OF WIFE. In full and complete settlement and satisfaction of any and all past, present, and future claims and rights of the wife for support and maintenance, or alimony, permanent, temporary, pendente lite, in changing expenses, attorneys fees, and court costs, husband agrees to pay to wife the sum of \$____ per month, commencing for the first payment on the____day of ____, 19__, and monthly thereafter until terminated as hereinafter provided." *Id.* § 3031.

¹⁵ An example of this type of transfer may be found in the separation agreement involved in *Wolfe v. Wolfe*, quoted in part by the court as follows:

Item 9 — In satisfaction of [Mr.] Wolfe's obligation to support and maintain Mrs. Wolfe, [Mr.] Wolfe shall pay to Mrs. Wolfe for her support and maintenance . . . \$35,000 . . . per year. . . . The liability of [Mr.] Wolfe for the payment set forth in this paragraph shall cease upon the happening of whichever of the following events shall occur first: (a) the remarriage of the wife; (b) the death of the wife. This obligation shall be binding upon and be a charge upon the estate of Wolfe and upon his executors, administrators and legal representatives in the event that [Mr.] Wolfe shall predecease Mrs. Wolfe. . . .

Item 10 — As a division of property and in further satisfaction of [Mr.] Wolfe's obligation to support and maintain Mrs. Wolfe and in addition to the monthly alimony payments required to be paid by [Mr.] Wolfe, [Mr.] Wolfe shall pay to Mrs. Wolfe the sum of . . . \$350,000. . . .

. . . The obligation of [Mr.] Wolfe for these payments shall survive his death and shall be binding upon his estate.

Wolfe v. Wolfe, 46 Ohio St. 2d 399, 400, 350 N.E.2d 413, 415 (1976) (omissions by the court). See, e.g., *In re Kuchenbecker's Estate*, 4 Ill. App. 2d 314, 124 N.E.2d 52 (1955); *Johnson v. Every*, 93 So. 2d 390 (Fla. 1957). In Ohio, in order to determine whether such payments are intended to continue after the death of the obligor, it is necessary to examine the entire contract and to read it as a whole. *Billow v. Billow*, 97 Ohio App. 277, 283, 125 N.E.2d 558, 561.

¹⁶ For example, item ten of the separation agreement involved in *Wolfe v. Wolfe*, quoted in note 15 *supra*, could have been payable in fixed installments rather than in a lump sum.

Once a transfer of property, cash, or both is ordered by the court, problems may arise concerning the continued enforceability of the award. Is the husband's obligation to transfer property dischargeable in bankruptcy? Can a husband's recalcitrance to make such payments be remedied through a civil contempt proceeding, or must the wife resort to execution on the judgment against the husband's property? Under what circumstances should the husband be ordered to pay child support, and for how long?

These and other questions will be considered in the following discussion. An analysis of recent Ohio decisions on the subject of alimony will first be presented. The discussion will then turn to the effects of these decisions in the area of child support.

II. ALIMONY

The award of alimony, and the subsequent modification thereof, was discussed by the Ohio Supreme Court in *Wolfe v. Wolfe*. In anticipation of their divorce, Mr. and Mrs. Wolfe executed a separation agreement,¹⁷ the relevant terms of which provided that Mr. Wolfe would transfer \$350,000 as a lump sum property settlement to Mrs. Wolfe. In addition, Mr. Wolfe was required to pay to Mrs. Wolfe, as "support and maintenance," \$35,000 per year until her death or remarriage. The couple had no children. Later, when Mrs. Wolfe moved to Arizona and began cohabiting with a married man, traveling with him and paying his expenses, Mr. Wolfe sought to be relieved from making further "alimony payments."¹⁸ The trial court granted defendant's motion to modify the periodic payments. The judge found that the plaintiff, through her conduct and cohabitation, had abandoned her right to the payments. To the trial judge, it was as if she had fulfilled the "remarriage" condition of the decree.¹⁹ The court of appeals for Franklin County reversed, holding that the periodic payment could not be modified because the trial judge, in his original decree, had not expressly retained jurisdiction to do so.²⁰

On appeal, the Ohio Supreme Court held *inter alia* that jurisdiction to modify periodic transfers of cash subject to the conditions subsequent of remarriage or death of the wife will be implied in every decree of divorce or dissolution.²¹ This rule applies, according to the court, even though the periodic transfers are contained in a separation agreement, as long as the

¹⁷ See note 15 *supra*.

¹⁸ *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 400, 350 N.E.2d 413, 415 (1976). The court itself placed emphasis upon the word "alimony." Considering the major contribution of *Wolfe v. Wolfe* — that it defined and made more precise the concept of post-dissolution alimony — the court's emphasis was appropriate.

¹⁹ The trial judge expressed the opinion that Mrs. Wolfe was "attempting to enjoy all of the benefits of a marriage by cohabiting with another man and not yet entering into an actual marriage in order to avoid the loss of alimony." *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 401, 350 N.E.2d 413, 416 (1976) (quoting from the trial court decision).

²⁰ See 46 Ohio St. 2d at 401, 350 N.E.2d at 416.

²¹ *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 350 N.E.2d 413 (1976) (syllabus at ¶ 2).

agreement has been merged by the court into its decree.²² But an alimony award which constitutes a division of property, the court concluded, is a non-modifiable property settlement.²³ Thus, in *Wolfe*, the \$35,000 cash transfer was modifiable for changed circumstances,²⁴ but the \$350,000 cash transfer was not.

In his concurring opinion, Justice Paul W. Brown stated that the trial judge had acted well within the bounds of his discretion to modify, since on the record Mrs. Wolfe's behavior after the divorce indicated that she did not really need the annual payments.²⁵ Justice Corrigan, in dissent, contended that Mrs. Wolfe's private life was not a matter for the trial court to consider. The question before the court, according to Corrigan, was whether the contingencies that conditioned the payment of alimony support had occurred. Believing that they had not, Corrigan asserted that Mr. Wolfe's support obligations to Mrs. Wolfe continued. The dissenting justice felt that a trial judge's authority to modify support payments should be read narrowly rather than in the broad manner suggested in the concurring opinions.²⁶ Consequently, the chief dispute among the justices in *Wolfe* did not concern the disposition of the case on appeal — it was remanded to the trial court for reconsideration in light of the rule of implied jurisdiction to modify periodic alimony payments — but rather the sufficiency of changed circumstances to warrant modification.

The real significance of *Wolfe* lies in its clarification of the nature of alimony under Ohio law, a point on which all the justices agreed. Writing for the majority, Justice William B. Brown traced the historical development of alimony in Ohio, and in a departure from prior case law,²⁷ concluded that the responsibilities of the spouses toward each other are based upon the Ohio alimony statute²⁸ and not upon the statutory obligation of the husband to support his wife during the marriage. According to the court, "although post-marital alimony has been said to *arise out of* the husband's duty to support his wife, . . . [t]he *legal obligation* of the husband to furnish support to the wife ceases

²² *Id.* (syllabus at ¶4).

²³ *Id.* (syllabus at ¶1).

²⁴ Though not grounds for automatic termination of such alimony, post-dissolution unchastity may be considered in a later modification proceeding as relevant to the issue of "continued need for such alimony and the amount." *Id.* (syllabus at ¶3).

²⁵ 46 Ohio St. 2d at 422-23, 350 N.E.2d at 427-28.

²⁶ 46 Ohio St. 2d at 424, 350 N.E.2d at 428.

²⁷ *Olney v. Watts*, 43 Ohio St. 499, 3 N.E. 354 (1885), *Law v. Law*, 64 Ohio St. 369 (1901) and *Newman v. Newman*, 161 Ohio St. 247, 18 N.E.2d 649 (1954). These cases had concluded that domestic relations courts could not reserve jurisdiction to modify alimony when it had been established by a separation agreement subsequently incorporated into a decree of divorce even when the alimony took the form of support payments to the ex-wife. As noted in *Wolfe*, however, the court had taken a step back from this position in *Hunt v. Hunt*, 169 Ohio St. 276, 159 N.E.2d 430 (1959), when it modified support payments to an ex-wife who had remarried because the ex-husband had "forgotten" to incorporate a remarriage clause into the separation agreement.

²⁸ OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1976). This statute authorizes the granting of alimony on equitable principles to either party in the form of real or personal

upon the termination of the marriage relation."²⁹ Thus, despite its appellation the Ohio alimony statute is really a property distribution statute which authorizes the court to liquidate the marriage, that is, to distribute the marital assets and liabilities. This distribution could be made as a lump-sum property settlement, "sustenance" paid over an uncertain period, or both.³⁰ The court also said that "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."³¹

By the terms of the alimony statute, either party may be required by the court to make transfers of property.³² In so ordering, the court may give force to a separation agreement executed by the parties, or fashion its own order when the parties have been unable to agree.³³ The court stressed in *Wolfe*, however, that no matter what form these transfers might take they all amount to "alimony"; either "alimony property settlement," "alimony sustenance," or both. Furthermore, according to the *Wolfe* court when the sustenance payments are "clearly severable" from the property settlement, the trial court has modification

property or both, in either lump sum or periodic payments.

Eleven factors are provided to aid the court in determining the nature, amount, and type of alimony:

- (1) the relative earning abilities of the parties;
- (2) the ages, and the physical and emotional conditions of the parties;
- (3) the retirement benefits of the parties;
- (4) the expectancies and inheritances of the parties;
- (5) the duration of the marriage;
- (6) the extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;
- (7) the standard of living of the parties established during the marriage;
- (8) the relative extent of education of the parties;
- (9) the relative assets and liabilities of the parties;
- (10) the property brought to the marriage by either party;
- (11) the contribution of a spouse as homemaker.

The statute also allows modification of continuing orders for periodic payments when justified by changed circumstances. For a discussion of the development of criteria to be used in formulating post-marital decrees, see Note, *The Economics of Divorce: Alimony and Property Awards*, 43 CIN. L. REV. 133 (1974).

²⁹ 46 Ohio St. 2d at 410, 350 N.E. 2d at 421 (quoting *Lockwood v. Krum*, 34 Ohio St. 1, 7 (1877)).

³⁰ 46 Ohio St. 2d at 413, 350 N.E. 2d at 422.

³¹ *Id.* at 414, 350 N.E. 2d at 423.

³² OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1976) provides that the trial court "may allow alimony as it deems reasonable to either party."

³³ OHIO REV. CODE ANN. § 3105.18(A) (Page Supp. 1977). Divorce reform is not effected solely through legislation, however, as the following suggests:

Even in those states in which alimony is provided by statute for both spouses, the presumption that a wife should be awarded alimony in all cases, independent of her financial needs, plays a vital part in the court's determination. Some states have attempted to prevent this result by statutes requiring a definite showing of need, but it is likely that the presumption will continue to influence a judge who is given wide discretion in granting alimony.

Note, *The Economics of Divorce: Alimony and Property Awards*, 43 CIN. L. REV. 133, 146 (1974).

authority; otherwise, it does not. The court concluded with the following instruction to lawyers:

[t]he courts and parties have frequently failed to delineate whether the [alimony] award was for sustenance or constituted a property division for the reason that such delineation was not considered important. In holding herein that modification jurisdiction continues as to alimony sustenance awards . . . we perceive that immeasurable difficulties will arise in attempting to judicially determine the character of an 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 to decrees incorporating separation agreements entered after the date of this judgment.³⁴

Because of its reformulation of Ohio alimony concepts, *Wolfe* sets forth serious implications for alimony modification and enforcement practice. By its holding that indefinite alimony "sustenance" can be modified for changed circumstances but that alimony "property settlements" cannot be so modified,³⁵ *Wolfe* seems to confirm the rule that alimony property settlements can indeed be discharged in bankruptcy. The Bankruptcy Act provides in relevant part that alimony is nondischargeable,³⁶ but here, too, the term "alimony" has a technical meaning. The federal courts have concluded that "alimony" under the Bankruptcy Act refers only to support payments,³⁷ or what would now be characterized as "sustenance" under Ohio law. Thus, "property settlements" are not alimony for purposes of the Bankruptcy Act and are therefore dischargeable. The question typically arises when a husband files his petition for bankruptcy and a determination has to be

³⁴ 46 Ohio St. 2d at 421, 350 N.E. 2d at 427.

³⁵ *Id.* at 421-22, 350 N.E.2d at 427 (emphasis added).

³⁶ 11 U.S.C. § 35(a)(7) (1970) provides that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child." This statute reflects long-standing law:

Although this language was added in 1903 by an amendment to the Bankruptcy Act, the courts had long been achieving the same result by treating maintenance and support obligations as nonprovable and therefore nondischargeable debts. Clearly, both the legislative and judicial views of this exception indicate that the non-bankrupt spouse's need for continued maintenance and support outweighs the bankrupt's need for a fresh start.

Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469, 473 (1977).

³⁷ See *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976); *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975); *in re Waller*, 494 F.2d 447 (6th Cir. 1974). But see *DeMilo v. Watson*, 166 Ohio St. 433, 143 N.E. 2d 707 (1957). In this action for enforcement of a divorce judgment, the court stated that there was no need to distinguish between support payments and property settlement because the purpose of alimony is to effect an equitable adjustment of property rights.

One commentator would challenge dischargeability of property settlements on the grounds that in most marriages the assets are so limited that the property settlement actually constitutes part of the support of the obligee spouse and children, and should therefore be exempt from discharge. Branca, *Dischargeability of Financial Obligations in Divorce: The Support Obligation and the Division of Marital Property*, 9 FAM. L.Q. 405, 433 (1975).

made whether the ex-wife's claim is provable under the Bankruptcy Act.³⁸ If it is, she must stand in line with the husband's other creditors for a share of the estate. If her claim is not provable, the ex-wife is entitled to pursue the ex-husband after his discharge, and, if she is able, to collect the full amount. Ex-wife's claim would be provable, and hence dischargeable, if the subject matter of the claim is essentially a "property settlement." Thus, in adjudicating the rights of the parties the bankruptcy court must determine whether the wife's claim relates to a property settlement or merely to support.

Federal courts refer to state law in determining whether transfers following dissolutions of marriage are property settlements or support. Typical is *In Re Alcorn*,³⁹ in which a referee held that the ex-husband's obligation was dischargeable and ex-wife petitioned for review. Under the decree of divorce, ex-husband was obligated to pay ex-wife fifty dollars per month "for her maintenance and support," so long as she remained unmarried and both parties lived. Ex-husband contended that the support payments in question were but a part of an integrated "property settlement." The district court concluded that the transfer in issue arose out of the "husband's duty to support his wife," and not out of a "bona fide property settlement."⁴⁰ According to the court,

In determining whether an agreement is [within the exemption for alimony] the court must look to the nature of the contract itself and ascertain whether the contract is one which merely provides for the division of property between the parties, and as such is in lieu of alimony and a bona fide property settlement contract, or whether the contract, although denominated "property settlement contract" is one which embodies within its terms the common law or statutory duty and, consequently, is essentially a contract for . . . support.⁴¹

Although the court probably reached the correct result in its characterization of the transfers involved — a result consistent with the *Wolfe* decision — the court offered no clue regarding the standards to be applied other than its reliance upon the husband's duty to support his wife.

More representative of Ohio practice is *In Re Waller*.⁴² In this case

³⁸ *Schiller v. Cornish*, 529 F.2d 1363 (7th Cir. 1976), *Caldwell v. Armstrong*, 342 F.2d 485 (10th Cir. 1965). See Branca, *Dischargeability of Financial Obligations in Divorce: The Support Obligation and the Division of Marital Property*, 9 FAM. L.Q. 405, 413 (1975); Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L. J. 469, 473 (1977). But see Lee, *Dischargeability of Debt: Alimony, Maintenance, or Support*, 50 AM. BANKR. L.J. 175 (1976) (eschewing broad construction of alimony as frustrating the purpose of the Bankruptcy Act).

³⁹ 162 F. Supp. 206 (N.D. Cal. 1958). See also *In re Cornish*, 529 F.2d 1363 (7th Cir. 1976), *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975), *Caldwell v. Armstrong* 342 F.2d 485 (10th Cir. 1965), *Merriman v. Hawbaker*, 5 F. Supp. 432 (E.D. Ill. 1934).

⁴⁰ *In re Alcorn*, 162 F. Supp. 206 (N.D. Cal. 1958).

⁴¹ *Id.*

⁴² 494 F.2d 447 (6th Cir. 1974).

the Sixth Circuit adhered to the "support-property settlement" distinction and resolved all doubts in favor of the ex-wife, which is understandable when one considers that the Ohio courts of this period were talking in post-dissolution alimony cases about a "husband's duty to support his wife."⁴³ In *Waller*, ex-husband had agreed in the separation agreement to "pay and indemnify and hold wife absolutely harmless from all existing obligations." One of these obligations, an account for furniture, was discharged by ex-husband in bankruptcy proceedings. The merchant brought an action against ex-wife, who then filed a motion to show cause against ex-husband. The bankruptcy judge had concluded that ex-husband's obligation to hold wife harmless was a "mere division of property" and not support. Hence, it too had been discharged in bankruptcy.⁴⁴ The Sixth Circuit reversed,⁴⁵ stating that it is "not necessary for a divorce court in Ohio to state specifically whether an award which it makes to a wife is alimony."⁴⁶ Since the divorce court in *Waller* had not applied any label at all to the transfer, the Sixth Circuit felt free to construe ex-husband's indemnity obligation as non-dischargeable "support."⁴⁷ Of course, if courts are allowed such wide latitude in determining whether a decretal provision constitutes property settlement or support, the practitioner's ability to predict the outcome of a particular discharge in bankruptcy will largely be defeated.

The analysis employed by the Sixth Circuit in *Waller* is far indeed from the conclusion in *Wolfe* that a husband's common law or statutory duty to support his wife while married is immaterial in determining the form of the property settlement upon dissolution. Support payments following dissolution, according to *Wolfe*, stem from the general marital property settlement and are merely one way to distribute marital property. *Wolfe* would seem to compel this result when an ex-spouse seeks to discharge in bankruptcy any post-nuptial transfer: If the Ohio divorce decree provides for severable sustenance payments labeled as such, they will not be dischargeable in bankruptcy; everything else, however, will be dischargeable. Consequently, the federal court's application of Ohio law in bankruptcy proceedings should not be troublesome since the characterization of a particular distribution of

⁴³ *Waller* was decided prior to the 1974 amendments allowing "no-fault" divorce or marital dissolution. See OHIO REV. CODE ANN. § 3105.61-.65 (Page Supp. 1976).

⁴⁴ 494 F.2d 447, 448 (6th Cir. 1974).

⁴⁵ The district court had affirmed the decree of the bankruptcy judge on review. See *id.* at 448.

⁴⁶ *Id.* at 449.

⁴⁷ See, e.g., *Stone v. Stidham*, 96 Ariz. 235, 393 P.2d 923 (1964); *Bradley v. Superior Court*, 48 Cal. 2d 509, 310 P.2d 634 (1957); *Alexander v. Alexander*, 526 P.2d 934 (Okla. 1974). These courts recognized wide latitude in appellate courts to construe payments either as alimony or as property division when such payments are unlabeled in the original settlement agreement, notwithstanding the fact that the agreement was incorporated into the divorce decree. But see *Phillips v. District Court*, 95 Idaho 404, 509 P.2d 1325 (1973), and *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958), both holding that once the original agreement is incorporated into the divorce decree the trial court has jurisdiction to find contempt for non-payment of support, but that appellate courts should not look beyond the divorce decree in determining the nature of the payments.

property should be evident from the terms of a well-drafted dissolution decree.

Another question relating to the wife's enforcement of property distribution decrees has caused considerable litigation around an extremely narrow point: Can she order the ex-husband to show cause for his refusal to make the transfer,⁴⁸ or must she resort to the ordinary civil processes for execution of judgments?⁴⁹

Most states resolve this question by again resorting to the familiar shibboleth: If the transfer is a "property settlement" it must be enforced under the rules controlling the seizure and disposition of property in satisfaction of judgments. The courts reason that enforcement of mere property transfers by imprisonment would constitute imprisonment for debt, which is prohibited by most state constitutions.⁵⁰ But if the transfer is founded upon the "duty of the husband to support his wife," then the transfer is not a debt and it may be enforced by contempt.⁵¹ Thus, in determining whether the transfer is enforceable by contempt, most courts attempt to determine whether it is intended as "support" for the ex-wife.⁵² If it is, it is so enforceable despite the use

⁴⁸ The Ohio contempt statute provides in relevant part: "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer." OHIO REV. CODE ANN. § 2705.02 (Page 1954). Section 2705.03 authorizes a hearing on the contempt order. Section 2705.05 provides for punishment by imprisonment for up to ten days, or a fine of up to \$500, or both. Section 2705.06 provides that when the contempt consists of an omission to do an act which the accused can yet perform, the contemnor may be imprisoned until the act is performed.

⁴⁹ The requirements for execution against the property of a judgment debtor, and the exemptions to which he is entitled, are set forth in Chapter 2329 of the Ohio Revised Code. Chapter 2331 provides for execution against the judgment debtor's person. A judgment creditor is authorized to obtain body attachment when the judgment debtor fraudulently attempts to place his property beyond the reach of the judgment creditor. OHIO REV. CODE ANN. § 2331.02 (Page 1954).

⁵⁰ See, e.g., OHIO CONST. art. 1, § 15.

⁵¹ See, e.g., *State, ex rel Cook v. Cook*, 66 Ohio St. 566, 64 N.E. 564 (1902); and *Bradley v. Superior Court*, 48 Cal. 2d 509, 310 P.2d 634 (1957). In *Cook*, the Ohio Supreme Court upheld against constitutional attack the use of contempt proceedings in enforcing alimony decrees, stating that:

[alimony] is not a debt in the sense of a pecuniary obligation; it arises from a duty which the husband owes as well to the public as to the wife. . . . 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. . . . The withholding of this allowance, therefore, by the late husband, when able to respond, is a refusal to abide by and perform the order and decree of the court, and it is difficult to see why such refusal should not be punished as contempt. . . .

66 Ohio St. 566, at 572-73; 64 N.E. 567, at 568-69. The enforcement of child support orders and decrees has also been held not to be within the constitutional inhibition for imprisonment for debt. *Slawski v. Slawski*, 49 Ohio App. 100, 195 N.E. 258 (1934).

⁵² The ex-husband's support obligation typically is construed broadly. In *Phillips v. District Court*, 95 Idaho 404, 509 P.2d 1325 (1973) the court upheld ex-wife's claim that ex-husband was in contempt of court for failing to make support payments. The contractual provision in issue consisted of a release by ex-wife of "all claims whatsoever upon the husband for a further division of the community property, alimony, support and maintenance . . . except the right to demand performance of all the undertakings of the husband." 95 Idaho at 406, 509 P.2d at 1327. Ex-husband had failed to make automobile payments. In *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958) the court stated

of a syllogism in describing the genesis of the transfer. After *Wolfe*, of course, the Ohio courts cannot appropriately speak in terms of the husband's duty to support his wife following dissolution of the marriage.⁵³

The Ohio courts have split on the use of the contempt power to enforce post-dissolution transfers of property. At least two courts of appeal⁵⁴ hold that the characterization of the transfer as support or a property settlement is insignificant. What is significant, according to one of these courts, is the language of the decree.⁵⁵ If the decree orders either spouse to make a property or money transfer to the other, it is enforceable by contempt.⁵⁶ Other Ohio courts still adhere to the distinction, as they see it, between support payments and property settlements. Under this view, only those payments characterized by the court as support are enforceable by contempt.⁵⁷

In *Hogan v. Hogan*,⁵⁸ a separation agreement which required the husband to transfer certain property to the wife had been merged into a judgment of divorce which ordered him to do so.⁵⁹ When the husband

that the only relevant inquiry is "whether there is a reasonable relation between the provision here sought to be enforced . . . and the duty of [the husband] to support [the wife]."

The Ohio cases tend also to reflect this liberal view of support. While there exists some authority for the proposition that the support obligation is narrowly defined, *Traylor v. Traylor*, 46 Ohio App. 87, 187 N.E. 722 (1933) (mortgage and property tax payments held to be in nature of property settlement and thus not enforceable by contempt), more recent decisions appear to construe the support obligation broadly. *See, e.g., Peters v. Peters*, 115 Ohio App. 443, 183 N.E.2d 431 (1962) (\$400 lump sum "permanent alimony" payable in \$10 installments held to be enforceable by contempt proceedings). *But see Hogan v. Hogan*, 29 Ohio App. 2d 69, 278 N.E.2d 367 (1972), in which the appellate court for Cuyahoga County entirely abandoned the *Peters* rule as "arbitrary and artificial" in application.

⁵³ *Wolfe v. Wolfe*, 46 Ohio St. 2d 411, 350 N.E.2d 413 (1976). In an effort to clarify what exactly the legal obligations of an ex-spouse are once the marriage is dissolved the court stated in *Wolfe*: "Although post-marital alimony has been said to *arise out of* the husband's duty to support his wife, . . . 'the *legal obligation* of the husband to furnish support to the wife ceases upon the termination of the marriage relation.'" 46 Ohio St. 2d at 410, 350 N.E.2d at 421 (quoting *Lockwood v. Krum*, 34 Ohio St. 1, 7 (1877) (emphasis in the *Wolfe* opinion).

⁵⁴ *Hogan v. Hogan*, 29 Ohio App. 2d 69, 278 N.E.2d 367 (1972); *Peters v. Peters*, 115 Ohio App. 443, 183 N.E.2d 431 (1962).

⁵⁵ *See Hogan v. Hogan*, 29 Ohio App. 2d 69, 71, 278 N.E.2d 367, 369 (1972).

⁵⁶ The trial court in *Peters v. Peters*, 115 Ohio App. 443, 183 N.E.2d 431 (1962), issued a decree awarding the spouse a lump sum payable in weekly installments as permanent alimony. While the decree specified the amounts and a provision for acceleration of payments upon default, the decree's language did not specifically order the defendant to make the installment payments. The court held that the decree was enforceable by contempt proceedings, reasoning that a mere adjudication of the amount of alimony by the court amounted to "a direct command" to the defaulting party. The court based this liberal rule on the "public interest involved in both temporary and permanent alimony." *Id.* at 447-448, 183 N.E.2d at 434.

⁵⁷ *Saslow v. Saslow*, 104 Ohio App. 157, 147 N.E.2d 262 (1957); *Addison v. Addison*, 95 Ohio App. 191, 118 N.E.2d 225 (1953); *Traylor v. Traylor*, 46 Ohio App. 87, 187 N.E. 722 (1933).

⁵⁸ 29 Ohio App. 2d 69, 278 N.E.2d 367 (1972).

⁵⁹ The decree in *Hogan* provided in pertinent part: "The court finds that the parties have, prior to the conclusion of this hearing, entered into a separation agreement which is

subsequently refused to pay, the wife prompted a contempt proceeding against him. The defendant contended that the incorporated separation agreement was in fact a property settlement. Applying the general rule that property settlements are not enforceable by contempt, the trial court dismissed the ex-wife's motion.⁶⁰ The Court of Appeals for the Eighth District reversed, holding that all court orders are enforceable by contempt whether they provide for alimony, property settlements, or both.⁶¹ Since the defendant had violated a court order, he could be punished for his contempt if the violation was willful and he had the means to make the transfer.⁶² Willfulness reasoned the court, established his contemptuous conduct, and his ability to make the transfer precluded a claim of imprisonment for debt.⁶³

In so holding, the Eighth District rejected the conclusion of the Third District in *Saslow v. Saslow*.⁶⁴ There, a transfer of real estate was supposed to have been made by the husband in "full payment" of permanent alimony. The decree provided, however, that the wife was to reconvey the real estate under certain conditions, which she subsequently refused to do. The court concluded, after applying the "alimony-

fair, just and equitable, and orders that said agreement . . . be incorporated herein . . . and its terms ordered into execution." *Id.* at 76 n. 2, 278 N.E.2d at 372 n. 2.

⁶⁰ *Id.* at 70-71, 278 N.E.2d at 368.

⁶¹ *Id.* at 70, 278 N.E.2d at 368.

⁶² *Id.* at 71, 278 N.E.2d at 369 (citing *Holloway v. Holloway*, 130 Ohio St. 214, 198 N.E. 579 (1935)). In *Holloway*, the Ohio Supreme Court held that an alimony decree which incorporated a separation agreement between parties was enforceable by contempt proceedings. At issue before the court was whether contempt proceedings to enforce obligations based originally upon contract, but subsequently incorporated into a divorce decree, violates the Ohio Constitution's prohibition on imprisonment for debt, OHIO CONST. art. 1, § 15. The *Hogan* court followed the supreme court's reasoning in *Holloway* which found the contractual obligation merged into the divorce decree: "[T]he inquiry is not whether the alimony obligor has paid the amounts provided for in the contract, but whether he had paid the amounts ordered by a decree of court." *Holloway v. Holloway*, 130 Ohio St., at 217, 198 N.E. at 58.

⁶³ The *Hogan* opinion briefly addressed some possible defenses to contempt proceedings enforcing decretal provisions: that the act or omission was not willful, that the decree's provisions had already been complied with, or that the trial court had exceeded its authority in decreeing the provisions currently before the court for enforcement. In cases in which the trial court incorporates a separation agreement, the *Hogan* court expressed doubts whether the last defense could be effective in light of the Ohio Supreme Court's decision in *Robrock v. Robrock*, 167 Ohio St. 479, 150 N.E.2d 421 (1958). *Robrock* was an expansion upon the supreme court's decision in *Holloway v. Holloway*, 130 Ohio St. 214, 198 N.E. 579 (1935), holding that an incorporated separation agreement is merged into the decree and is thereby enforceable by contempt proceedings notwithstanding its contractual origins. In the fourth paragraph of the *Robrock* syllabus the majority stated that in order to allow a court "to give effect to a separation agreement [the court] has the power to incorporate it in the divorce decree or base the decree on its provisions, even though the court, in the absence of an agreement of the parties, would not have the power to make the resultant decree." Four years subsequent to the Eighth District's *Hogan* decision the Ohio Supreme Court, in *Nokes v. Nokes*, 47 Ohio St. 2d 1, 351 N.E.2d 174 (1976); questioned the validity of paragraph four of *Robrock*. While the outcome in the *Nokes* decision did not turn on the question of whether a court could enforce decretal provisions beyond its statutory authority, the court's language in *Nokes* indicates that collateral attack upon a court's abuse of authority in enforcing decretal provisions based on incorporated separation agreements may remain a valid defense to contempt proceedings.

⁶⁴ 104 Ohio App. 157, 147 N.E.2d 262 (1957).

property settlement" rule, that the transfer was not support and could not be enforced by contempt.⁶⁵

The Eighth District rejected the *Saslow* reasoning outright in *Hogan*, creating an apparent conflict which would ordinarily be resolved by the Ohio Supreme Court. Unfortunately, *Wolfe* does not deal directly with alimony enforcement procedures, and it is difficult to predict the ultimate outcome on this point. However, *Wolfe* should be helpful to those courts which do apply the "support-property settlement" rule in making the appropriate distinction for purposes of contempt.

Nevertheless, some guesses can be made about the current status of alimony contempt in Ohio. Interestingly, in *Saslow* the court held that lump-sum property settlements are not enforceable by contempt since a court's jurisdiction over such settlements ends with the original decree.⁶⁶ Of course, *Wolfe* said exactly the same thing about alimony property settlements in general, creating an exception for severable sustenance payments. At a minimum it would seem that absent specific language in the decree ordering that a transfer be made, the supreme court will endorse show cause procedures protecting a party's right to receive severable support since the receipt of such a transfer vindicates an important state policy: preventing the recipient from becoming a ward of the state. The right to receive other property, which right, according to *Wolfe*, is not a right to support and hence indistinguishable from the right to enforce an ordinary debt, will probably be left to those enforcement devices applicable to ordinary judgments.

The conflict between the Eighth District in *Hogan* and the Third District in *Saslow* is probably more apparent than real, for *Hogan* held only that a party who violates a court order is subject to punishment for contempt. Thus, if the decree dissolving the marriage specifically orders that a particular transfer be made, then as *Hogan* points out the contempt statute by its terms provides that the court can invoke its provisions against a recalcitrant transferor. The Eighth District's view is persuasive. It would seem that the result of a willful violation of the court order should be the same regardless of the characterization of the property or the nature of the transaction which gave rise to the order.

If the supreme court does ultimately conclude that only sustenance orders can be enforced by contempt, then whether the transfer involved is indeed a property settlement or sustenance will be answered, as *Wolfe* indicates, by the form in which it is cast. Conversely, if the court concludes that all post-dissolution alimony is enforceable by contempt, then form will still control, since according to the *Hogan* rationale, and the contempt statute, if the judgment entry is drafted so that the defendant is ordered to make a transfer he will be required to show cause for his failure to do so.⁶⁷

⁶⁵ *Id.* at 165, 147 N.E.2d at 268 (following *Traylor v. Traylor*, 46 Ohio App. 87, 187 N.E. 722 (1933)).

⁶⁶ 104 Ohio App. at 166, 147 N.E.2d at 269.

⁶⁷ See *Hogan v. Hogan*, 29 Ohio App. 2d at 71, 278 N.E.2d at 369.

III. CHILD SUPPORT

The statute which requires the husband to support his wife during the marriage also imposes upon the husband the primary obligation of support for his children.⁶⁸ Like the wife's duty to support herself while married, a mother's duty to support her children is a secondary one. A few efforts have been made recently by the General Assembly to equalize the support burden during the marriage, but these have been unsuccessful. Ohio legislators seem to believe that a wife's responsibility to her family is still to take care of the children and, if she insists upon working, to earn discretionary income. Although this view has been rejected by the Internal Revenue Service⁶⁹ and, presumably, by the large number of mothers who must work out of necessity, the basic philosophy still governs the common law marital regime.

On January 1, 1974 the General Assembly lowered the age of majority in Ohio to eighteen.⁷⁰ Fathers bound by previous child support orders to support their children until age twenty-one soon stopped making payments to ex-wives for children who had reached eighteen. Further, fathers who were bound by separation agreements merged into divorce decrees to support their children until age twenty-one also stopped paying child support when their children reached the new age of majority. On motions to show cause, the Ohio Supreme Court was ultimately asked whether the new age of majority applied to old child support orders.

In *Nokes v. Nokes*,⁷¹ the court held that the new legislation lowering the age of majority was to be given prospective application only, thus leaving intact child support orders not founded on separation agreements that had been journalized before the effective date of the legislation. In a companion case, *Rosenfeld v. Rosenfeld*,⁷² the court applied the same rule to divorce decrees which had incorporated separation agreements providing that the father would support his children until age twenty-one.

In *Nokes, v. Nokes*,⁷¹ the court said that once a child turns eighteen and is no longer in high school, domestic relations courts lose jurisdiction over him. Hence, they lose any further power to enforce their child support decrees.⁷³ The court stated in *Rosenfeld*, consistent with what it already had concluded in *Wolfe*, that once a separation agreement is incorporated into a decree it loses its independent existence as a contract. Under the *Nokes* reasoning, the court loses its juris-

⁶⁸ OHIO REV. CODE ANN. § 3101.03 (Page Supp. 1976).

⁶⁹ See I.R.C. § 44A (credit for dependent care services); I.R.C. § 7701(a)(17) (definition of husband and wife).

⁷⁰ Effective January 1, 1974, the age of majority in Ohio was changed from 21 to 18 years of age by an amendment to OHIO REV. CODE ANN. § 3109.01 (Page Supp. 1976), which now reads: "All persons of the age of eighteen years or more, who are under no legal disability, are capable of contracting and are of full age for all purposes."

⁷¹ 47 Ohio St. 2d 1, 351 N.E. 2d 174 (1976).

⁷² 47 Ohio St. 2d 12, 351 N.E.2d 181 (1976).

⁷³ See *Holloway v. Holloway*, 130 Ohio St. 214, 198 N.E. 579 (1935).

diction over the children, and its ability to enforce its decree, at the age of majority.⁷⁴

There is, of course, nothing in either *Wolfe*, *Nokes*, or *Rosenfeld* to prevent a parent from entering into a contract in which he agrees to support the children beyond age eighteen. If the contract is kept independent of the dissolution decree, the obligation will be a contractual one enforceable in courts having general jurisdiction rather than one imposed by a court that loses jurisdiction when the children reach majority.⁷⁵

In any event, it is obvious from *Nokes* and *Rosenfeld* that Ohio law no longer requires either parent to support the children beyond age eighteen, unless required to do so under a decree of divorce entered before the effective date of the legislation lowering the age of majority. Following the rule established in *Wolfe* for alimony, the Ohio Supreme Court has also made it clear that identical support responsibilities will be imposed upon the parents, whether agreed to in a separation agreement later incorporated into a decree, or imposed by court order.

Despite these recent cases, some significant child support questions remain. For example, the relative responsibilities of fathers and mothers to support their children are still unclear, notwithstanding the recent drift toward parental equality. Some guarded speculations about these responsibilities follow.

In determining how and by whom the children of a marriage will be supported following its dissolution, domestic relations courts must apply the Ohio child support statute.⁷⁶ This statute is quite similar in terms to the alimony statute⁷⁷ and should be read to effectuate the same purpose. The intended purpose of these laws can be stated as follows: support payments, whether alimony-sustenance or child support, should be awarded on the basis of need and not according to the sex of the supporting obligor. Recent Ohio cases lend support to the conclusion that the Ohio alimony and child support statutes should be read in *pari materia*. They hold that while the husband still has the primary duty of support during the marriage, both parties are equally responsible for supporting the children following dissolution.

*State v. Oppenheimer*⁷⁸ was a criminal prosecution against a divorced father for non-support of his children, who resided with the mother under the terms of the divorce decree. The defendant did not deny that he possessed the means to support the children.⁷⁹ He did show, how-

⁷⁴ *But see* Bugay v. Bugay, 7 Ohio Op. 3d 336 (Ct. App. 1977), a questionable opinion which reaches a contrary result.

⁷⁵ *See* Tefft v. Tefft, 73 Ohio App. 399, 54 N.E.2d 423 (1943); Danner v. Danner, 57 Ohio L. Abs. 30, 93 N.E.2d 54 (Ct. App. 1950).

⁷⁶ OHIO REV. CODE ANN. § 3109.05 (Page Supp. 1976). *See also* OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1976) (husband has a duty to support his wife and minor children out of his own property).

⁷⁷ OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1976).

⁷⁸ 46 Ohio App. 2d 241, 348 N.E. 2d 731 (1975).

⁷⁹ The prosecution was brought in juvenile court under OHIO REV. CODE ANN. § 2919.21 (Page Supp. 1976). The court cited OHIO REV. CODE ANN. § 2919.21(B) (Page Supp. 1976)

ever, that they had received adequate support from the mother. On review of his conviction, the Tenth District Court of Appeals reversed, stating that the criminal non-support statute applies to "persons" rather than fathers and mothers, and that the statute places "an equal burden on both parents."⁸⁰ The court described the current status of Ohio child support law as follows: "Present Ohio law holds that equal protection requires that the burden to support minor children be placed equally on both parents to the extent of their ability and means to the end that children should be adequately supported by their parents."⁸¹ Since the mother was providing the children with adequate support, the court concluded that the father had not breached any duty toward them and could not, therefore, be prosecuted under the criminal statute. The court pointed out that the parties had been separated by a decree of dissolution which ordered the defendant to pay \$260 per month to support his children, and that the ex-wife could have enforced the decree by civil contempt proceedings. The court concluded that such a child support decree would have been a post-dissolution substitute for the statutory obligation of the father to support the children during the marriage.⁸²

More directly to the point is *Hill v. Hill*.⁸³ In *Hill*, the First District Court of Appeals considered the question whether the child support statute⁸⁴ which applies to dissolution of marriage imposed obligations different from those imposed upon the parties under the marriage support statute. The court upheld an order compelling the mother of children not in her custody to make child support payments to the father, concluding that the child support statute, like the criminal non-support statute, applies by its terms to persons and not to husbands and wives. So construed, the statute requires that child support following dissolution be determined by the children's need for support and the ability of the parties to provide it, and not according to the traditional roles of the parents in the marriage relation.⁸⁵

Oppenheimer and *Hill* are strikingly similar to *Wolfe* in at least one important respect. They recognize that certain statutory obligations are imposed by Ohio law upon men to support their families during marriage, but that these obligations terminate and other statutes control when the marriage is dissolved. Upon dissolution of marriage the woman must support herself according to her means, and she and the father must support the children according to their respective abilities. Both the man and the woman will have received, through the dissolution of their marriage,

which provides that an inability to pay support is an affirmative defense to such prosecution, noting the similarity between a prosecution under this statute and the enforcement of support orders in contempt proceedings.

⁸⁰ 46 Ohio App. 2d at 244, 348 N.E.2d at 736.

⁸¹ *Id.* at 248, 348 N.E.2d at 738.

⁸² *Id.* at 246, 348 N.E.2d at 737.

⁸³ 40 Ohio App. 2d 1, 317 N.E.2d 250 (1973).

⁸⁴ OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1976).

⁸⁵ 40 Ohio App. 2d at 4-5, 317 N.E. 2d at 253.

alimony property settlements, as that term is used in *Wolfe*. In fashioning a support order under the child support statute the court is mandated to consider these settlements in determining exactly what responsibility each of the parties must bear in supporting the children.⁸⁶ Thus, *Oppenheimer* and *Hill* replicate in the child support area principles that *Wolfe* established for alimony. Of course, *Oppenheimer* and *Hill* are not the law of Ohio, but as consistent as they appear to be with *Wolfe*, they probably represent sound rules of child support law.

IV. CONCLUSION

The law of alimony and child support in Ohio has been reformulated to reflect certain common principles. Post-dissolution alimony is now regarded as a liquidation of the marital estate; it is a distribution to both the husband and wife of marital property that may take several forms, including support. Post-dissolution child support obligations have become the responsibility of both parents and, if established by court order after January 1, 1974, terminate at the age of majority. If alimony is ordered in the form of support or "sustenance" from one spouse to the other, the court will have continuing jurisdiction, as it does in child support cases, to modify its order for changed circumstances. Alternatively, the husband and wife may agree to a property settlement which has no alimony support characteristics. This property settlement cannot be modified by the court, but is probably dischargeable in bankruptcy. If the decree is properly drafted, the party who is entitled to receive an alimony transfer of some kind can enforce it by contempt against the party refusing to make the transfer. These are some of the more important consequences suggested by the recent cases.

How are these consequences to be put into effect? Through a careful adherence to form, the Ohio Supreme Court suggests. If post-dissolution alimony in the form of support payments is to withstand challenge, it must clearly be severable from the remainder of the property settlement. Thus, the careful draftsman will label such payments as "periodic sustenance payments to wife or husband," as the case may be, and expressly provide in either the separation agreement or judgment entry that they are meant to be "severable" and "independent" of the property settlement. If post-dissolution alimony in the form of a property settlement without support is to be used, the draftsman should label it as such and provide for the transfer of its components in a lump sum or definite installments. Of course, *Wolfe* will tolerate a little sloppy draftsmanship here, since all post-marital distributions will be presumed to be property settlements unless expressly labeled "sustenance."

The *Wolfe* court apparently looks unenthusiastically upon post-decree alimony sustenance payments between ex-spouses as indicated by its rule that such payments must be "clearly severable" from the rest of the property settlement. If the alimony property settlement between the husband and wife is to involve combinations of lump sum transfers and

⁸⁶ OHIO REV. CODE ANN. § 3109.05(B), (E) (Page Supp. 1976).

sustenance, the language of the decree should state that the support payments are intended to be independent of the general property settlement.

The responsibility for child support on the part of either parent now ends at the age of majority, and it is clear that the father will not be ordered to provide such support solely on the basis of his sex or status. Child support awards must now be based upon the needs of the children and the ability of either parent to provide it. Then, too, there is nothing in the law to prevent the parents from reaching a supplemental agreement concerning child support which provides that one or both of them are to support a child beyond the age of majority. This supplemental agreement will be enforceable as a contract in courts of common pleas.

And so, for better or for worse, the law of post-dissolution alimony and child support in Ohio has joined the Twentieth Century despite the State's reluctance to modernize the actual marital relationship itself. It would probably be more pragmatic to apportion the responsibilities in that relationship along functional lines rather than in accordance with sex as they are now. Still, the modern family is reorganizing itself; and so long as this lasts the General Assembly might more profitably wait to see what happens before locking the family into another marital regime.