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Notes

Alimony in Indiana Under No-Fault Divorce

INTRODUCTION

The nation has been witnessing a major revolution in the law of divorce in recent years. Since 1970 more than 30 states have adopted a system of no-fault divorce or have added no-fault grounds within a fault system.¹ Indiana joined this revolution in 1973.² Serious opposition had been expected in the Indiana legislature to changing the statutory grounds for divorce to irretrievable breakdown of the marriage. The greatest conflict arose, however, with regard to the provisions for property distribution rather than over the change to "no-fault" grounds for dissolution. Property distribution may take one of two forms, division of property or maintenance. Property division is a final settlement of the parties' assets made at the time of the dissolution, whereas maintenance is an ongoing obligation for purposes of support to the ex-spouse.³ The Indiana General Assembly worked three years on the new code, using the 1970 Uniform Marriage and Divorce Act as a model; but when the Act finally became law in 1973, significant changes had been made from the Uniform Act's provisions for division of property and maintenance of the ex-spouse.⁴ The maintenance

¹ See BNA FAMILY L. RPTER. 401:0001-452:0002 (Ref. File 1974) for the full text of existing current divorce laws, and the full text of all amendments to them.

² IND. ANN. STAT. §§ 31-1-11.5 (Code ed. Supp. 1974).

³ Under the prior law the term "alimony" was used to describe both maintenance and a division of property. The modern view is to separate these two awards. Throughout this note, the term "alimony" is used to refer to both forms of property distribution, and the term "support" is used to refer to maintenance only.

⁴ See Uniform Marriage and Divorce Act (1970) § 307 (Disposition of Property), § 308 (Maintenance) [hereinafter cited as Uniform Act]. The Uniform Act was revised in 1973, and an Alternative A was added to section 307:

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the ap-

provisions taken from the Uniform Act,⁵ which recognized support payments in certain circumstances, had been fully deleted, reflecting Indiana's traditional refusal to award support. Yet, a new provision, unique to Indiana's code, was later added, providing for maintenance when a spouse has been "physically or mentally incapacitated."⁶ Further confusing the distinction between the concepts of property division and maintenance was the addition of an inquiry into "the earnings or earning ability of the parties"⁷ to the criteria governing property division. The result of these changes is that the legislature—perhaps unintentionally—may have in effect established unlimited maintenance in Indiana, a result which the Uniform Act itself would not permit.

This note will explore the possible ramifications of these new provisions. Indiana courts have traditionally been reluctant to award maintenance even under statutes arguably authorizing such awards. The new maintenance provision may fall to a similar narrow interpretation, making it unlikely that courts will award maintenance even in situations apparently anticipated by the new code. Countering this, however, are recent appellate court decisions⁸ allowing what are in effect maintenance awards under the guise of a property division. The narrow interpretation of the maintenance provisions will not allow for maintenance where it is needed, while the use of property division to accomplish maintenance purposes circumvents the limitations on maintenance the General Assembly sought to impose, and further fails to achieve the

portionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

(b) In the proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Alternative B reads essentially the same as section 307, of the 1970 draft. The Comment states that Alternative A is the alternative recommended generally for adoption. It proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a). "Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A" *Id.* § 307.

⁵ See Uniform Act § 308, PROPOSED ACT OF THE CIVIL CODE STUDY COMMISSION § 210 (1970).

⁶ IND. ANN. STAT. § 31-1-11.5-9(c) (Code ed. Supp. 1974).

⁷ IND. ANN. STAT. § 31-1-11.5-11(e) (Code ed. Supp. 1974).

⁸ *Hibbard v. Hibbard*, — Ind. App. —, 315 N.E.2d 731 (1974); *Weiss v. Weiss*, — Ind. App. —, 306 N.E.2d 120 (1974).

collateral benefits, as in tax law, of calling a maintenance award what it is.⁹ This note suggests ways in which courts may interpret the new Act that will more properly implement the overall legislative design, and suggests changes the General Assembly can make in the maintenance and division of property sections of the code which will better clarify and coordinate the manifest policies the Act seeks to further.

PRE-1973 LAW—STATUTES AND CASES

The fault system of divorce under which Indiana operated until 1973 was based upon the century-old code¹⁰ which included an alimony statute providing:

The courts shall fix the amount of alimony and shall enter a judgment for such sum, and specify the character and method of payment, which in his discretion he deems to be just and proper under all of the evidence . . .¹¹

It was uncertain whether this statute delineating the method of payment limited alimony solely to a present and complete settlement of the property rights of the parties, or whether courts could also make alimony awards for the future maintenance of a spouse. Indiana courts were unwilling to interpret the alimony statutes to make an allowance for maintenance awards.¹²

⁹ There are several important practical consequences to classifying an award either as support or as a division of property. Alimony awarded for support is tax deductible by the payor whereas property (including cash) relinquished under a division is not. See INT. REV. CODE OF 1954, §§ 71(a) (1), (c) (2), 215, which allows the spouse who pays the support to deduct the amount paid to a former spouse and requires the spouse receiving the support to pay income tax on the amount received. Support payments are modifiable whenever there is a substantial change of circumstances. A division of property, however, is a final settlement between the parties and is not modifiable. Support awards may be enforced by contempt of court citations should a spouse be delinquent in making payments. H. CLARK, LAW OF DOMESTIC RELATIONS 465-67 (1968). A division of property award is considered a debt, and it would be unconstitutional to imprison a person for failure to pay his debts. IND. CONST. art. 1, § 22. See CLARK at 467.

¹⁰ [1873] Ind. Laws, ch. 43. The code contained one section authorizing alimony payments, *id.* § 20, and another fixing the method of payment, *id.* § 22, *as amended*, [1949] Ind. Acts, ch. 120, § 3.

¹¹ [1873] Ind. Laws, ch. 43, § 22, at 107, *as amended*, [1949] Ind. Acts, ch. 120, § 3, at 310, formerly codified at IND. CODE § 31-1-12-17 (1971).

¹² In taking this position, the courts relied on the following language from the method of payment provision: "The decree of alimony to the wife shall be for a *sum in gross*, and not for annual payments . . ." [1873] Ind. Laws, ch. 43, § 22 (emphasis added). The courts construed this provision to require a judgment for a specific amount and not for installments without limit as to amount. *Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1904); *Runyan v. Runyan*, 72 Ind. App. 469, 126 N.E. 35 (1920); *Boggs v. Boggs*, 45 Ind. App. 397, 90 N.E. 1040 (1910). For a discussion of the confusion in the application of this statute see Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970); Note, *Alimony in Indiana: Traditional Concepts v. Benefit to Society*, 29 IND. L.J. 461 (1954).

Despite this prevailing view there were some suggestions that support awards were authorized. Certain language in the 1949 amendments to the method-of-payment provisions of the alimony statutes could be interpreted as allowing a court discretion to make support awards.¹³ For a time several cases seemed to indicate that the courts would recognize the language in the statute relating to periodic payments and begin to make support awards.¹⁴ In *State ex rel. Roberts v. Morgan Circuit Court*,¹⁵ the Indiana Supreme Court allowed an action for contempt against a husband who failed to make monthly money payments as well as monthly mortgage payments. Since the court had earlier held that obligations incurred under a property division were not enforceable through an action for contempt,¹⁶ it appeared that the court was construing the 1949 amendments to provide for support payments.

The dispute, however, remained unresolved as the supreme court more often than not embraced the contradictory position that support payments were inconsistent with the statute.¹⁷ A more recent case, *State ex rel. Schutz v. Marion Superior Court*,¹⁸ explicitly retreated from the position taken in *Roberts*, narrowly interpreting that case as permitting contempt proceedings only where the husband was delinquent in making mortgage payments. The notion that contempt proceedings may be

¹³ In determining the method of the payment of the alimony the court may require that it be paid in gross or in periodic payments, either equal or unequal, and if to be paid in periodic payments the court may further provide for their discontinuance or reduction upon the death or remarriage of the wife, and, in his discretion, the court may further provide for such security, bond, or other guarantee as shall be satisfactory to the court for the purpose of securing the obligation to make such periodic payments.

[1949] Ind. Acts, ch. 120, § 3, at 313, *amending* [1873] Ind. Laws, ch. 43, § 22, formerly codified at IND. CODE § 31-1-12-17 (1971). Of special significance was the language in the statute relating to periodic payments and the discontinuance of those payments on the death or remarriage of the wife.

¹⁴ *In re Webb*, 160 F. Supp. 544 (S.D. Ind. 1958); *State ex rel. Roberts v. Morgan Cir. Ct.*, 249 Ind. 649, 232 N.E.2d 871 (1968); *McDaniel v. McDaniel*, 245 Ind. 551, 201 N.E.2d 215 (1964); *Wellington v. Wellington*, — Ind. App. —, 304 N.E.2d 347 (1973); *Baxter v. Baxter*, 138 Ind. App. 24, 195 N.E.2d 877 (1964); *Bahre v. Bahre*, 133 Ind. App. 567, 181 N.E.2d 639 (1962).

¹⁵ 249 Ind. 649, 232 N.E.2d 871 (1968).

¹⁶ *Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1904).

¹⁷ The Indiana Supreme Court held in *Shula v. Shula*, 235 Ind. 210, 214, 132 N.E.2d 612, 614 (1956):

Alimony is awarded in Indiana for the purpose of making a present and complete settlement of the property rights of the parties. It does not include future support for the wife, nor is it intended as a medium for providing financial compensation for injured sensitivities during marriage.

See also *Doner v. Doner*, — Ind. App. —, 302 N.E.2d 511 (1973); *Sidebottom v. Sidebottom*, 140 Ind. App. 657, 225 N.E.2d 772 (1967); *Smith v. Smith*, 131 Ind. App. 38, 169 N.E.2d 130 (1960).

¹⁸ — Ind. —, 307 N.E.2d 53 (1974).

used to enforce support payments was expressly rejected.¹⁹

The *Schutz* decision compounded, rather than clarified, the alimony confusion.²⁰ Perhaps the result can best be explained as an indication of the court's unwillingness to embrace support alimony in Indiana. The result takes on added significance because the decision, though decided under the old law, was made after the new code had been passed—when the court would have been aware of the legislative history and intent of the new law. *Schutz* may be viewed as an indirect response to the legislature and as a signal as to how the new alimony law may be interpreted.

LEGISLATIVE HISTORY OF THE NEW ACT

The Civil Code Study Commission Subcommittee on Juvenile Procedure and Dissolution of Marriage, which was charged with redrafting the divorce code, used as its model the 1970 version of the Uniform Marriage and Divorce Act.²¹ The only major change from the Uniform

¹⁹ *Id.* at —, 307 N.E.2d at 55.

²⁰ Chief Justice Arterburn wrote a dissenting opinion in which he made three quite compelling arguments. First, he noted that the code at that time (section 31-1-12-17, discussed *supra* note 13) provided for payments of alimony in installments and provided for its discontinuance in case of death or of remarriage of the wife. "In other words," he concluded, "it has all the characteristics of support . . ." *Id.* at —, 307 N.E.2d at 56. Second, he noted that *Roberts* was the more enlightened rule since it was decided after the 1949 amendments to section 31-1-12-17, whereas *Marsh* had been decided prior to its passage. He expressed agreement with the holding in *State ex rel. Roberts v. Morgan* Cir Ct., 249 Ind. 649, 232 N.E.2d 871 (1968), that alimony payments in installments may be enforced by a contempt action, which would be an appropriate remedy to enforce a support judgment. Third, he could find "no historical or rational basis for the distinction attempted to be made in the majority opinion." *Id.* Since a contempt action is available only to enforce a support judgment and not a division of property, it is difficult to see how the court logically could say it is proper to order contempt for failure to make the mortgage payments but improper to order contempt for failure to pay a money judgment.

²¹ The sixth and final draft of the Proposed Act was completed in 1970. Section 209, *Disposition of Property*, read:

In an action pursuant to Section 201(a) or 201(b), the court shall divide the property of the parties, whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage, or acquired by their joint efforts, in a just and reasonable manner, either by division of property in kind, or by setting the same or parts thereof over to one of the spouses and requiring the other to pay such sum as may be just and proper, or by ordering the sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

In determining what is just and reasonable the court shall consider the following factors:

- (a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;
- (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;
- (c) the economic circumstances of the spouse at the time the disposition is to become effective, including the desirability of awarding the family residence or right to dwell therein for such periods as the

Act in the maintenance and division of property sections of the Subcommittee's Proposed Dissolution of Marriage Act was to allow the court to make a final disposition of all property without regard to whether it was marital or not.²²

This proposed act became the basis of House Bill No. 1179 as introduced in the 1971 session of the legislature.²³ No significant

court may deem just to the spouse having custody of any children.

The Comment to Section 209 explained:

The disposition of property will be incident to an action for dissolution of marriage or will follow a dissolution of the marriage in a prior judgment by a court which had jurisdiction only to dissolve the marriage. The factors to be considered in determining whether the property settlement is reasonable and just are similar to those contained in the Sixth Draft of [the] Uniform Regulation and Dissolution of Marriage Act.

Section 210, *Maintenance*, provided:

(a) In an action pursuant to Section 201(a), (b) or (c), the court may grant a support order, denominated a maintenance order, for either spouse only if it finds

- (1) that the spouse seeking maintenance lacks sufficient income and property to provide for his reasonable financial needs and
- (2) that the spouse seeking support is unable to support himself through employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in such amount and for such periods of time as the court may deem just. Such order may make the future payments conditional or terminable under circumstances prescribed therein and it may be in periodic payments or on a percentage of earnings or on any other basis.

The amount and conditions of such order shall be determined after consideration of all relevant factors, including:

- (1) financial resources of the party seeking maintenance and his ability to meet his financial needs independently;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the physical or mental condition of the spouse seeking maintenance; and
- (6) the ability of the spouse from whom maintenance is sought to meet his own financial needs.

The Comments to Section 210 stated:

(a) This section probably represents a change in Indiana law . . . and will allow for, under the narrow conditions set out in this section, a support award. Maintenance payments are amounts for the support of one spouse and are unrelated to a division of the property owned by the spouses. An award of maintenance payments may be made to either spouse if the conditions outlined in subsections (1) and (2) are met. These conditions were taken from the Sixth Draft of the Uniform Regulation and Dissolution of Marriage Act.

(b) The court is given wide discretion in fixing the terms and conditions of the award to meet the individual needs of the spouses. The factors deemed relevant to the duration and amount of maintenance payments are similar to those in the Sixth Draft of the Uniform Regulation and Dissolution of Marriage Act.

²² See *id.*

²³ [1971] IND. HOUSE J., 97th Gen. Assembly, 1st Reg. Sess., at 59.

changes were made in the division of property section, but the maintenance section and all references to maintenance in other sections were deleted.

In the 1972 session, bills modeled after H.B. 1179 as amended were introduced in each house of the General Assembly.²⁴ Since these bills repealed the very limited maintenance provisions in the old code which had provided maintenance to former spouses divorced on grounds of incurable insanity and confined to mental institutions and to spouses seeking separation from bed and board,²⁵ legislators realized that some maintenance would be needed for the incapacitated spouse or she would be left desolate.²⁶ To meet this objection section 10(b) of the House bill, which pertained to separation agreements, was amended by the Senate to read:

The court may make no provision for maintenance; Provided, However, That when the court finds a spouse to be physically or mentally incapacitated, the court may make provision for the maintenance of said spouse subject to further order of court.²⁷

The real dispute arose over the division of property section. The Senate was adamant that any bill it passed revising the divorce code should include language making fault a criterion in making the division. As a result a fourth criterion for the court to consider, "the conduct of the parties during the marriage," was added to each bill.²⁸ In effect the Senate was saying that they were willing to accept no-fault divorce where the parties could really prove that the marriage was irretrievably broken, but the party responsible for the breakdown could expect to pay for his faults by receiving a smaller share of the property.

The House was equally adamant in its desire to keep this provision out.²⁹ This provision would have allowed the same evidence of fault to be brought in under the rubric of property settlement which the framers of the bill had sought to keep out by adopting no-fault grounds. A Conference Committee was established in an effort to arrive

²⁴ House Bill No. 1021 and Senate Bill No. 66. See [1972] IND. HOUSE J., 97th Gen. Assembly, 2d Reg. Sess., at 35; [1972] IND. SENATE J., 97th Gen. Assembly, 2d Reg. Sess., at 46.

²⁵ [1873] Ind. Laws, ch. 43, § 8, at 107; [1903] Ind. Laws, ch. 48, § 2, at 114; [1935] Ind. Acts, ch. 87, § 1, at 248; formerly IND. CODE §§ 31-1-12-3, -22-2 (1971).

²⁶ Letter from State Senator Merton Stanley to Stephen Pennell, Oct. 21, 1974 (on file with the INDIANA LAW JOURNAL).

²⁷ [1972] IND. SENATE J. 443.

²⁸ [1972] IND. SENATE J. 81 (S.B. 66), 553 (H.B. 1021).

²⁹ No bill passed the House with any provision containing fault as a relevant factor to consider in making the property division.

at a compromise. It made two proposals,³⁰ neither of which included fault as a criterion in making the property division. The House voted in favor of each,³¹ but the Senate failed to pass either.³²

Senator Stanley felt that the bills were rejected in 1972 because the Conference Committee Report made no provision for the conduct of the parties to be considered in any way, nor was the earning ability of either party to be considered.³³ Many felt the bill failed to provide adequate protection for a respondent.³⁴ Senator Stanley attempted to resolve these problems when he introduced S.B. 68 in the 1973 legislature.³⁵

Senate Bill No. 68 read basically the same as the Senate drafts of the 1972 bills. The fault controversy was finally resolved as a compromise was reached on section 11(d), the criterion relating to fault of the parties.³⁶ The Senate Judiciary Committee amended it to allow the courts to consider the conduct of the parties during the marriage "as related to the acquisition, use, or disposition of their property."³⁷ As a result of this compromise fault was eliminated as a punitive measure and became relevant only as it relates to a division of property. Hence the fact that a spouse committed adultery would be irrelevant. The fact that he gave his mistress a \$500 ring would be quite relevant and that sum should be deducted from his share of the property.³⁸

With the center of controversy focused on the fault provision, little attention was paid to the addition of a fifth criterion, "the earnings or earning ability of the parties,"³⁹ which was part of S.B. 68 as introduced by Senator Stanley. Yet it is this provision which may prove to be the major source of difficulty.

The House Judiciary Committee also made a significant change in the bill. It took the maintenance provision out of the section relating to separation agreements⁴⁰ and placed it in the section on final hearings as section 9(c).⁴¹ This is important because, if the maintenance provision had been left in the section relating to separation agreements, one could

³⁰ [1972] IND. HOUSE J. 707, 769.

³¹ *Id.* at 757, 775.

³² [1972] IND. SENATE J. 692.

³³ See Stanley, *supra* note 26.

³⁴ *Id.*

³⁵ [1973] IND. SENATE J. 43.

³⁶ *Id.* at 202 (S.B. 68, § 1, at 7, line 10).

³⁷ *Id.*

³⁸ Hopson, *Summary of the New Indiana Dissolution of Marriage Law*, in INDIANA STATE BAR ASSOCIATION, FAMILY LAW PRACTICE MANUAL at II-6-1, -13 (1974).

³⁹ S.B. 68, [1973] Ind. Gen. Assembly, 98th Sess.

⁴⁰ See *id.*

⁴¹ [1973] IND. HOUSE J., 98th Gen. Assembly, 1st Reg. Sess., at 790.

have argued that a court could make no provision for maintenance absent a separation agreement. With this provision now in the section on final hearings, it is clear that a court may order maintenance whenever the court finds the requirements of section 9(c) warrant it. The language of section 9(c) was also changed so as to define incapacitation in terms of conditions materially affecting one's ability to support oneself.⁴² As amended, the bill passed the House, the Senate concurred in the amendments, and it was signed into law as Public Law 297⁴³ by Governor Bowen.

To summarize: From the time that the first bill, patterned on the Uniform Act, was introduced, the legislature made significant changes in both the maintenance and division of property provisions. In 1971 the maintenance provision of the proposed act and all references to maintenance were deleted. In 1972 a maintenance provision was reinserted allowing maintenance awards when the very nebulous standard of "incapacitation" was met. And in 1973 the concept of incapacitation was defined more precisely, in terms of conditions "materially affecting" a spouse's ability to support himself.

The first significant change with respect to property division was that the distinction between marital and nonmarital property, borrowed from the Uniform Act, was abandoned. The next change was that fault was made a relevant criterion for the courts to consider in making the division. Finally, the spouses' "earnings or earning ability" was also made a relevant criterion for the courts to consider.

METHODS OF PAYMENT UNDER THE NEW ACT

The new Act provides two methods for payments between the divorcing parties: maintenance, under section 9(c),⁴⁴ and division of property under section 11.⁴⁵ The multiple provisions of these two sections give rise to the need for courts to both interpret the individual sections and coordinate their relationship as part of a coherent divorce policy.

Section 9(c)

Section 9(c) provides for maintenance payments "when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or her-

⁴² *Id.*

⁴³ *Id.* at 1372.

⁴⁴ IND. ANN. STAT. § 31-1-11.5-9(c) (Code ed. Supp. 1974).

⁴⁵ IND. ANN. STAT. § 31-1-11.5-11 (Code ed. Supp. 1974).

self is materially affected"⁴⁶ As originally drafted section 9(c) merely provided for maintenance payments to spouses who were "physically or mentally incapacitated."⁴⁷ In 1973, the language was added defining "incapacitation" in terms of conditions materially affecting a spouse's ability to support himself or herself. Senator Stanley, one of the sponsors, indicated that the purpose of the inserted language was

to meet the objection of many, that a wife who had devoted many years to a marriage, and who had no special skills, could be divorced without cause and left with no means of support. The present provision is a compromise in an effort to provide some means of support for a physically or mentally incapacitated spouse.⁴⁸

Perhaps fearing that courts would interpret "incapacitation" narrowly, so as to allow maintenance awards only to spouses who were totally incapacitated, the committee may have changed the definition of incapacitation in hopes of broadening the range of spouses eligible for support. Senator Stanley has indicated that this was the legislature's intention.⁴⁹ This interpretation of the Committee's purpose is further reinforced by the marked tendency of the Indiana courts to read alimony statutes narrowly.⁵⁰ Undoubtedly aware that the courts would most likely give this section a restricted interpretation, the Committee, in adding the language, ensured that even a restricted reading of the new provision would constitute an extension beyond the previous law.

The courts will be presented with many difficult cases calling for interpretation of this section. The legislature has seemingly restricted the courts' ability to continue refusing to award support payments. When incapacitation materially affects a spouse's ability to support himself or herself, support payments are appropriate.⁵¹ The question which the courts must now confront is what conditions constitute incapacitation "materially" affecting a spouse's capacity for self-support. Is the wife with five small children entitled to support? Unless given support she will be forced to find employment and hire another to take care of the children. Should the elderly or middle-aged housewife who has lost any marketable skills she might once have had be entitled to support? Is the burden of child-rearing a loss of marketable skills which should

⁴⁶ IND. ANN. STAT. § 31-1-11.5-9(c) (Code ed. Supp. 1974).

⁴⁷ See text at note 27 *supra*.

⁴⁸ Stanley, *supra* note 26.

⁴⁹ *Id.*

⁵⁰ See, e.g., State *ex rel.* Schutz v. Marion Super. Ct., — Ind. —, 307 N.E.2d 53 (1974); Shula v. Shula, 235 Ind. 210, 132 N.E.2d 612 (1956).

⁵¹ IND. ANN. STAT. § 31-1-11.5-9(c) (Code ed. Supp. 1974).

be considered an incapacitation which has materially affected one's ability to support himself or herself?⁵²

The elderly housewife presents the stronger case for allowing a support award. Her loss of the opportunity to acquire marketable skills, or her loss of those she may once have had, has, without doubt, materially affected her ability to support herself. While the legislature may have wished to avoid allowing support to the "alimony drone,"⁵³ section 9(c), as Senator Stanley suggests,⁵⁴ should not be so narrowly construed as to force a long-married, middle-aged or older woman, "incapacitated" because of lack of any marketable skills, to fend for herself.⁵⁵

Women in these circumstances differ from mothers with children. Whereas the former have lost or failed to acquire marketable skills because of their age and duration of marriage, the latter will still be young enough to have retained any marketable skills acquired before the marriage, or they could return to school or receive training to acquire the same level of skill they would have obtained had they not been married. The earning ability of these younger women has only been affected by the fact that they have children and have chosen to stay at home to rear the children rather than go outside the home to find employment.⁵⁶

The Uniform Act, in section 308, adopted the policy of support to a mother who lacks sufficient resources to care for her dependent children.⁵⁷ Operating under a statute based on the Uniform Act, an Iowa court granted a 40-year-old mother support alimony even though she could find adequate employment as a nurse.⁵⁸ The Indiana legislature having rejected section 210 of the proposed act,⁵⁹ which was based on the Uniform Act, it would appear that the legislature intended to reject the policy of granting maintenance awards to mothers with children.

⁵² See *Dash v. Dash*, 284 So. 2d 407 (Fla. App. 1973).

⁵³ *Doyle v. Doyle*, 5 Misc. 4, 6, 158 N.Y.S.2d 909, 911 (1957). The term "alimony drone," of course, refers to the ex-spouse who, although capable of supporting himself or herself, prefers to live off the earnings of the other ex-spouse.

⁵⁴ Stanley, *supra* note 26.

⁵⁵ *Cf. Dash v. Dash*, 284 So. 2d 407 (Fla. App. 1973).

⁵⁶ For example, suppose the wife is qualified to work as a secretary for \$2.50 an hour. If not awarded support she would be forced to go to work, which would require her to hire a sitter or place the children in a day care center should they be young enough to require such care. If the sitter is paid \$1.75 an hour, the working mother is clearing only \$30.00 per week (working a 40-hour week) over what she is paying the sitter. Taxes and social security will be deducted from this, so it is possible she may in fact be losing money by working. Indeed, she may even be required to seek welfare.

⁵⁷ See Uniform Act § 308(a)(2) (1970).

⁵⁸ *In re Marriage of Beeh*, 214 N.W.2d 170 (Iowa 1974).

⁵⁹ See note 21 *supra*.

However, the later insertion of the broad language defining "incapacitation" in section 9(c) can be viewed as reinstating this policy. Given the policy behind the Indiana statute to allow maintenance to former spouses whose ability to support themselves is materially affected due to some mental or physical "incapacitation," it would seem consistent with this policy to allow mothers with children to remain at home rather than find employment when it would be psychologically detrimental⁶⁰ or economically impractical for them to work.⁶¹

Should the court grant an award under section 9(c), the question yet remains what factors should be considered in deciding how much should be granted. Since under the old act Indiana did not allow for support alimony, there would be no local precedent available. Thus, Indiana must look elsewhere for criteria to use in making the award.⁶² The two most important factors have traditionally been the one spouse's ability to pay and the other's need.⁶³ In addition to these, other factors which the courts have traditionally considered are the ages and health of the parties, the duration of the marriage, what the wife gave up when she married, the couple's standard of living during the marriage, the total property of the parties, and the extent to which the wife, by her own efforts, contributed to the accumulation of that property.⁶⁴ Because section 9(c) focuses exclusively on a spouse's ability to support himself or herself—*i.e.*, the spouse's need—other factors not related to need are irrelevant. Thus, the courts should restrict their consideration to the one spouse's need, and, by implication, the other spouse's ability to meet that need with support payments.⁶⁵

⁶⁰ "Just as children need a roof over their heads, they need a mother-custodian who is fed and clothed. In short, for conceptual as well as psychological reasons, child support awards should include a sum for the mother's maintenance." R. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 145 (1968).

⁶¹ Indeed, arguments will be made that the grant follows from the term "incapacitation." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1958) defines "incapable" which is the root for "incapacitation" as "not capable; wanting in capacity, ability or qualification for the purpose or end in view" Synonyms are "unqualified, disqualified, inefficient." Requiring mothers to seek employment outside the home will render many mothers less efficient.

⁶² It would be relevant, however, to consider the criteria the Indiana courts have used in making decrees for temporary support. The rule has been that in determining the amount of temporary support the court should consider both the husband's ability to pay and the needs of the wife. *Rooney v. Rooney*, 231 Ind. 443, 109 N.E.2d 93 (1952); *Snider v. Snider*, 179 Ind. 583, 102 N.E. 32 (1913); *Yost v. Yost*, 141 Ind. 584, 41 N.E. 11 (1895).

⁶³ H. CLARK, *supra* note 9, at 441-45.

⁶⁴ *Id.* at 445-47. See also Uniform Act § 308(a) (1970).

⁶⁵ *In re Marriage of Beeh*, 214 N.W.2d 170 (Iowa 1974), is illustrative of the type of case where this award may be made. In that case the wife had started a career teaching nursing. She gave that up for the sixteen and one-half years she was married to become a homemaker and mother. "But no one, upon proper reflection, could say her

Another important aspect of section 9(c) is the question of how long payments should continue. That section provides that payments are to be made "during any such incapacity, subject to further order of the court."⁶⁶ This would take care of the spouse who, for example, required support while hospitalized, but upon release from the hospital could return to work. When there is no longer an incapacity the court should order that the payments cease. This language would also authorize rehabilitative alimony, thereby providing sufficient support to enable the spouse to attain skills lost or forgone due to the marriage.

The language of section 9(c) is certainly broader than the language in the old code. The language defining incapacitation in terms of impairment of the ability to support oneself appears to have been an effort to make it even broader so as to allow maintenance for the wife who has lost her skills after many years of marriage.⁶⁷ Even though the legislature rejected any form of maintenance in 1971,⁶⁸ it is clear that by 1973 at least part of the policies embodied in section 308 of the Uniform Act (section 210 of the proposed act) were restored. The language of section 9(c) is sufficiently broad to enable the court to interpret the section so as to completely restore these policies and allow maintenance for the spouse who has custody of children requiring his or her care. Such an interpretation would be good policy, yet still be short of a general maintenance award.

Section 11

Section 11 provides five criteria to guide the court in making a division of property between the spouses. In light of certain judicial developments in the area of property division under Indiana's old divorce law,⁷⁰ it is now possible to construe section 11 so as to permit awards under the guise of property division which, in terms of their effect, are nearly indistinguishable from maintenance awards under section 9(c). Moreover, although section 11 was based on the Uniform Act's division of property provision, the legislature's departure from that provision has created the possibility of much broader awards than the Uni-

career has not been affected by her virtual removal from her profession and its technical and scientific changes during sixteen and one-half years." Accordingly, the court awarded her alimony "during the year and a half she might require to obtain her master's degree or otherwise rehabilitate her career." *Id.* at 174.

⁶⁶ IND. ANN. STAT. § 31-1-11.5-9(c) (Code ed. Supp. 1974).

⁶⁷ See notes 50-57 *supra* & text accompanying.

⁶⁸ See text at note 23 *supra*.

⁶⁹ IND. ANN. STAT. § 31-1-11.5-11 (Code ed. Supp. 1974).

⁷⁰ *Hibbard v. Hibbard*, — Ind. App. —, 315 N.E.2d 731 (1974); *Weiss v. Weiss*, — Ind. App. —, 306 N.E.2d 120 (1974).

form Act would permit.

Given the Indiana courts' tradition of reluctance to allow maintenance awards, creative lawyering may yield for a deserving spouse an award under section 11 functionally equivalent to one that was arbitrarily denied under section 9(c). Although this result is preferable to leaving the spouse with no award whatsoever, collateral problems relating to modification and enforcement of the awards as well as taxation make it necessary for the legislature to redraft the provisions in order to give the courts clear guidance as to its policies.

Using Section 11 to Provide De Facto Maintenance

Under section 11 all the property of the parties, regardless of when or how acquired, is to be divided by the court in "a just and reasonable manner."⁷¹ Although five factors to be considered are listed in section 11,⁷² the fifth criterion, "(e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties,"⁷³ may prove to have the greatest significance. Earnings and earning ability are not new factors. Indeed, they have been routinely cited in numerous Indiana cases as being proper criteria to be used in making a division of property.⁷⁴

A significant change, however, has occurred recently in defining earning ability. Proceeding under the old divorce law, the court in *Weiss v. Weiss*,⁷⁵ instead of merely regarding a spouse's earning ability as a factor to be considered in dividing the property between the parties, capitalized earning ability as an asset to be divided between them. The parties' total combined property, excluding earning ability, was valued at \$13,000 in personalty and \$10,000 in realty. The husband had a salary of \$23,000 a year, and variable partnership income which had amounted to \$14,000 at one time in the past. The wife worked as a nurse, earning \$8,100 per year. The court granted the husband \$10,000 of the personal property and granted the wife the remaining \$3,000 in personal property, plus \$20,000 in alimony. (The realty, held by the entireties,

⁷¹ IND. ANN. STAT. § 31-1-11.5-11 (Code ed. Supp. 1974).

⁷² The court should first look under criterion (a) to the contribution of each spouse to the acquisition of the property, including the contribution of the wife as homemaker. The other side of the coin is criterion (b), "the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift." The third criterion is the economic circumstances of the spouse, and the fourth criterion is fault as related to dissipation of assets.

⁷³ IND. ANN. STAT. § 31-1-11.5-11(e) (Code ed. Supp. 1974).

⁷⁴ See, e.g., *Miller v. Miller*, 146 Ind. App. 455, 256 N.E.2d 589 (1970); *Languell v. Languell*, 143 Ind. App. 24, 237 N.E.2d 587 (1968); *Cornwell v. Cornwell*, 108 Ind. App. 350, 29 N.E.2d 317 (1940); *Glick v. Glick*, 86 Ind. App. 593, 159 N.E. 33 (1927).

⁷⁵ — Ind. App. —, 306 N.E.2d 120 (1974).

was not disposed of in the decree.) It is clear that the parties did not have sufficient property at the time of divorce to justify an award of \$20,000 for alimony without considering the husband's future earnings as a distributable asset.⁷⁶

A similar result was reached in *Hibbard v. Hibbard*,⁷⁷ where the husband claimed that the property at the time of divorce was of negative value. He was awarded \$24,550 worth of property, which included the house which had a \$12,000 mortgage. On a weekly salary of \$275, he was ordered to pay the mortgage plus \$10,747 in other debts. After paying the debts, he would have been left with property worth \$1,803. The wife was awarded \$21,650 in "property" which included an alimony award of \$18,300. Again, the parties did not have sufficient property to justify an alimony award of \$18,300 unless the court used the husband's earning ability as an asset to be divided. Yet the appellate court, citing *Weiss*, found no abuse of discretion by the trial court in making this award.⁷⁸

Although both *Weiss* and *Hibbard* were decided under the old law, they may indicate how the courts will construe section 11(e). By including capitalized future earnings as an asset, and by considering the parties' economic circumstances, the courts can make property divisions which approximate the results of support awards. The spouse facing circumstances that should qualify as incapacitation under section 9(c) would receive about the same kind of support under section 11.⁷⁹ In

⁷⁶ An interesting—and perhaps limiting—rationale was mentioned by the court. After their marriage, the wife went to work and the husband returned to college—one and one-half years in undergraduate school, and seven years in graduate school culminating in a Ph. D. The appellate court noted: "Probably in recognition of Darlene's financial contributions to the family which apparently was a factor in Doyle's advanced and extensive education and ability to earn a good income, the trial court awarded Darlene \$20,000." — Ind. App. at —, 306 N.E.2d at 124. Likening the wife's actions here to situations where "by her industry and economy [she] has contributed to the accumulation of the husband's property," the trial court's approach was found to be supported by "logic and reason." *Id.* at —, 306 N.E.2d at 125.

⁷⁷ — Ind. App. —, 315 N.E.2d 731 (1974).

⁷⁸ *Id.* at —, 315 N.E.2d at 735. In *Hibbard* there was also evidence that the wife had helped build up the family's Hibbard Construction Co., and "spent many weeks in the employ of the company without compensation." *Id.* at —, 315 N.E.2d at 734. In upholding the award of alimony, the appellate court noted the evidence of the "wife's contribution to the accumulation of the husband's property by her industry" and the husband's present ability to earn. Both *Hibbard* and *Weiss* may be narrowly construed to create in the wife a present right to a share of her ex-husband's future earnings where his present earning power derives from her past contributions.

⁷⁹ Suppose a wife is institutionalized with a permanent disability so that she has no earning ability to contribute. The husband has a capitalized earning ability of \$300,000. The cost of her support is \$75,000. Under section 9(c) the court may make a provision for her support while she is incapacitated which would cover the costs of her institutionalization. The husband would pay \$75,000 for maintenance and retain \$225,000. Under

addition, a material incapacitation short of being total would also be compensated under section 11 as it would be under section 9(c).⁸⁰ The greater one spouse's loss in earning ability, the more the other will be required to contribute from his future earnings to make up for the difference in earning abilities. Given the legislative history of these sections,⁸¹ it would appear that the legislature did not intend to provide for this kind of maintenance award. Yet by allowing the courts to consider earning ability as an asset, and to take into account all the economic circumstances in dividing the property, the legislature has in fact authorized just such awards.

After deciding how much capitalized earning ability there is to divide,⁸² the court must still determine how this amount should be di-

section 11 she would be entitled to whatever part of the assets she had helped to acquire. In addition the courts should consider her economic circumstances and award her whatever further funds would be required to meet the costs of her hospitalization. If the wife's contribution to the total assets was worth \$50,000, she would receive an additional \$25,000 in consideration of her economic circumstances. This would represent the amount needed for her to obtain a level of subsistence in light of her needs. The husband would retain \$225,000, or the same amount he would retain under section 9(c).

⁸⁰ For example, consider the case of the elderly lady who has lost her marketable skills and qualifies under section 9(c). Suppose the parties' only assets are their capitalized earning abilities. Before the marriage the wife was a nurse. She has lost those skills, so her earning ability is only one-half of what it would have been as a nurse. The husband's earning ability is valued at \$200,000. The wife's earning ability would be valued at \$100,000 had she retained her skills but only \$50,000 since she lost them. If these assets were equally divided each would receive \$150,000 had she retained her skills as a nurse. The husband would pay her \$50,000 from his future earnings. With these skills lost there would only be \$250,000 to divide so each would receive \$125,000. Now the husband would pay her \$75,000 since the difference in earning ability is greater.

⁸¹ See text at notes 21-43 *supra*.

⁸² There is no particular method for capitalizing earning ability that has been adopted by courts. Generally, the first step is to determine how long each spouse may expect to live and earn income. Mortality tables may be used as evidence of a spouse's life expectancy, and other evidence would be admissible to show that a particular spouse's life expectancy may be greater or shorter than indicated by the tables. The second step is to determine how much each spouse would have earned during these years. See 3 AM. JUR. PROOF OF FACTS 618-41 (1959). The third step is to determine the rate of capitalization. In the business world the rate of capitalization is a reflection of the market's confidence in the stability of the business. D. HERWITZ, BUSINESS PLANNING 151 (1966). In this situation the court must choose a ratio which reflects the risk that a spouse will not earn the previously determined earning ability. Without the aid of the market the court may only speculate as to what it might be.

Once earning ability is capitalized as an asset, two other problems are presented. First, how much, if any, of this amount is to be deducted for personal consumption? In order to avoid a serious tax inequity, a division of property for family law purposes should be defined as being that property remaining after payment of all income taxes and debts. Otherwise the spouse with the greater earning ability would be required to pay the tax on the amount he makes before he gives a percentage of the remainder to his spouse in order to reduce the disparity in earning ability.

The second problem would be for the court to reduce any lump sum awards to their present values. It is evident that if a spouse receives the award today he will have the

vided. The statute seems to contemplate that the marriage is a partnership, the assets of which are to be divided by a standard of fairness and reasonableness. This certainly will allow the trial court to continue exercising a great deal of discretion. Certain guidelines, however, can be suggested.

As a starting proposition the court should begin with the idea that, all things being equal, each partner is entitled to one-half the total assets. After the court capitalizes the earning abilities of both the husband and the wife and deducts taxes and debts, these amounts are totaled and divided by two.⁸³ The problem with this approach is that the statute requires the court to consider the contribution of each spouse to the acquisition of the property including the contribution of a spouse as homemaker. In some cases this requirement would have the effect of totally negating the effect of capitalizing earning ability. If the husband has a capitalized earning ability of \$300,000 and the wife \$150,000, it can be argued that his share of their aggregate capitalized earnings should be twice as much as hers. This theory depends on the husband's being able to prove that the asset, his earning ability, was acquired solely by his own efforts.⁸⁴ If he can prove that, his income should be treated in the same manner as though he had received it as a gift.

The analysis, however, should not end here. There are many ways in which one spouse may contribute to the earning ability of the other. A wife may directly contribute to the husband's earning ability. She may, for example, have worked to put him through graduate school.⁸⁵ Had she not worked to put him through school his earning ability would probably be significantly decreased. The wife should be allowed to share in these increased earnings as she has invested time, effort, and money to the acquisition of this increased earning ability of the husband.⁸⁶ Theoretically, in the division of this asset, she should receive whatever represents her contribution to his earning ability.

The wife may also indirectly contribute to the earning ability of

opportunity to invest that sum, opportunities which the paying spouse who must wait to earn the money would not have. Standard annuity tables, of course, will be helpful.

⁸³ If the total assets were \$450,000 with the husband having contributed \$300,000 and the wife \$150,000, then each would be entitled to \$225,000. The husband would be required to make up the difference in earning ability, so he would pay the wife \$75,000 from his future earnings.

⁸⁴ Cf. notes 76 & 78 *supra*.

⁸⁵ See *Weiss v. Weiss*, — Ind. App. —, 306 N.E.2d 120 (1974).

⁸⁶ See Note, *Alimony Awards Under No Fault Divorce Statutes*, 53 N.E. L. REV. 126, 129 (1974).

the husband. The statute expressly contemplates that the contribution of a spouse as homemaker should also be taken into account. This will require the court to consider not only those services subject to direct monetary expression, such as housekeeping; but also to consider those intangible contributions incapable of precise measurement, such as providing the meals, taking care of and raising the family, being a companion and lover. The longer the spouse has provided these benefits and the better she was at providing them the more she has helped in the acquisition of the asset and the more she should receive when it is divided. Whether the asset is a house or earning ability the principle should be the same. The problem in each of these cases will be to determine how much a wife has contributed to the acquisition of the husband's earning ability. It should also be noted that a working wife may provide the same intangible benefits as the housewife and therefore may also be considered as contributing to the acquisition of the husband's earning ability.

Awards Under Section 11 and Under the Uniform Act

Results obtained under the Indiana division of property statute can be even broader than those obtained under the Uniform Act's division of property and maintenance provisions. Under the Uniform Act, the property is first divided with each party receiving that which he or she acquired independently—*i.e.*, the nonmarital property.⁸⁷ Then the property they acquired together—marital property—is divided between them. In dividing marital property the court may consider the contribution of each spouse to its acquisition as well as the spouses' economic circumstances.⁸⁸ Although no explanation of "economic circumstances" is given in the *Uniform Marriage and Divorce Legislation: A Preliminary Analysis*,⁸⁹ the term seems to refer to any economic disparity resulting from setting aside to each spouse his or her respective nonmarital property. After the division of both nonmarital and marital property, maintenance may be awarded only if the available property

⁸⁷ The nonmarital property is that property acquired by each spouse separately as by gift, inheritance, or prior to marriage. Uniform Act § 307.

⁸⁸ Note that under the Uniform Act, section 307, economic circumstances are considered in reducing the disparity which results from the division of marital and nonmarital property, but only in dividing the marital property. Hence, if the husband owns and receives all the nonmarital property and there is only \$100 of marital property, in considering economic circumstances the court may give the entire \$100 to the wife, but it may not give her any of the nonmarital property as part of a division of property.

⁸⁹ R. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* (1968). Levy was the primary author of the Uniform Act and wrote this work as explanation and commentary to it.

is insufficient for the purpose of meeting needs and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with childcare.⁹⁰ Since the "standard of living established during the marriage" is a factor to be considered in making the maintenance award,⁹¹ it would be appropriate to use the same standard as that used in determining "economic circumstances" under the provision for property division. If a spouse is not given enough property to maintain the standard of living established during the marriage, he may be awarded under the maintenance provision an amount sufficient to allow him to meet his "reasonable needs" to maintain this standard of living.

Even assuming that the Indiana courts construe section 9(c) restrictively, this same result can be obtained under section 11 of the Indiana Act if the spouse would qualify for maintenance under the Uniform Act. Instead of explicitly separating marital and nonmarital property as the Uniform Act does, the Indiana statute lumps it all together. However, in the course of dividing the property, the court considers what the contribution of each spouse was to the acquisition of the property⁹² and whether it was acquired by gift, inheritance, or acquired before the marriage;⁹³ in effect, then, the court does separate the two types of property.

Under the Uniform Act separation of marital and nonmarital property will leave a disparity which may be narrowed by considering the economic circumstances of the parties;⁹⁴ if a spouse is still in need of further property to provide for his reasonable needs and is unable to support himself he may receive a maintenance award from the future earnings of the other spouse.⁹⁵ Under the Indiana statute, however, the future earnings are an asset to be divided along with the marital and nonmarital property. The future earnings of each spouse are capitalized, and in separating the spouses' shares, the court should consider the con-

⁹⁰ The spouse may yet receive a maintenance award if the two requirements of section 308 are met:

(1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose conditions or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

⁹¹ Uniform Act § 308(b)(3).

⁹² IND. ANN. STAT. § 31-1-11.5-11(a) (Code ed. Supp. 1974).

⁹³ IND. ANN. STAT. § 31-1-11.5-11(b) (Code ed. Supp. 1974).

⁹⁴ See note 88 *supra*.

⁹⁵ Uniform Act § 308. See note 90 *supra*.

tribution of each spouse to the acquisition of the other's earning ability. Having separated the marital and nonmarital property as well as the future earnings of each spouse, the court, prior to final division of the assets, should consider the spouses' relative "economic circumstances" in order to reduce the disparity in their positions. This disparity may be the result of the separation of marital and nonmarital property, and it may also reflect the difference in the spouses' future earning abilities. In making the final division, the court should take this disparity into account and divide the property so as to ensure that each spouse receives enough "property" to meet the reasonable needs of a person having the standard of living enjoyed by the spouse during the marriage. Hence under both section 11 of the Indiana Act and the property division and maintenance provisions of the Uniform Act, each spouse may receive enough property to satisfy his reasonable needs.⁹⁶

⁹⁶ The division of property, including capitalized earning ability, which results under the present provision of the Indiana Code can approximate those reached under the Uniform Act, although the manner of computation is different. Assume the following situation:

Husband (*H*) brought \$100,000 of property into the marriage, which his wife (*W*) did not assist him in acquiring. *H* also received, during the marriage, an inheritance of \$100,000. At divorce, *H*'s capitalized earning ability is \$300,000; *W* supported *H* through college, so that \$100,000 of this is ascribable to her assistance. *W*'s present capitalized earning ability is \$50,000, of which *H*'s assistance can be valued at \$10,000. There is \$80,000 in property acquired during marriage, to which both *H* and *W* contributed equally. In tabular form, the assets would be:

Assets	
<i>H</i> 's property before marriage:	\$100,000
<i>H</i> 's inheritance:	100,000
Property acquired during marriage:	80,000
<i>H</i> 's capitalized earning ability:	300,000
<i>W</i> 's capitalized earning ability:	50,000
Available assets:	\$630,000

Division under the Uniform Act:

Although the Uniform Act first sets aside to each spouse his separate property acquired before or independently of marriage, section 308 awards to the wife, as maintenance, an amount sufficient to meet her needs, as established by the standard of living enjoyed during marriage, to the extent her separate property and her own earning ability do not suffice. Thus, the court first establishes the bottom line—the wife's reasonable needs—and then computes the division of the spouses' assets to arrive at the figure selected. So, if the present value of the income reasonably necessary to maintain the wife at her current standard of living is \$250,000, then the court would first seek to satisfy this out of her own future earnings (\$50,000) and her separate property (\$0). Next, property acquired during marriage would be divided so as to reflect the balance yet due (assume \$60,000 of the \$80,000). This leaves \$140,000 to which *W* is entitled, an amount the court will order paid periodically or in a lump sum as *maintenance* (Uniform Act § 308(b)). (Note that *W*'s limited earning ability—\$50,000 total—is the crucial factor that qualifies her for the full \$140,000 in maintenance; were there no dis-

ability, *W*'s earning ability would be sufficient to release *H* of any maintenance responsibility. Uniform Act § 308(c)(2).)

Uniform Act		
Assets	<i>H</i>	<i>W</i>
<i>H</i> 's property before marriage:	\$100,000	
<i>H</i> 's inheritance:	100,000	
Property acquired during marriage:	20,000	\$ 60,000
<i>H</i> 's earnings	160,000	140,000 (maintenance)
<i>W</i> 's earnings		50,000
	\$380,000	\$250,000

Division Under the Indiana Code:

Section 31-1-11.5-11 directs that the division of property be "just and reasonable." In terms of the bottom line for *W*, this might take one of three forms: (1) an amount sufficient to keep the wife from being a public charge; (2) an amount sufficient to maintain the standard of living established during marriage (equivalent to the Uniform Act's approach), or (3) an equal division of property. Assuming that \$80,000 is the present value of the amount necessary to keep *W* off welfare, \$250,000 is sufficient to maintain her at her present standard of living, and \$315,000 is half of all assets, then the amount *H* must pay from his capitalized earnings is determined by the difference between *W*'s own assets (including her separate claims to *H*'s income because of her contributions), and the bottom figure. Remembering that *W* may claim \$100,000 of *H*'s earnings by virtue of her having assisted *H* in reaching his present earning ability, and that *H* may claim \$10,000 of *W*'s present earning ability for similar reasons, and that each contributed half of the property acquired during marriage, then the computations would be as follows:

Welfare Level		
Assets	<i>H</i>	<i>W</i>
<i>H</i> 's property before marriage:	\$100,000	
<i>H</i> 's inheritance:	100,000	
Property acquired during marriage:	40,000	\$ 40,000
<i>H</i> 's capitalized earning ability:	200,000	100,000
<i>W</i> 's capitalized earning ability:	10,000	40,000
	\$450,000	\$180,000

Since *W* is above the welfare level, no further transfer from *H*'s earning ability is warranted.

Maintaining Standard of Living		
Assets	<i>H</i>	<i>W</i>
<i>H</i> 's property before marriage:	\$100,000	
<i>H</i> 's inheritance:	100,000	
Property acquired during marriage:	40,000	\$ 40,000
<i>H</i> 's capitalized earning ability:	130,000	170,000
<i>W</i> 's capitalized earning ability:	10,000	40,000
	\$380,000	\$250,000

Here, \$70,000 of *H*'s earning ability was transferred to *W*. However, the \$70,000 could also be considered to have been taken from *H*'s separate property, a distinction which would have different tax consequences for *H* and *W*.

Parity		
Assets	<i>H</i>	<i>W</i>
<i>H</i> 's property before marriage:	\$ 50,000	\$ 50,000
<i>H</i> 's inheritance:	50,000	50,000
Property acquired during marriage:	40,000	40,000
<i>H</i> 's capitalized earning ability:	150,000	150,000

Indeed, the Indiana statute may go beyond the Uniform Act and fail to give the paying spouse as much protection as is secured by the Uniform Act. The sole concern of the Uniform Act is to ensure that each party receives enough assets to satisfy his reasonable needs. If, after a division of property pursuant to section 307, this goal is attained, no maintenance awards are permitted no matter how great the disparity between the spouses' relative economic positions. Under section 11 of the Indiana Act, which does not contain the same limitations as the maintenance provision of the Uniform Act, the relatively poorer spouse could still receive part of the other spouse's future income as a division of assets, notwithstanding need. This would mean, then, that each spouse would receive half of the couple's total assets, including earning ability. Such a result is obtainable by interpreting the section 11(c) command to consider each spouse's "economic circumstances" as one demanding absolute parity of the spouses' positions after dissolution. Courts seeking to avoid this result have several alternatives. The first is to read "economic circumstances" as authorizing courts to reduce the disparity between the spouses' positions only to the extent that the relatively poorer spouse has enough property to satisfy his reasonable needs.⁹⁷ This would effectuate the policies behind the Uniform Act but in the form of a limitation on property division rather than on maintenance awards.

A second alternative would be for courts to refuse to capitalize future earnings under section 11(e) and instead construe the maintenance provisions of section 9(c) to have the same limitation as the maintenance provision of the Uniform Act. This would foreclose the possibility of receiving de facto maintenance awards in the guise of property division awards, while it would enable the needy spouse to receive under the Indiana Act the same maintenance award as would be available under the Uniform Act.

<i>W</i> 's capitalized earning ability:	25,000	25,000
	\$315,000	\$315,000

Here, again, *W*'s bottom line figure of \$315,000 could also be satisfied by a \$135,000 transfer of *H*'s earning ability, rather than from an equal splitting of all assets. Since the Code does not direct from which source—property or earnings—the transfer shall be made, the tax treatment of such payments remains unclear.

⁹⁷ "Reasonable needs" can be defined to mean that amount of property which will keep the spouse from being a public charge, or that amount which will maintain the spouse at the standard of living established during marriage—approaches which emphasize the notion of "needs." Alternatively, the amount awarded may simply represent a straight one-half of all property available to the spouses upon their divorce, an approach that equates "reasonableness" with parity. See note 96 *supra*.

Finally, the courts could refuse to capitalize future earnings and also refuse to construe section 9(c) as allowing maintenance awards except in extremely limited circumstances. This would, in effect, return the Indiana divorce law relating to property division and maintenance to approximately the same position as before the enactment of the present statute. It would seem that a full return is foreclosed since under the old law maintenance awards were rendered only in cases of insanity;⁹⁸ no matter how restrictively the courts read the present standard governing maintenance—incapacitation materially affecting ability to support oneself—it seems impossible that only insanity would constitute such incapacitation.

The possibility of capitalizing future earnings was probably unforeseen by the legislature. As previously noted, important consequences relating to the tax treatment of an award, as well as its enforcement and modification, may result from labeling it as a division of property or as maintenance.⁹⁹ Litigation will likely arise in the tax area as the party who is required to pay his former spouse from his future earnings will claim a deduction for alimony when he makes these payments. At the same time, the recipient spouse will seek to exclude such payments from taxable income on the grounds that they represent a division of property—not alimony support. The tax court will look behind the label the state attaches to see whether the award is for support or a division of property.¹⁰⁰

The fact that a property division is not subject to modification may prove to be the most significant consequence of this distinction. Many problems and much unfairness will be created by basing the division of property on earning ability and then not permitting modification when there has been a subsequent change in that ability.¹⁰¹

⁹⁸ [1873] Ind. Laws, ch. 43, § 8, at 107; [1935] Ind. Acts, ch. 87, § 1, at 243. Although the old code also made provision for maintenance for spouses separated from bed and board, [1903] Ind. Laws, ch. 48, § 2, at 114, this should be irrelevant under the new code because the separation from bed and board section was repealed, leaving only provisions for absolute divorce.

⁹⁹ See note 9 *supra*.

¹⁰⁰ See, e.g., *Bardwell v. Commissioner*, 318 F.2d 786 (10th Cir. 1963).

¹⁰¹ *Bourman v. Bourman*, 155 Kan. 602, 127 P.2d 464 (1930). It has been suggested that insurance may be required to meet the harshness of this result. Special forms of alimony insurance may be specially devised to cope with this problem so as to assure that funds will be available should the spouse become disabled or lose his job. Alimony insurance may also be a possible solution should the court grant a spouse a lump sum payment award rather than making it payable in installments. See *Basic Family Support Needs Can Be Met by Divorce Insurance*, 1 BNA FAMILY L. REFR. 2085 (Dec. 3, 1974).

THE NEED FOR REFORM

Regardless of how broadly or narrowly sections 9 and 11 are interpreted, trial courts will possess considerable discretion in making property division and maintenance awards. Should they capitalize earning ability, as authorized by section 11(e), the result will be a confused mixture of which Professor Clark warns:

Many courts, however, assimilate the property division to the alimony decree, taking into account in dividing the property the same sort of factors which are relevant in setting alimony. These include the extent of husband's property, the wife's needs, [and] the duration of the marriage The authority to make the division is usually granted in general terms, limited only by the requirement that the result be "just" or "reasonable". It is easy to see how, relying on a vague statutory power, the courts have come to blur the distinction between alimony orders and division of property.¹⁰²

To prevent such confusion the legislature should redraft the maintenance and division of property sections so as to make clear what policies each is designed to serve and what factors should be considered in making each award. It is evident from the history of the present act that the legislature would not enact a statute containing a support provision that guarantees awards for ex-spouses even if they can support themselves. While the state should not encourage the "alimony drone,"¹⁰³ a statute could be drafted to allow support for those spouses who have a definite need. Section 9(c) was aimed at this result, but the language defining incapacitation, as has been seen, is very ambiguous.

Should a limited maintenance statute be drafted, it can accomplish several policies.

The first and most important of all the functions of alimony relates to the care of children. . . . If [the mother] is to be able to care for them adequately, she herself must be supported, alimony being in most cases the only source available¹⁰⁴

¹⁰² H. CLARK, *supra* note 9, at 450-51. The distinction between these two purposes for making the award is important. Strictly speaking, a division of property between the parties is not alimony, although it may incidentally provide a source of income from which a spouse may derive support. See Note, *Alimony in Indiana: Traditional Concepts v. Benefit to Society*, 29 IND. L.J. 461, 464 (1954). The award serves as a final determination of the property rights of the parties and is based on the presumption that henceforth they will be mutually independent. See Note, *Indiana's Alimony Confusion*, 45 IND. L.J. 595 (1970). The support concept of alimony has different historical origins and was awarded only to a separated wife in order to satisfy her continuing need for support upon separation of the spouses.

¹⁰³ See note 53 *supra*.

¹⁰⁴ H. CLARK, *supra* note 9, at 441-42.

Alimony may also be necessary to minimize the financial impact of the divorce and to prevent the wife's becoming dependent upon public support.¹⁰⁵ Further, alimony may serve as compensation for the spouse's faithful services.¹⁰⁶

Adopting the maintenance provision of the Uniform Act (section 210 of Indiana's Proposed Act) would effectuate these policies while withholding general maintenance from spouses who really have no need. The Uniform Act's maintenance provision abolishes alimony in all cases except where a spouse lacks sufficient property to provide for his reasonable needs *and* is unable to support himself through appropriate employment or where a spouse is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.¹⁰⁷

An order for a division of property should have a different function than a maintenance award. In noncommunity property states, the purpose is to unscramble the ownership of the property, giving to each spouse what is equitably his.¹⁰⁸ The Indiana division of property statute could be made to conform to this function simply by removing section 11(e), which permits judicial consideration of earnings and earning ability, thereby leaving only current assets of the parties to be divided, and leaving whatever allocation of future income that may be necessary to be considered as part of a maintenance award.

CONCLUSION

Sections 9(c) and 11 of the present Indiana divorce code are unique provisions for maintenance and division of property. It will be the duty of the courts to define their scope and meaning. It is clear that some changes have been made in the law with the adoption of the new code, but should the courts construe these sections narrowly the changes would be negligible. Given the courts' treatment of the old alimony law in refusing to recognize support awards, and the legislative history of the new law which indicates an intent to broaden the alimony law while stopping short of authorizing general support awards, it is likely that such a narrow construction will prevail. The confused situation of

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 8-9 (1968). As the Task Force on Family Law and Policy noted, "[A]limony should recognize a contribution made by a spouse to the family's well-being which would otherwise be without recompense."

¹⁰⁷ Uniform Act § 308. See note 90 *supra*.

¹⁰⁸ H. CLARK, *supra* note 9, at 449-50.

alimony law should not be left to the judiciary to remedy. Rather, the Indiana legislature should draft a statute recognizing the policy distinctions between maintenance and division of property, and providing clear guidelines to aid courts in making this distinction.

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