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The Effect of Third Party Cohabitation on Alimony Payments

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NOTES AND COMMENTS

THE EFFECT OF THIRD PARTY COHABITATION ON ALIMONY PAYMENTS

I. INTRODUCTION

The modern concept of alimony is not founded on punitive justice, but rather is designed to provide maintenance for the dependent spouse until that individual becomes self-supporting.[1] Alimony is not awarded to support a third party.[2] The growing incidence of cohabitation[3] and its acceptance by society has forced state legislatures and courts to balance the policy of providing economic security to the dependent ex-spouse with the policy of ensuring fairness to the paying ex-spouse. As a result, many state courts have re-evaluated their rules on termination or modification of support payments when the recipient cohabitates with a third party. Some state legislatures are enacting laws to aid the courts.

The Oklahoma legislature enacted such a statute which became effective October 1, 1979.[4] This statute provides for the termination or reduction of support payments when the recipient cohabitates with a member of the opposite sex, and a substantial change of economic need or ability to pay can be shown.[5]

This comment compares the statutory and nonstatutory tests of various jurisdictions for terminating alimony for cohabitation with a third party and analyzes the implications of the untested Oklahoma statute. It appears that the provisions of the Oklahoma statute are triggered solely on the basis of conduct. This comment argues that sexual conduct after divorce should not affect alimony payments unless a diminished economic need is realized by the payee within the relationship. This comment does not attempt to analyze the possible

1. H. Clark, LAW OF DOMESTIC RELATIONS § 14.5 (1968).
2. *See* Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799, 803-04 (1975).
3. Nonmarital cohabitation increased by 700% from 1960 to 1970. 2 U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS 137 (1974).
4. OKLA. STAT. tit. 12, § 1289(D) (Supp. 1979).
5. *Id.*

constitutional problems of regulating private sexual behavior.[6]

II. HISTORICAL CONTEXT

Alimony payments to the wife originated under the authority of the ecclesiastic courts of England.[7] The ecclesiastic courts could grant a divorce *a mensa et thoro*, authorizing the husband and wife to live apart without severing the marriage bonds.[8] The alimony awarded was based on the husband's continuing duty to support the wife[9] and was measured by the wife's property over which the husband, by law of curtesy, had total control; the lack of employment opportunities for the married woman; and the degree of the husband's fault in the failure of the relationship.[10]

In the United States, absolute divorce, divorce *a vinculo matrimonii*, rather than divorce *a mensa et thoro*, is authorized and controlled by state law.[11] The acceptance of absolute divorce in early

6. *See, e.g.*, for a progression of Supreme Court interpretations of fundamental rights, Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation is a fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception and fundamental right to marital privacy); Loving v. Virginia, 388 U.S. 112 (1967) (fundamental right to marry); Boddie v. Connecticut, 401 U.S. 371 (1971) (fundamental right to marry and divorce); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (fundamental right to abortion). "If the right of privacy means anything it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). This ruling extended the right of privacy in contraception to single as well as married people. The issue in this instance was whether the individual's right of privacy extends to cohabitation. If the Supreme Court grants certiorari to Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1979) (woman denied custody of children because cohabiting with member of opposite sex), they may delineate the standards for interfering with an individual's chosen lifestyle.

See also for the progressive development of the right of association, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upheld limitation on two people living together outside "family"); Moore v. City of Cleveland, 431 U.S. 494 (1977) (extended "traditional family" beyond nucleus of parent and child as fundamental right of association); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (the government cannot use the threat of withholding food stamps in order to foster "traditional family" concepts); Stanley v. Illinois, 405 U.S. 645 (1972) (cannot presume the unwed father as less significant in parent-child relationship).

The holding in United States Dept. of Agriculture v. Moreno that government *economic support* cannot be used to penalize parties living outside a legal marriage upholds the fundamental right of association. The question remains whether the private individual's economic support can be withheld by state law to penalize nonmarital cohabitation.

7. 2 C. VERNIER, AMERICAN FAMILY LAWS 104 (1935). *See generally* Bradney, *Why Pay Alimony*, 32 ILL. L. REV. 295 (1937).

8. CLARK, *supra* note 1, at § 14.1 (1968).

9. *Id.*

10. *Id.* If the wife were at fault for the dissolution of the marital relations, no alimony was awarded. Cases in this area are collected in Annot., 34 A.L.R.2d 313 (1954). The theory would appear to be that the alimony decree enforces the husband's duty to support his wife, and that her misconduct removes that duty. 2 VERNIER, *supra* note 7, at 266.

11. A divorce *a vinculo matrimonii* dissolves the marriage bond and releases the parties from

America probably resulted from the Protestant Reform attitudes of the colonists.[12] Alimony has been awarded since colonial times.[13]

The original policy justification of alimony—the continuance of the husband's duty to support—is not compatible with the absolute divorce decree. To the extent that alimony developed as a replacement for the common law right to support in a divorce *a mensa et thoro*, it should not have been applied to the absolute divorce decree which severs all legal ties between the two parties.[14] Furthermore, the expanded employment opportunities for women and their legal rights to own property and enter into contractual relations negate the historical criteria used in determining the need for support.[15]

The courts, nevertheless, have formulated new policy justifications for awarding alimony payments to the dependent spouse. These policies include such concepts as preventing the dependent spouse from becoming an economic liability on the state; providing for the care of

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their marital obligations. A divorce *a mensa et thoro* is a partial divorce, by which the parties are separated and forbidden to live together, without affecting the marriage itself. Pennsylvania still grants a divorce *a mensa et thoro*, but in most jurisdictions this status is a legal separation.

> The action for separate maintenance is often said to have as its purpose the support of the wife, while divorce from bed and board is to affect the requirement of marital cohabitation. The fact is, however, that both actions contemplate that the parties will live apart, but that they will remain married to each other in the sense that they will not be free to marry anyone else. And both actions can result in decrees which order the husband to support his wife. . . . The two actions are sometimes distinguished by saying that separate maintenance permits the parties to live apart, while divorce from bed and board compels them to. . . .
>
> [Case] results show that the only real difference between separate maintenance and divorce from bed and board turns on the effect of reconciliation. Reconciliation terminates obligations under most separate maintenance decrees but not those of divorce from bed and board. . . . If the parties are living apart by virtue of a separate maintenance decree, an offer of reconciliation made in good faith by the losing defendant (that is, the wrongdoer) places upon the plaintiff the duty of accepting the offer or being labelled a deserter and losing the benefits of the separate maintenance decree. An offer of reconciliation has no such effect, apparently no effect at all, if the parties are living apart under a divorce from bed and board.

CLARK, *supra* note 1, at 192-93.

12. *See* 2 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 60-85 (1904).

13. CLARK, *supra* note 1, at 421. There are two states which do not grant alimony after an absolute decree of divorce. Texas, which has a community property system under which both parties receive a share of community assets, TEX. FAM. CODE ANN. tit. 1, § 3.63. (Vernon 1975), provides alimony only until the final decree of divorce is granted. *Id.* at § 3.59. The parties may contract, however, for lump sum or future periodic payments which are not categorized as alimony. Francis v. Francis, 412 S.W.2d 29, 33 (Tex. 1967).

Pennsylvania, a non-community property state, allows alimony when the divorce is *pendente lite*, 23 PA. CONS. STAT. ANN. § 46 (Purdon 1974); when divorce from bed and board (*a mensa et thoro*) is granted, PA. STAT. ANN. tit. 23, § 47 (Purdon 1929); when a party is insane, PA. STAT. ANN. tit. 23, § 45 (Purdon 1929); or when a party is suffering from a serious mental disorder, 23 PA. CONS. STAT. ANN. § 48 (Purdon 1972).

14. CLARK, *supra* note 1, at § 14.1.

15. *Id.*

the children of the marriage while they are minors; in the case of a long-term marriage, returning an investment in marriage property; and punishing the guilty party for the wrongs suffered by the innocent party.[16] As no-fault divorce[17] becomes more prevalent, the criteria for awarding alimony focuses more on the payee's actual need and the payor's ability to pay. Most alimony is now awarded only if it is reasonably expected that the dependent party will become self-support-

16. *But cf.* Richards v. Richards, 44 Hawaii 491, 355 P.2d 188 (1960) (alimony is not awarded as punishment); Bouma v. Bouma, 439 P.2d 198 (Okla. 1968). *See also*, Clark, *supra* note 1, at § 14.5.

Delaware recently revised the alimony statute to reflect the growing trend toward awarding temporary maintenance:

> (a) The Court may grant alimony for a dependent party as follows:
>
> (1) Temporary alimony for either party during the pendency of an action for divorce or annulment;
>
> (2) Alimony for a respondent commencing after the entry of a decree dissolving an irretrievably broken marriage characterized by mental illness; or
>
> (3) Alimony for a petitioner, or for a respondent who does not qualify for alimony under paragraph (2) of this subsection, commencing after the entry of a decree of divorce or annulment but not to continue for more than 2 years after marriage dissolution unless the parties were married for more than 20 years.
>
> (b) A party is dependent if the party or someone on behalf of the party shall aver in an affidavit of dependency filed in the action and shall prove by a preponderance of the evidence that such party:
>
> (1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;
>
> (2) Lacks sufficient property including any award of marital property, to provide for the party's reasonable needs; and
>
> (3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> (c) The alimony order shall be in such amounts and for such time, except as limited in time under subsection (a) of this section, as the Court shall deem just without regard to marital misconduct and after considering all relevant factors justified by the evidence, including:
>
> (1) Financial resources of the party seeking alimony including marital property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with such party includes a sum for that party as custodian;
>
> (2) Time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;
>
> (3) Standard of living established during the marriage;
>
> (4) Duration of the marriage;
>
> (5) Age, and the physical and emotional condition of the party seeking alimony;
>
> (6) Ability of the other party to meet his or her needs while meeting those of the party seeking alimony; and
>
> (7) Tax consequences.

DEL. CODE ANN. tit. 13, § 1512 (Supp. 1979).

17. For a breakdown of the various grounds for divorce as of August 1, 1977, *see* Freed and Foster, *Family Law in the Fifty States: An Overview*, 3 Fam. L. Rep. 4047 (1977).

The result of the requirement of fault as a ground for divorce often led to perjury or collusive actions by the parties in order to end a marriage. *See* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 44 (1966).

ing.[18] This policy of assisting the dependent party until self-sufficient reflects the increasing employment and competitiveness of women in the work force. Self-sufficiency can also be furthered by terminating alimony payments upon the remarriage of the payee.[19] The termination of alimony payments upon remarriage apparently is an extension of the husband's common law duty to support. Since the remarriage imposes the duty of support on the new spouse, the paying spouse of the former marriage is released from that duty.[20] The payee receives support from the new spouse and therefore is no longer dependent upon the former spouse. State statutes generally provide for termination of alimony when a subsequent marriage of the payee has been solemnized.[21] The dramatic alteration of social attitudes toward unmarried cohabitation, however, has created a gap in the law governing termination of alimony.

The early English law did not grant absolute divorce and it was not uncommon to require an ex-wife to live a chaste life.[22] The development of absolute divorce certainly did not support this duty to remain chaste to a party who is no longer one's spouse. Nevertheless, as the number of unmarried couples living together increases, courts are being asked to provide relief from alimony payments for the supporting

18. The Maryland Senate recently passed Senate Bill 811. Favorable action on the companion House Bill 1810 is expected. Section one authorizes the awarding of alimony in connection with divorce or annulment without regard to fault and sets forth criteria which are relevant to the amount of the award. Section one provides further:

> [T]hat the court shall determine the period during which alimony shall be paid. This 'fixed-time,' at the end of which alimony obligations automatically cease, is conceived to be an incentive to attaining self-sufficiency by the recipient, and would be tied to a specific program or goal leading to that end. This section also provides for extensions of the fixed period set by the court, and for the award of alimony for an indefinite period should the facts and circumstances of the case indicate that result.

6 FAM. L. REP. (BNA) 2360 (1980).

19. *See, e.g.*, OKLA. STAT. tit. 12, § 1289 (Supp. 1979). The Oklahoma statute allows the recipient to petition the court within 90 days of remarriage for assessment of the change of circumstances giving rise to the automatic termination of alimony. If the recipient sufficiently convinces the court that "some amount of support is still needed and that circumstances have not rendered payment of the same inequitable," the alimony will be reinstated. *Id.*

20. *See, e.g.*, Wear v. Boydston, 320 Ark. 580, 324 S.W.2d 337 (1959). "We have no quarrel with the statement that alimony payments should cease upon the divorced wife's remarriage, for we see no logic in requiring a first husband to contribute at regular intervals to an ex-wife whose care and maintenance has been assumed by a second husband." 324 S.W.2d at 339.

21. *See, e.g.*, OKLA. STAT. tit. 12, § 1289(B) (Supp. 1979).

22. Waddlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 265 (1977). The *dum sola et casta vixerit* clause, or clause for payment while she remains single and chaste, developed under the fault-oriented policy and the divorce *a mensa et thoro*. For a further discussion of *dum casta* clauses *see* Courson v. Courson, 213 Md. 183, 129 A.2d 917 (1957). *See generally*, notes 10-11 *supra* and accompanying text.

ex-spouse.[23] "[I]t is now being asserted that the payor should be relieved from further obligation to support an ex-spouse because of the latter's post-divorce sexual conduct even when no legal remarriage has occurred."[24]

The new sexual openness in today's society reflects what appears to be an unwillingness to enter into a relationship involving legal ramifications. "[T]he friendlier attitude toward unmarried cohabitation that has resulted from [marriage's] displacement from its traditional pedestal is more accurately described as a worldly acceptance than a mere tolerance."[25] Nevertheless, the payor rarely is willing to provide maintenance to an unforeseen third party and is requesting that legal consequences be imposed upon the cohabiting payee. Cohabitation has created a gap in the law when a "legal remarriage" is the condition precedent to termination or modification of support payments.

III. SOLUTIONS TO THE GAP

A. *Judicial Response*

The majority of states have statutes which authorize upward and downward modification of alimony based upon proof of changed circumstances.[26] The modification of alimony when the payee cohabitates has been justified by the courts of these states under the guise of the change of circumstances test. In order to understand the numerous, and often conflicting, judicial evaluations of cohabitation, it is necessary to review case law from several jurisdictions. The judicial decisions which follow are chosen not as a statement of the law, but as examples of how current courts apply the law in an attempt to meet the challenge that unwed cohabitation represents.

A few jurisdictions have refused to penalize a dependent ex-spouse on the sole basis of conduct after an absolute divorce has been entered.[27] "Alimony is based on the obligation to support an ex-wife and

23. *See* Marriage of Vaughn, 25 Or. App. 655, 550 P.2d 1243 (1976). This comment does not attempt to discuss the rights of the parties within a nonmarital relationship. For a clear discussion of the legal ramifications of this type of relationship, *see* Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *Sexual Relations, supra* note 22.

24. *Sexual Relations, supra* note 22, at 266.

25. *The Course of Change in Family Law 1978-79*, 5 Fam. L. Rep. 4013, 4018 (1979).

26. *See* CLARK, *supra* note 1, at 452-65.

27. *See, e.g.*, Drummond v. Drummond, 590 S.W.2d 658 (Ark. 1979); Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554 (1956).

is not to be measured in the future by her chastity or moral conduct."[28] The duty to support does not imply any duty of proper conduct.[29]

This refusal to consider the sexual conduct of the alimony recipient may be unfair to the payor. Foreclosing modification of alimony when the payee is cohabitating with a new partner without considering economic need may encourage nonmarital relationships, since the benefits of alimony payments and of support from the paramour may be realized simultaneously.

The majority of jurisdictions have approached the problem by recognizing that cohabitation with a third party may result in a substantial change of circumstance warranting reduction or termination of support payments. Generally, the substantial change of circumstance the courts look for is a diminished economic need.[30] The courts have established

28. Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329, 332 (1977).

29. Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554, 562 (1956). Just as the conduct of the ex-wife is not a ground for terminating alimony, neither will the sexual conduct of the husband afford grounds for increasing alimony payments. Alibrando v. Alibrando, 375 A.2d 9, 14 (D.C. Ct. App. 1977).

30. O'Dell v. O'Dell, 57 Ala. App. 185, 326 So. 2d 747 (1976); Byrd v. Byrd, 252 Ark. 202, 478 S.W.2d 45 (1972); Alibrando v. Alibrando, 375 A.2d 9 (D.C. Ct. App. 1977); Meyer v. Meyer, 41 Md. App. 13, 394 A.2d 1220 (Ct. Spec. App. 1978); Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979); Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799 (1975); Grossman v. Grossman, 128 N.J. Super. 193, 319 A.2d 508 (Ch. Div. 1974); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979); Wolfe v. Wolfe, 46 Ohio St. 399,350 N.E.2d 413 (1976); Marriage of Vaughn, 25 Or. App. 655, 550 P.2d 1243 (1976).

Two recent cases illustrate exceptional judicial logic in applying the economic need test. In Kerner v. Kerner, 5 Fam. L. Rep. 2548 (Me. 1979), although emphasizing that post-divorce cohabitation does not automatically terminate alimony, the court decided that "where the facts demonstrate that a person receiving alimony is living in a relationship with all the attributes of husband and wife except the formal legal bond of marriage, that relationship will *presumptively* terminate a former spouse's alimony obligation . . . ." *Id.* at 2549 (emphasis added). Apparently, the presumption is that the former spouse's duty to support has been assumed by the paramour. Although an economic need standard is still applied, the burden of proof has been shifted to the person receiving alimony. In this particular case, however, the court seemed to be persuaded by the fact that the couple's reason for not marrying appears to have been the belief that they would be better off financially if they did not marry. *Id.*

In Anonymous v. Anonymous, 5 Fam. L. Rep. 2127 (Minn. 1978), the court faced the more difficult problem of homosexual cohabitation.

> There is nothing in the relative financial conditions of the parties which would justify a termination of alimony. There has been, however, a basic change in the assumptions which underlie the stipulation: defendant has discovered that her sexual orientation is lesbian. She has entered into an apprently stable love relationship with a woman friend.
>
> At the time of the 1972 divorce plaintiff could have realistically assumed that defendant would remarry. Defendant was 30 years old. Plaintiff would not have entered into a stipulation to pay alimony until defendant remarried or died had he realize [*sic*] remarriage was or would become impossible.
>
> Defendant's post-decree lesbianism is a material change in circumstances which justifies the termination of alimony.

Id.

The court, however, continued alimony payments until July 1, 1980, to enable the defendant

distinguishable tests for determining the effect cohabitation has on economic need.[31] To the unwary, the language may seem the same, but the courts' placement of the burden of persuasion required to terminate alimony payments may be decisive.[32]

Some courts' language reflects a policy that post-divorce cohabitation is not evidence at all of changed financial circumstances.[33] This position evaluates the relationship's effect upon the need for support only if economic need has been substantially changed and does not look at the nature of the relationship itself.[34] Another stricter economic circumstance test requires proof that the alimony recipient's paramour has assumed the responsibility of support. This assumption of the duty to support releases the former husband from the common law duty of support.[35] This is the strictest application of the change of circumstance test because cohabitation affects alilmony payments only if it is proven that the paramour supports the payee.

The prevailing economic need test has been clearly defined in *Garlinger v. Garlinger*[36] and has been used by other courts in determining termination of alimony.[37] The *Garlinger* test recognizes two situations which create a substantial change in economic circumstances: (1) when the paramour contributes to the payee's support or (2) when the paramour resides in the payee's home without contributing his share of the expenses.[38] These two variations protect the former spouse from incidentially supporting an unforeseen third party and prevent the alimony recipient from receiving unneeded support. In a situation where

to become self-supporting. Therefore, the court determined a future date upon which the economic need test met the requirement for terminating alimony.

31. *See, e.g.*, Byrd v. Byrd, 252 Ark. 202, 478 S.W.2d 45, 46 (1972) (remarriage rule requires contribution to support or relationship meeting common law marriage test); Meyer v. Meyer, 41 Md. App. 13, 394 A.2d 1220, 1224 (1978) (conduct may be considered if relevant to economic need); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979) (support contributed by live-in lover is a factor); Marriage of Vaughn, 25 Or. App. 655, 550 P.2d 1243, 1245 (1976) (based on the showing of a change in financial circumstances by reason of the cohabitation).

32. California's statute includes a rebuttable presumption against the party cohabiting, thus placing the burden of persuasion on the defendant. CAL. CIV. CODE § 4801.5(a) (West Supp. 1979). *See* notes 48-53 *infra* and accompanying text.

33. Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979). "We conclude that the existence of a meretricious relationship does not constitute, simply by reason of the nature of the relationship, sufficient ground for the termination of alimony." *Id.* at 566. *See also* O'Dell v. O'Dell, 57 Ala. App. 185, 326 So. 2d 747 (1976); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979).

34. 282 N.W.2d at 566.

35. Byrd v. Byrd, 252 Ark. 202, 478 S.W.2d 45 (1972); Fahrer v. Fahrer, 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973).

36. 137 N.J. Super. 56, 347 A.2d 799 (1975).

37. *See, e.g.*, Wolfe v. Wolfe, 46 Ohio St. 2d 399, 350 N.E.2d 413, 426 (1976).

38. 347 A.2d at 803.

the recipient still requires the alimony for living expenses in spite of the new relationship and can demonstrate the need to the court, the alimony is not terminated.[39] If only a portion of the alimony is still needed, modification rather than termination may result.[40] The rationale in *Garlinger* is based upon realistic financial need. This is evidenced further by the revival of alimony payments when the cohabitation ends if economic need is re-established,[41] protecting the state from the burden of providing welfare support.

B. *Legislative Response*

Some states have attempted to resolve the problem of cohabitation and alimony through legislation. Since 1934, New York courts have had statutory authority to terminate alimony upon proof that the recipient is "habitually living with another man and holding herself out as his wife, although not married to such man. . . ."[42]

The New York statute's[43] two-part test appears to ignore economics as an element of change of circumstances necessary to terminate alimony, and by court interpretation allows for modification.[44] The strict two-part test[45] is so closely akin to the common law marriage, however, that the economic test may be hidden within the *de facto* marriage requirement, since the new partner is presumed to have assumed

39. *Id.*

40. *Id.* Cohabitation is a factor only to the extent that the relationship alters economic needs. If the paramour contributes to the support of the payee or resides in the home of the payee without paying a share of the household expenses, the two-part test may be a "change of circumstances sufficient to entitle the [payor] to relief." *Id.*

41. *Id.* at 804. *See also* Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979) (since the wife's relationship with her live-in lover had ended, no grounds for modifying alimony existed).

42. N.Y. DOM. REL. LAW § 248 (McKinney 1964).

43. *Id.*

44. *But see* Hall v. Hall, 82 Misc. 2d 814, 372 N.Y.S.2d 344 (1975), *aff'd*, 55 A.D.2d 752, 389 N.Y.S.2d 448 (1976). The court ruled that although the statutory language provides only for termination, the court has the discretion to reduce alimony payments. 372 N.Y.S.2d at 347.

45. N. Y. DOM. REL. LAW § 248 (McKinney 1964).

> Where an action for divorce or for annulment or for a declaration of the nullity of a void marriage is brought by a husband or wife, and a final judgment of divorce or a final judgment annulling the marriage or declaring its nullity has been rendered, the court, by order upon the application of the husband on notice, and on proof of the marriage of the wife after such final judgment, must modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the wife. The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife.

Id.

the duty of support.[46] This theory focuses on the relationship of the parties, rather than the support needs of the cohabiting spouse.

In 1974, California enacted a law terminating alimony upon proof that the payee was "living with a person of the opposite sex and holding himself or herself out as the spouse of the person for a total of thirty days or more, either consecutive or non-consecutive, although not married to the person."[47] California substantially changed the language of the statute in 1976 by providing:

> Except as otherwise agreed to by the parties in writing, there shall be a rebuttable presumption, affecting the burden of proof, of decreased need for support if the supported party is cohabiting with a person of the opposite sex. Upon such a finding of changed circumstances, the court may modify the payment of support . . . .[48]

The 1976 version of the California law, while eliminating the "holding out" provision in the 1974 version, added that "later modification of support upon proof of change of circumstances" is possible.[49] More significantly, the statute created the rebuttable presumption of decreased need. It should be noted that the term "cohabitation" means more than sharing living accommodations[50]; it involves an exchange of services with full credit to the economic value of such services.[51] The exchange of services includes cooking, cleaning, and other household tasks, but not sexual favors.[52]

> Logical analysis would indicate that the Legislature created the presumption against a cohabiting former spouse supported by a divorced husband or wife based on thinking that

46. *See* notes 16-19 *supra* and accompanying text.

47. CAL. CIV. CODE § 4801.5 (West Supp. 1979) (cited in *In re* Marriage of Lieb, 80 Cal. App. 3d 624, 145 Cal. Rptr. 763 (1978)).

> Upon the petition of a spouse who has been ordered to pay support under Section 4801, the court shall revoke the order for support upon proof that the spouse to whom support has been ordered to be paid is living with a person of the opposite sex and holding himself or herself out as the spouse of the person for a total of 30 days or more, either consecutive or nonconsecutive, although not married to the person.

In re Marriage of Lieb, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763, 765 (1978).

48. CAL. CIV. CODE § 4801.5(a)(West Supp. 1979).

49. *Id.* at § 4801.5(c).

50. *Compare* Lang v. Superior Court, 53 Cal. App. 3d 852, 126 Cal. Rptr. 122 (1975) (construing the 1974 statute) *with In re* Marriage of Lieb, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978) (construing the 1976 statute).

51. *In re* Marriage of Lieb, 80 Cal. App. 3d 644, 145 Cal. Rptr. 763, 771 (1978).

52. 145 Cal. Rptr. at 770-71. The court considered the payee's services as "homemaker, housekeeper, cook, and companion," for which she might have been compensated outside the nonmarital relationship. These services, however, must be balanced against the economic support contributed by the paramour in order to prove fair and reasonable value of all services. *Id.*

> cohabitation establishes a status for the benefit of the supported spouse and such status therefore creates a change of circumstances so tied in with the payment of spousal support as to be significant enough by itself to require a re-examination of whether such need for support continues in such a way that it still should be charged to the prior spouse.[53]

Alabama enacted a statute, effective April 27, 1978, mandating modification of the divorce decree to terminate alimony payments if the person receiving alimony lives openly or cohabits with a member of the opposite sex.[54] The complaining party must prove the cohabitation to warrant the alimony termination.[55] The Alabama Appeals Court, in interpreting the cohabitation standard, found:

> [T]he legislature intended to strike a balance between the occasional brief sojourn and the common-law marriage. Thus while not every occurrence of post-marital unchastity by a former spouse will bar the right to alimony, a petitioner need not prove the former spouse is habitually living with another and that the couple consider themselves married.[56]

Georgia's current statute concerning termination of alimony became effective April 4, 1979.[57] The test involved in this statute requires voluntary cohabitation with a third party in a meretricious relationship.[58] Cohabitation is defined by the statute to mean dwelling together continuously and openly in a meretricious relationship with a

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53. *Id.* at 771.

54. ALA. CODE § 30-2-55 (Supp. 1979).

> Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex. This provision shall be applicable to any person granted a decree of divorce either prior to April 28, 1978, or thereafter; provided, however, that no payments of alimony already received shall have to be reimbursed.

Id.

55. *Id.*

56. Parish v. Parish, 374 So. 2d 348, 349 (Ala. Civ. App. 1979) (citations omitted).

57. GA. CODE ANN. § 30-220(b)(Supp. 1979).

> Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of such former spouse. As used herein, the word cohabitation shall mean dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex. In the event the petitioner does not prevail in the petition for modification on the ground as set forth herein, petitioner shall be liable for reasonable attorney's fees incurred by the respondent for the defense of the said action.

Id.

58. *Id.*

person of the opposite sex.[59] The case law in Georgia prior to the enactment of this statute required a common law marriage in order to terminate alimony payments.[60]

The statutes of Alabama and Georgia[61] do not include an economic test within the statutory language. They do require, however, an open, continuous living arrangement which would appear to adopt the de facto marriage policy of New York.[62] Since these laws are new, state courts hopefully will interpret the language to require some degree of support from the paramour, or at least allow the payee to prove the continued need for economic support when applicable. The Georgia high court appeared to use an economic test based upon the paramour's contribution in *Morris v. Morris*[63] when "sharing living quarters (and thus expenses) with another" was held to be sufficient to modify alimony payments.[64]

Illinois' statute terminating marriage upon cohabitation became effective October 1, 1977.[65] The test included in the statute states that "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis" the alimony is terminated.[66] This is the only statute that does not refer to a member of the opposite sex when referring to the cohabiting partner.

The Illinois Supreme Court interpreted that statute in *In re Support of Halford*.[67] The court decided that the legislature intended conduct to be grounds for terminating alimony[68] and then defined the conduct required.

> We believe that it was the intention of our legislature to provide for the termination of an ex-spouse's obligation to pay

59. *Id.*

60. *See* Taylor v. Taylor, 243 Ga. 506, 255 S.E.2d 32 (1979); Lindwall v. Lindwall, 242 Ga. 13, 247 S.E.2d 752 (1978).

61. ALA. CODE § 30-2-55 (Supp. 1979); GA. CODE ANN. § 30-220(b) (Supp. 1979).

62. *See* notes 42-43 *supra* and acompanying text. The term *de facto* marriage is used since New York has abolished the common-law marriage.

The *de facto* marriage is tantamount to a common law marriage in that the relationship requires habitually living together and holding oneself out as married. N.Y. DOM. REL. LAW § 248 (McKinney) 1964). *E.g.*, Sims v. Sims, 6 FAM. L. REP. (BNA) 2485 (Ga. 1980) (cohabitation interpreted as voluntary relationship similar in nature to marriage). *See generally* Clark, *The New Marriage*, 12 WILLAMETTE L. J. 441 (1976).

63. 244 Ga. 120, 259 S.E.2d 65 (1979).

64. 259 S.E.2d at 67.

65. ILL. REV. STAT. ch. 40, § 510(b) (Supp. 1979). "[I]f the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." *Id.*

66. *Id.*

67. 70 Ill. App. 3d 609, 388 N.E.2d 1131 (1979).

68. *Id.* at 1134.

> future maintenance whenever the spouse receiving the maintenance has entered into a husband-wife relationship with another, whether this be by legal or other means.
>
> . . . .
>
> We believe that this statute contemplates acts of sexual intercourse as part of the full or *de facto* husband-wife relationship which it seeks to describe. The term "cohabitation" means living together as husband and wife, but does not necessarily imply sexual intercourse . . . . "Conjugal basis," however, implies the assertion of conjugal rights which have been defined both as "the right which husband and wife have to each other's society, comfort and affection" . . . and "the right of sexual intercourse between husband and wife" . . . . The statute further requires that the cohabitation be on a resident and continuing basis.[69]

The court in *Halford* determined two elements of the required conduct: a husband-wife relationship and a continuous relationship. The appellate court of Illinois in *In re Bramson*[70] decided that the husband-wife relationship had not been established since there had been no commingling of funds, no use of the paramour's name, and no monogomous dating relationship.[71] The court apparently ruled that, to avoid punishing the conduct per se, more than sexual relations was necessary. "Rather, an important consideration, divorced from the morality of conduct, is whether the cohabitation has materially affected the recipient spouse's need for support because she either received support from her co-resident or used maintenance monies to support him."[72] This is the *Garlinger* test.[73]

In jurisdictions which treat cohabitation as a *de facto* marriage, it is probable that once the alimony is terminated, it may not be revived after the liason ends.[74] The refusal to revive alimony defeats the objectives of alimony support,[75] and may necessitate court interference in the rights of the parties within the nonmarital relationship. For example, if alimony is permanently terminated because cohabitation has been treated as a *de facto* marriage, the payee may have to become a

69. *Id.*
70. 6 FAM. L. REP. (BNA) 2486 (Ill. App. Ct. 1980).
71. *Id.* at 2486-87.
72. *Id.* at 2488.
73. Garlinger v. Garlinger, 173 N.J. Super. 56, 347 A.2d 799. *See* note 38 *supra* and accompanying text.
74. Hardwick v. Hardwick, 5 Fam. L. Rep. 2477 (N.Y. 1979); CLARK, *supra* note 1, at 457-58.
75. *See* note 15 *supra* and accompanying text.

welfare recipient when the cohaitation ends. In order to avoid expanding the state welfare rolls, the courts might expand the definition of *de facto* marriage to include the duty of support and order the paramour to support the payee. Statutes based on an express economic need test, as in California, merely suspend alimony payments during cohabitation and provide the authority to reinstate them when the two parties end the cohabitation.[76] This is a better way to protect the paying spouse and yet support the economic interest of the state.

IV. THE OKLAHOMA STATUTE

Oklahoma revised its alimony statute, effective October 1, 1979, and for the first time provided for reduction or termination of alimony on grounds other than death or remarriage:

> The voluntary cohabitation of a former spouse with a member of the opposite sex shall be a ground to modify provisions of a final judgment or order for alimony as support. If voluntary cohabitation is alleged . . . , the court shall . . . reduce or terminate support payments upon proof of substantial change of circumstances relating to need for support or ability to support. As used herein, cohabitation shall mean the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage according to law, or not necessarily meeting all the standards of a common-law marriage.[77]

The statute incorporates a built-in economic test, without a presumption of decreased need, applying the change of circumstances test to the need for or ability to support. The Oklahoma legislature apparently determined that the change of circumstances test used in other states to modify alimony should be used in reducing or terminating alimony when a former spouse cohabitates. The legislature presumably wanted to continue the policy of nonmodifiable alimony in Oklahoma except when an ex-spouse cohabitates. It is significant to note that under the statute modification is limited to reduction or termination with no provision for increased alimony payments. Nevertheless, because the statute requires a change in the need for support or in the ability to pay, cohabitation is not necessarily proof that support

76. CAL. CIV. CODE § 4801.5(c) (West Supp. 1979). *See also* Note, *Domestic Relations—No Revival of Alimony Following an Annulled "Remarriage"*, 43 MO. L. REV. 591 (1978); note 89 *infra*.
77. OKLA. STAT. tit. 12, § 1289(D) (Supp. 1979).

should be terminated. Moreover it is not clear if the *Garlinger* test,[78] which requires either the paramour's contribution to the support of the alimony recipient or the paramour's total lack of contribution toward his own expenses, could be used by the Oklahoma courts. The language of the statute is ambiguous as can best be illustrated by examining the phrases "cohabitation of a former spouse," "need for support," and "ability to support" in light of several hypothetical situations.

The Oklahoma statute does not limit cohabitation sanctions to the party *receiving* alimony. Therefore, it is arguable that if the payor cohabitates, the "ability to support" clause could reduce or terminate the alimony payment obligation. The payor, for example, may claim that the expenses of the new living arrangement necessitate the reduction of alimony payments. Oklahoma's policy of nonmodifiable alimony, however, does not allow the payor to reduce or terminate alimony payments upon remarriage.[79] This means that the payor might receive an economic benefit by cohabiting but not by remarrying. It is inequitable to release the payor from the support obligation when the payee is not the party cohabiting. Because the innocent payee would suffer if alimony is terminated when the payor cohabits, it is more probable that the court would allow the payee to prove continuing "need for support" and deny modification based on equitable principles.

The cohabiting payor problem becomes more complex if the payee cannot prove a continuing "need for support." Since Oklahoma does not allow reduction or termination of alimony payments except upon death, remarriage, or cohabitation, the payor can benefit from cohabitation if the payee has made any progress toward self-sufficiency. Although the payor's remarriage cannot benefit the payor by affecting the alimony obligation, the payor can benefit from the statutory definition of cohabitation and the new remedy which accompanys it. For the first time, the payee may suffer a loss of alimony if the payee has entered the job market. This would reward the payor for cohabiting and penalize the payee for seeking economic independence.

In a third hypothetical, if the payor receives a monetary benefit from a live-in lover, the payee cannot rely on the payor's cohabitation

78. Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799 (1975). *See* notes 36-38 *supra* and accompanying text.

79. OKLA. STAT. tit. 12, § 1289(B) (1971). Alimony may be terminated by death or remarriage of the recipient. For expressions of the view that second families' needs should be taken into account, *see* Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978).

to modify alimony upwards since the statute limits modification to reduction or termination. As a result, the payee will probably not seek modification under the Oklahoma statute. No benefits will accrue to the payee from the payor's cohabitation nor can the payee's alimony payments increase as a result of the payee's cohabitation. The statute is designed to aid only the payor by reducing or terminating alimony payments.

Since the cohabitation statute affords a one-sided payor remedy, it is even more important that the courts scrutinize the relationships and apply the economic tests used in *Garlinger*.[80] Cohabitation triggers the right of the payor to petition the court for reduction or termination of alimony payments. Unless the "need for support" is limited to the economic consequence of the payee's cohabitation and is always used by the court in applying the change of circumstances test, the payee is penalized for cohabitation, whereas the payor is rewarded for cohabitation.

Under the *Garlinger*[81] test parties are penalized for their conduct only if the paramour supports the payee or if the payee supports the paramour. Both situations indicate a lack of need. The payee continues to receive the alimony payments if the paramour neither contributes nor receives support. Thus, the payee is not penalized for conduct if no change in economic need results from the relationship. The requirement of proof of economic benefit from the relationship also prevents deterring the payee from achieving economic independence, since only the paramour's effect on economic need is used to determine reduction or termination of alimony payments.

The ambiguous language of the statute may be applied to the paramour. The "ability to pay" clause of the statute may be used by the court to evaluate the paramour's failure to contribute support. If the Oklahoma courts extend the "ability to pay" clause to the paramour who is unwilling to support the payee, it is the cohabitation, not the change of circumstances, which triggers the reduction or termination of alimony payments. The payee is therefore punished for conduct.

It is also unclear under the statute how long the cohabitation must continue before the payor can petition the court for relief. The language "continuously and habitually" is probably longer than the one

80. 137 N.J. Super. 56, 347 A.2d 799 (1975).
81. *Id.*

night required in a common law marriage.[82] The Oklahoma courts will have to define the period of time in which a relationship must exist before relief from alimony payments may be granted.

The statute's provision that cohabitation may occur when a couple continuously lives together while "not necessarily meeting all the standards of a common-law marriage"[83] is also ambiguous. Whether the legislature meant any element for establishing a common law marriage could be absent or whether it meant a specific element is conjecture. The most probable elements of common law marriage not to be required are the intent to enter into a marital relationship and the intent to enter into a permanent relationship, neither of which are commonly present in non-marital relationships. If either of these two conditions are required to modify alimony, the payee would be able to avoid the consequences of the statute.

Since Oklahoma alimony law does not provide for the upward modification of alimony, it is questionable whether the original alimony award may be reinstated if the cohabitation which resulted in a modification terminates. If the conduct of the payee is the key element it is possible that courts would refuse to revive alimony after forfeiture. On the other hand, the courts could easily decide to revive the alimony after cohabitation ends and the payee can establish economic need. This better policy would support the state's interest in lessening welfare demands of the payee and would reward the payee for ending the "misconduct."

In *Rice v. Rice*,[84] rendered before the effective date of the new alimony statute, the Oklahoma Supreme Court reversed a ruling by a lower court which had terminated the alimony rights of an ex-wife for

82. In Oklahoma, once the elements of intent and cohabitation are satisfied, the common law marriage ripens immediately. *See, e.g.*, Earley v. State Indus. Comm'n, 269 P.2d 977 (Okla. 1954); Tiuna v. Willmott, 162 Okla. 42, 19 P.2d 145 (1933).

83. Note 77 *supra* and accompanying text.

Matter of Estate of Bouse, 583 P.2d 514 (Okla. Ct. App. 1978).

> [T]o establish a common-law marriage there must be . . . [a]n actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such a contract, consumated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations."

Id. at 517 (citing Daniels v. Mohon, 350 P.2d 932 (Okla. 1960); Bothwell v. Way, 44 Okla. 555, 145 P. 350 (1914)).

84. 603 P.2d 1125 (Okla. 1979). After the divorce was granted, the couple lived together in an attempt to reconcile. While living together, the wife made her car payments, which was the amount of alimony awarded in the divorce decree. After separating permanently, the wife asked the court to enforce the alimony award.

cohabiting with her former husband.[85] The supreme court decided that the wife had "merely waived her right to alimony during the period of cohabitation with her former husband."[86] The court held that under the statute then applicable alimony could not be terminated unless there had been a remarriage.[87]

The court seems to be supporting revival of alimony after an attempted reconciliation. Nevertheless, if the same logic of suspending alimony payments during a trial living arrangement as in *Rice* is applied to the termination of alimony in third party cohabitation cases, alimony may be revived after the nonmarital relationship ends. It is not clear that the legislature intended this result. Since the statute does not require common law marriage, it is not unreasonable to assume that the payor's duty to support is not extinguished by a *de facto* marriage.[88]

The support obligation should not be permanently terminated, but should be suspended once change in economic need has been shown.[89] The alimony should be revived through the courts only after the relationship has ended and the former spouse can demonstrate sufficient economic need. The revival of support should be limited to any time period established in, and running from the date of, the divorce decree. It should not be revived beyond the original time granted. Three distinct parties would benefit from limited revival of alimony: the payor would be allowed some degree of economic freedom while payment is suspended even though the support obligation might become effective again after a hearing to re-establish need; the recipient would not be penalized for sexual conduct and would have a source for support if need could be re-established; and the state's interest in preventing the payee's dependence on state welfare funds would be protected.

85. *Id.*
86. *Id.* at 1126.
87. *Id.*
88. *See* note 62 *supra* and accompanying text.
89. Cohabitation is distinguishable from an annulled remarriage in that the parties have not entered into a legal relationship. Statutes in many states provide that the remarriage of the payee terminates alimony payments. When the remarriage results in an annulment, courts have held that the remarriage ceremony alone is sufficient to permanently terminate the support obligation, Torgan v. Torgan, 159 Colo. 93, 410 P.2d 167 (1966); Richards v. Richards, 139 N.J. Super. 207, 353 A.2d 141 (1976); or that the remarriage is one factor used to determine if modification of support payments is required under the change of circumstances test, Boiteau v. Boiteau, 227 Minn. 26, 33 N.W.2d 703 (1948). *See also* Note, *Domestic Relations—No Revival of Alimony Following an Annulled "Remarriage"*, 43 MO. L. REV. 591, 591-92 (1978).

V. CONCLUSION

It is not uncommon for couples to live together without the legal duties of marriage. The Oklahoma legislature has attempted to meet the legal challenge of our changing social mores. Courts, however, should not use statutory ambiguity to invade the privacy of these couples. Instead, courts should balance the economic interest of the party paying alimony against the economic need of the party receiving alimony together with the interest of the state in providing support for dependent ex-spouses. Modification of alimony awards should be based not upon the moral conduct of the payee, but rather upon the economic need of the payee.

In attempting to resolve the issue of whether alimony payments should be made to an ex-spouse cohabiting with a third party, courts should avoid punishing conduct. Once a marriage is dissolved, no duty of sexual fidelity to the ex-spouse exists.[90] The courts should not attempt to control sexual conduct outside the marriage relationship unless children are involved.[91] Cohabitation may, however, affect the recipient's need for support and justify decreasing or terminating the alimony payment.

The Oklahoma statute is vulnerable to attack because it is unclear what degree of cohabitation is required and who must cohabitate in order to modify alimony payments. The courts should not allow the payor to successfully modify alimony unless the payee cohabitates.

The *Garlinger* test[92] reflects the standard needed for an economic determination for modifying alimony. It is submitted that the optimum economic test for alimony reduction would be either (1) if the paramour is contributing support, or (2) if the paramour is being supported by the payee. If either of those situations exists, the payor should be released from the support obligation to the extent that the payee's need has decreased.[93] The alimony should be reinstated if the payee proves increased need and if the cohabitation has ended. Only if the Oklahoma courts measure the economic impact of the liason on ex-

90. Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554, 562 (1956).

91. Jarrett v. Jarrett, 78 Ill. 2d 337, 400 N.E.2d 421 (1980) (ex-wife lost custody of children upon proof of cohabitation).

92. *See* note 36 *supra* and accompanying text.

93. This policy may have a coercive effect on the payee's right to enter into a nonmarital relationship, but may be justified in terms of the state's interest in promoting marriage and by limiting the decrease in alimony to the decrease in economic need.

spousal finances can the purposes of alimony awards and the rights of all parties involved be balanced.

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