Golden Gate University Law Review

Volume 8
Issue 3 *Women's Law Forum*

Article 3

January 1979

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EQUITY AND ECONOMICS: A CASE FOR SPOUSAL SUPPORT

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With the rapid rise in the divorce rate[1] and the advent of no-fault divorce, the legal and social issues of spousal support have gained importance. Ironically, as the number of divorces has increased, the number of women[2] awarded spousal support has decreased.[3] The popular myth is that a divorcee lives high on her ex-husband's money; the reality is that spousal support is awarded in only ten percent of divorces.[4] Contrary to a woman's expectation of fair treatment and individual consideration,[5] spousal support for the majority of women remains at best a myth and at worst a cruel joke.

The recent influx of women into the labor force and media attention to the feminist movement have created the assumption that spousal support is no longer required. However, close scrutiny of actual job opportunities for women outside the home reveals otherwise. Older women seeking entry or re-entry and single mothers of young children are particularly handicapped in the labor market. Economic needs, exacerbated by employment disa-

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1. In 1972, the latest year for which such figures are available, the United States had the highest divorce rate in the world: 3.72 per 1,000 population. By 1973, this figure rose to 4.4 per 1,000 and by mid-1974, to 4.5 per 1,000. P. GLICK, SOME RECENT CHANGES IN AMERICAN FAMILIES 10 (U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-23, No. 52) (1975).

Among those married a long time, the divorce rate has been rising dramatically. It more than doubled in the decade from 1963-1973 and in 1973 almost one half of all divorces occurred after seven years of marriage, and one fourth after 14 years. Griffiths, *How Much is a Woman Worth*, in ECONOMIC INDEPENDENCE FOR WOMEN 23, 32 (J. Chapman ed. 1976). The group of women presently 40-49 years old set a record for early marriages and high birth rates; this same group has experienced a substantial increase in divorce. P. GLICK, *supra* at 3-6.

2. In California, either spouse may be awarded spousal support. However, there are few cases in which the husband is the supported spouse. Therefore, this article will assume that the wife is the supported spouse. This is merely a recognition of reality, and not an attempt to perpetuate the cultural stereotype of the dependent female.

3. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 171, 190 n.50 (1971). *See also* Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974).

4. Weitzman, *supra* note 3, at 1186.

5. CAL. CIV. CODE § 4801(a) (West Supp. 1978). *See* notes 41-60 *infra* and accompanying text.

bilities, and equity itself require that spousal support be awarded as compensation for a woman's contribution to her marriage and for rearing her family.

This article will first examine the continuing need for spousal support in the context of current legal issues and judicial attitudes in California.[6] It will also briefly suggest some possible theories on which to base spousal support and some alternatives to spousal support for consideration by the legislature and judiciary in addressing the defects in the present law.

I. THE CONTINUING NEED FOR SPOUSAL SUPPORT

The rise in the divorce rate and the concomitant decline in the award of spousal support can be attributed in part to the apparent belief of some members of the judiciary that jobs are increasingly available to women on a competitive basis with men. In actuality, the job market for women is dismal. The fact remains that women still face a job market geared to the married male.[7] Despite the rapid growth of the female labor force in recent years,[8] a woman seeking employment will find only a limited number of jobs available. The United States Supreme Court recognized that continued economic discrimination against women and the socialization process of a male dominated culture combine to make "the job market . . . inhospitable to the woman seeking any but the lowest paid jobs."[9]

6. This article will not discuss amounts or exact terms of spousal support orders as a separate topic.

7. *See* notes 9-14, 28-30 *infra* and accompanying text.

8. In 1920, female workers comprised 22.7% of all workers. By 1970, this percentage had increased to 43.3. For an analysis of this increase, see A. SIMMONS, A. FREEMAN, M. DUNKLE & F. BLAU, TASK FORCE ON WORKING WOMEN, EXPLOITATION FROM 9-5, at 43-47 (1975) [hereinafter cited as TASK FORCE ON WORKING WOMEN].

9. Kahn v. Shevin, 416 U.S. 351, 353 (1974). *See also* Califano v. Webster, 430 U.S. 313, 318 (1977) (per curiam). The holdings in these cases can be criticized, but the findings are beyond dispute. In Kahn v. Shevin, both the majority and the dissent agreed on the finding of discrimination in the job market. 416 U.S. at 353 (majority), 358-59 (dissent). In 1970, while 40% of men in the work force earned over $10,000 and 70% earned over $7,000, 45% of women working full time earned less than $5,000 and 73.9% less than $7,000. 416 U.S. at 353 n.4, quoting U.S. Bureau of the Census statistics.

10. The service sector, defined by the United States Department of Labor Women's Bureau to include private household workers, cleaners and janitors, food service workers, health service workers, and personal service workers, is the single most important employer of women. In 1973, nearly one fourth of all women workers were employed in this sector, making up approximately 63 percent of all service employees. U.S. WOMEN'S BUREAU, DEP'T OF LABOR, BULL. NO. 297, 1975 HANDBOOK ON WOMEN WORKERS 90 (1975) [hereinafter cited as 1975 HANDBOOK]. A woman's median wage in this industry was 57.8% of the man's working next to her. *Id.* at 130.

Sales is another industry in which women, and especially the displaced homemaker,

Women are primarily concentrated in low paying, female-intensive industries and occupations.[10] Unfortunately, little headway has been made in sex-desegregating higher paid, male-intensive fields, such as management, the trades, and certain professions.[11] Moreover, contrary to public opinion, the disparity between women's and men's earnings has actually increased.[12] Comparable educational attainment does not decrease this disparity,[13] nor do women fare better in high paying job categories such as the professions or skilled technician positions.[14]

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may find work. In 1973, approximately 2.2 million women were employed as sales workers. *Id.* at 89. However, they were concentrated in the lower-paying trades, such as in ready-to-wear sales or in eating and drinking places. K. AMUNDSEN, A NEW LOOK AT THE SILENCED MAJORITY 35-36 (1977). Their median salary was 37.8% that of male sales workers, 1975 HANDBOOK, *supra* at 130, who were concentrated in the higher-paying sales trades, such as automobiles, farm equipment, building materials, insurance and real estate sales. K. AMUNDSEN, *supra* at 35.

11. The authors of the Report of the Twentieth Century Fund Task Force on Women and Employment state:

> [One] way of approaching the issue of the concentration of women in sex-segregated occupational categories is to construct an "index of segregation" based on the percentage of women in the labor force who would have to change jobs in order for the occupational distribution of women workers to match that of men. This "index of segregation" has remained virtually the same since 1900; it was 66.9 in 1900 and 68.4 in 1960, showing that sex segregation has remained virtually unaffected by the vast social and economic changes of the present century. It is interesting to note that the figure for racial segregation in 1960 was 46.8, less than three-fourths of the figure for sex segregation.

TASK FORCE ON WORKING WOMEN, *supra* note 8, at 50 (citation omitted).

12. While in 1955 women's median income was 63.9% of men's, in 1972 it was only 57.9%. Kahn v. Shevin, 416 U.S. at 353 n.5, quoting U.S. Dep't of Labor statistics.

One reason for this wage disparity is that women workers are less often protected by union membership. For example, in 1971 only 22% of all union members in California were women. K. KARRER, WOMEN AT WORK IN CALIFORNIA 26 (1974).

Another explanation for this wage disparity is the higher unemployment rate among women than men. In 1972, 5.7% of white women and 11.3% of Third World women were unemployed compared to 4.5% of white men and 8.9% of Third World men. TASK FORCE ON WORKING WOMEN, *supra* note 8, at 47. Economists emphasize that unemployed women form a large pool of reserve labor ready to enter the work force when needed and that this contributes to the disadvantaged position of women in the labor market. There is no incentive for employers to raise women's wages. For an in-depth discussion of the economic principles involved see K. AMUNDSEN, *supra* note 10; K. AMUNDSEN, THE SILENCED MAJORITY (1970); AMERICA'S WORKING WOMEN (R. Baxandall, L. Gordon & S. Reverby eds. 1976); J.K. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE (1973); M. KATZELL & W. BYHAM, WOMEN IN THE WORK FORCE (1972); J. KREPS, SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK (1971).

13. In 1974, a woman college graduate was likely to earn $368 less per year than a man with only an eighth grade education. U.S. WOMEN'S BUREAU, DEP'T OF LABOR, THE EARNINGS GAP 24 (1976).

14. In 1970, women comprised only 6.5% of the doctors, 2.1% of the dentists, 1.2% of

Women who have devoted their lives to homemaking often lack the experience and recognized skills necessary to compete in the job market. Single women with young children face the additional problem of inadequate childcare, which makes employment an impossibility for many. As long as women continue to face special problems in the job market, their need for spousal support will remain.

A. THE DISPLACED HOMEMAKER

Society traditionally defined a woman's primary role to be that of wife and mother and a man's role to be that of the family provider. Feminine success was measured by proficiency in homemaking skills, which were not and are not generally considered transferable to the job market.[15] Thus, the traditional wife did not have the opportunity or encouragement to develop the potential for employment outside the home. The role of homemaker was considered financially secure because marriage was expected to last a lifetime. If a marriage did end, alimony would provide support.

Many women who married at a time when these traditional notions prevailed currently face a financially insecure future. They are part of an increasingly large category of women described as "displaced homemakers," a term defined in the California Government Code[16] as women in their middle years who devoted their time to homemaking and became displaced through "divorce, death of spouse or other loss of family income."[17] Displacement leaves these women with no source of support; their

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the engineers, and 7% of the scientists in the United States. K. AMUNDSEN, *supra* note 10, at 32.

In 1973, women's median earnings were 63.6% of men's in the professional and technical job categories. 1975 HANDBOOK, *supra* note 10, at 130. Part of the explanation for the lower earnings of women with comparable education to their male counterparts lies in the channeling of women into lower-paying, lower-status professions, such as teaching and nursing. Even in these professions, however, women are given little opportunity to advance. For example, in 1968, only 12% of the teaching force was male; however, males held 78% of the elementary school principalships. The percentage of female principals actually dropped from 55% in 1928 to 22% in 1968, giving women elementary school teachers less mobility in 1968 than they had in 1928. K. AMUNDSEN, *supra* note 10, at 36-37.

15. In *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977), the court found that a "[woman's] . . . experience as a homemaker qualifies her for either of two positions, charwoman or babysitter. A candidate for a well paying job she isn't." *Id.* at 420, 136 Cal. Rptr. at 637.

16. Displaced Homemakers Act, CAL. GOV'T CODE § 7300 (West Supp. 1978).

17. *Id.* Although the statute uses the term "persons," women comprise the vast majority of displaced homemakers.

age and lack of marketable skills make self-support difficult, if not impossible. In 1975, the California Legislature expressly acknowledged the severity of the social and economic problems of displaced homemakers:

> [They] . . . are very often without any source of income; they are ineligible for categorical welfare assistance; they are subject to the highest unemployment rate of any sector of the work force; they face continuing discrimination in employment because they are older and have no recent paid work experience; they are ineligible for unemployment insurance because they have been engaged in unpaid labor in the home; they are ineligible for social security because they are too young, and for many, they will never qualify for social security because they have been divorced from the family wage earner; they have often lost their rights as beneficiaries under employers' pension and health plans through divorce or death of spouse, despite many years of contribution to the family well-being; and they are most often ineligible for Medi-Cal, and are generally unacceptable to private health insurance plans because of their age.[18]

The great majority of displaced homemakers are divorced women.[19] The courts have recognized that "[i]f [a woman] . . . has spent her productive years as a housewife and mother, and has missed the opportunity to compete in the job market and improve her skills, quite often she becomes, when divorced, simply a 'displaced homemaker'."[20] Spousal support is necessary to meet the economic crisis of the displaced homemaker[21] and

18. *Id.*

19. Telephone interview with Pat Stich, Volunteer Consultant for the Displaced Homemaker Center in Oakland, California (April 18, 1978).

20. *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 419, 136 Cal. Rptr. 635, 637 (1977). The court found that Mrs. Brantner was a displaced homemaker. At the time of the divorce, she was 44 years old, had been married 25 years, and was the mother of two teen-aged daughters. She had devoted her married life to caring for her family and had no marketable job skills.

21. Statistically, a person is most prosperous between the ages of 45 and 54. Among this age group, only 5.5% of all men and married women are living below poverty level. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, No. 98, 35 (1975). However, the incidence of poverty among displaced homemakers in this age group is four times as great. *Id.* at 78-79 (computed from statistics herein). The picture gets more dismal with advancing years; almost one half of all persons over the age of 65 living below the poverty level are women living alone. *Id.* at 80.

Most homemakers displaced by divorce receive some temporary spousal support. When this terminates, many exhaust their share of the community property and eventually qualify for General Assistance. Generally, this is the only welfare program for which

should be viewed as "a form of legal insurance or protection for the woman who has devoted her life to her husband and her children instead of developing marketable skills."[22]

B. Divorced Women with Dependent Children

Divorce usually leaves a woman with dependent children in serious financial difficulties regardless of the length of her marriage. The disadvantages of women workers generally are compounded for divorced women with dependent children because most courts award custody, especially of young children, to the mother but do not award the support necessary to enable her to provide financially for herself and the children.[23] Thus, among the increasing number of women who head households, a significant percentage are divorced women who live below the poverty level.[24]

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the displaced homemaker qualifies. General Assistance is an emergency welfare program for persons who do not qualify for categorical assistance such as Aid to Families with Dependent Children (AFDC) or one of the disability programs. When a displaced homemaker is forced to subsist on General Assistance, the state rather than the ex-husband bears the financial burden of divorce. At least one court has considered the likelihood that without continuing spousal support a displaced homemaker "will become the object of charity." *In re* Marriage of Brantner, 67 Cal. App. 3d at 419, 136 Cal. Rptr. at 636-37.

22. Weitzman, *supra* note 3, at 1185. As the California Supreme Court has stated in *In re* Marriage of Morrison:

> A wife who has spent her married years as a homemaker and mother may, despite her best efforts, find it impossible to reenter the job market. In such a case, "the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life. This has nothing to do with feminism, sexism, male chauvinism . . . . It is ordinary commonsense, basic decency and simple justice."

20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978), quoting *In re* Marriage of Brantner, 67 Cal. App. 3d at 420, 136 Cal. Rptr. at 637.

23. A national survey of judges showed that child support awards were "usually not enough to furnish even *one-half* the actual cost of rearing a child," and that permanent alimony was awarded in only two percent of the cases. Reported in K. Amundsen, *supra* note 10, at 27-28. Temporary alimony was awarded in 10% of the cases to enable the wife to find work, thus leaving the woman with the dual responsibility for raising her children and working outside the home. *Id.* at 27.

24. A Bureau of the Census report concluded that the rise in divorce and separation rates is the most important factor in the 25% increase in the last decade in the number of families headed by women. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, Series P-23, No. 50, Female Family Heads 7 (1974). This is a devastating trend since one third of all female-headed families are living below the poverty level while only 5.5% of male-headed families are in the same situation. U.S. Bureau of the Census, Dep't of Commerce, Current Population Reports, Series P-60, No. 98, Characteristics of the Low-Income Population: 1973, 8 (1973). In 1975, among families headed by women, the median income, which included any spousal and child support payments received, was less than half the median income of two-parent families in which only the husband worked. Stencel, *Single-Parent Families*, in Editorial Research Reports on The Women's Movement: Achievements and Effects 63, 70 (1976).

Due to their low income potential, the failure of fathers to make child support payments,[25] the reluctance of courts to award spousal support and the low amounts awarded,[26] thirty-five percent of these female-headed families must supplement their income with welfare aid.[27]

A mother might solve this economic dilemma by securing employment outside the home. However, society's traditional expectation that a woman devote herself totally to the care of her children is reflected in the lack of quality, low cost childcare,[28] inflexible work hours, lack of opportunity and minimal compensation for part-time work.[29] The work environment is geared to

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There are indications that poverty, for many women, is a result of divorce. A survey of divorced and separated persons found that former wives were much worse off financially, even taking into account any spousal or child support payments, than ex-husbands. Reported in Stencel, *supra* at 69. Another study, of divorced mothers receiving AFDC, showed that their ex-husbands' occupations, and presumably their incomes, paralleled the occupational distribution of men as a whole. Reported in Brandwein, Brown & Fox, *The Social Situation of Divorced Mothers and Their Families,* in WOMAN IN A MAN-MADE WORLD 350, 351 (2d ed. 1977) [hereinafter cited as Brandwein].

25. The record of fathers who have been ordered to make child support payments is dismal. A 1955 study of a metropolitan Wisconsin county found that after one year, four out of ten fathers were in default; after ten years, eight out of ten were not paying. Reported in Nagel & Weitzman, *supra* note 3, at 189-90. Surprisingly, data from the General Accounting Office in 1974 indicated that there is "little relationship between a father's ability to pay and either the amount of the payment agreed to or his compliance with the law." Stencel, *supra* note 24, at 69.

26. *See* text accompanying note 4 *supra.* In a recent article, the authors note that a study "showed that a majority of judges in a nationwide sample award less than 35 percent of husband's income to the wife and family." Brandwein, *supra* note 24, at 353.

Judge Donald B. King, Domestic Relations Judge of the Superior Court of San Francisco, indicates that in high income situations he will generally make spousal support awards which allot the supported spouse roughly one quarter of the supporting spouse's net spendable income. In middle income situations, the ratio will be closer to 50/50. Judge King emphasized, however, that "there is no such thing as a normal ratio of the net spendable income of one spouse to the other." In calculating the supported spouse's net spendable income, Judge King considers income from all sources, including child support payments. D. KING, GUIDELINES FOR DOMESTIC RELATIONS CASES 16-17 (1977).

27. Stencel, *supra* note 24, at 70.

28. *See generally* 1975 HANDBOOK, *supra* note 10, at 33-39. In the United States in 1974 there were almost 27 million children with working mothers, while the estimated number of children who could be cared for in licensed day care facilities in 1972 was only one million. *Id.* at 32, 35.

The National Council of Jewish Women, in a 1974 study, found that thousands of children are grossly neglected, are on their own ten hours a day, often stay at their mothers' places of work because no other arrangements are available, or survive in child-care centers or family day-care homes of extremely poor quality. Reported in Roby, *The Condition of Women in Blue-Collar Jobs,* in ECONOMIC INDEPENDENCE FOR WOMEN 155, 169 (J. Chapman ed. 1976).

29. Employers fear that part-time workers lack job commitment, but this is not born out in studies which have measured and compared productivity of full and part-time workers. Nevertheless, women who work part-time are treated as second class employees;

the traditional nuclear family. Single mothers face difficulties on the job because they have no "wife" at home to meet child-centered emergencies. Employer prejudice also exists because employers fear that mothers, but not married or single fathers, will rank a job second in importance after their children.[30]

Single mothers in the labor force thus bear the double burden of working and assuming full responsibility for housework and childcare.[31] The United States Supreme Court recently acknowledged that having complete responsibility for the adequate care of children "impeded [the single parent's] . . . ability to work."[32] The Court reasoned that providing benefits to the custodial parent, distinct from those for the children, would enable the single parent to forego remunerative employment.[33] While the Court was not concerned with a case involving a divorced woman with dependent children, the same reasoning is applicable. For divorced women with young children, spousal support could be viewed, not as the equivalent of child support, but as payment for assuming the full-time job of homemaker and foregoing employment opportunities. In computing such support payments, the length of marriage would be irrelevant because the compensation would be for the present and future job of homemaking.

Although the need for spousal support has been considered in relation to the woman's responsibilities for childcare, this is not to suggest that the need for spousal support ends with the termination of these responsibilities. Once her children are no longer dependent, the woman may be middle-aged and encounter all the difficulties of the displaced homemaker in the job market. If she

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they are often ineligible for fringe benefits which are accorded full-time employees and are rarely considered for promotions. *See* TASK FORCE ON WORKING WOMEN, *supra* note 8, at 79-81.

30. The fact situation in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), is illustrative. The corporation refused to hire women with pre-school aged children, although it would hire fathers of pre-school aged children.

31. In 1971, 30% of married mothers with pre-school children worked, while 62% of divorced mothers with children of the same age worked. These figures illustrate the difficulty of caring for young children and working outside the home, even with the help of a husband. Brandwein, *supra* note 24, at 352.

32. Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975). *Weinberger* dealt with survivor's benefits. A divorced mother, of course, is not eligible to receive such benefits. However, her situation is analogous to that of a widow or widower with dependent children. The Court found that Congress had provided survivor's benefits to widows with minor children because it believed these parents should not be required to work. *Id.* at 651.

33. *Id.* at 651-52. It should be emphasized that the disputed benefits in *Weinberger* were those to be paid to the surviving parent; the Wiesenfeld child was already receiving survivor's benefits.

has been able to remain at home, she will be without marketable skills; if she has been employed part-time, she will have missed opportunities for advancement and will probably not be eligible for retirement or health benefits. These difficulties indicate that some spousal support on a permanent basis may be required. Spousal support in these cases can be viewed as remuneration for foregoing gainful employment, a type of lost opportunity cost.

II. CURRENT LEGAL ISSUES

Prior to the Family Law Act of 1969,[34] fault was the primary factor considered by California courts in awarding spousal support.[35] The underlying theory was to punish the guilty and provide damages for the innocent:

> "The theory of [the] . . . requirement [of Civil Code section 139] is that the husband entered upon an obligation which bound him to support his wife during the period of their joint lives, that by his own wrong he has forced her to sever the relation . . ., and that he is required to make compensation for the offense committed by him which has deprived her of benefit of the obligation."[36]

The Family Law Act[37] represented a sweeping change in the laws governing domestic relations in California.[38] Fault of the parties was no longer the central concern. Instead, section 4801 directed the court to award spousal support "as the court may

34. The Family Law Act, passed in 1969, was codified as CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 1978). Section 4801 deals with spousal support and replaced CAL. CIV. CODE § 139, which was enacted as ch. 1700, § 7, 1951 Stats. 3912.

35. Spousal support could not be awarded without proof of both the plaintiff's innocence and the defendant's fault. The degree of fault alleged and proved determined the award and the division of community property. Everett v. Everett, 52 Cal. 383 (1877); Brooks v. Brooks, 53 Cal. App. 2d 93, 127 P.2d 298 (1942).

36. Webber v. Webber, 33 Cal. 2d 153, 157-58, 199 P.2d 934, 937 (1948), quoting Arnold v. Arnold, 76 Cal. App. 2d 877, 885-86, 174 P.2d 674, 678 (1946). Some courts did not consider an award under former section 139 "alimony" in the sense that it provided an ex-wife with needed support. Rather the award was considered a penalty against the errant husband which could be awarded "in the absence of allegations or evidence showing that the husband then owned either separate or community property to which resort may be had to enforce its payment, or that he has the ability to pay." Scheibe v. Scheibe, 57 Cal. App. 2d 336, 343, 134 P.2d 835, 840 (1943). *See also Ex parte* Spencer, 83 Cal. 460, 464, 23 P. 395, 396-97 (1890); Honey v. Honey, 60 Cal. App. 759, 761, 214 P. 250, 251 (1923).

37. CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 1978).

38. The new law eliminated all consideration of fault in divorce proceedings and replaced the terms "divorce" with "marital dissolution" and "alimony" with "spousal support." For a general history of the Act, see Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156 (1970).

deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children."[39] The courts interpreted the statutory language to mean that the critical factors were the supported spouse's need and the supporting spouse's ability to pay.[40] The removal of fault left the awarding of spousal support to the courts' discretion in determining said need and ability to pay, with little theoretical framework for guidance.

In 1977, subsection 4801(a) was amended to enumerate specific, mandatory factors to be considered by courts in determining the circumstances of the parties.[41] An apparent purpose of this legislation was to limit the court's discretion in determining and awarding spousal support. Nevertheless, courts retain broad discretion because the statute specifically allows the court to consider "[a]ny other factors which it deems just and equitable."[42]

A. The Factors Enumerated in Section 4801

The language of subsection 4801(a)[43] does not indicate that any one factor is to be weighed more heavily than the others. In actuality, however, courts have accorded such pre-eminent im-

39. Family Law Act, ch. 1608, § 8, 1969 Stats. 3333 (current version at Cal. Civ. Code § 4801(a) (West Supp. 1978)).

40. Pencovic v. Pencovic, 45 Cal. 2d 97, 100, 287 P.2d 501, 502 (1955); Philbin v. Philbin, 19 Cal. App. 3d 115, 119, 96 Cal. Rptr. 408, 411 (1971); Baron v. Baron, 9 Cal. App. 3d 933, 943, 88 Cal. Rptr. 404, 410 (1970).

41. Subsection 4801(a) (West Supp. 1978) of the California Civil Code reads, in pertinent part:

> In making the award, the court *shall* consider the following circumstances of the respective parties:
> (1) The earning capacity and needs of each spouse.
> (2) The obligations and assets, including the separate property, of each.
> (3) The duration of the marriage.
> (4) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
> (5) The time required for the supported spouse to acquire appropriate education, training, and employment.
> (6) The age and health of the parties.
> (7) The standard of living of the parties.
> (8) Any other factors which it deems just and equitable.

(emphasis added).

42. Cal. Civ. Code § 4801(a)(8) (West Supp. 1978).

43. *Id.* § 4801(a).

portance to one factor, duration of marriage,[44] that it has become a practical prerequisite to an award of spousal support. The San Francisco Superior Court, in its published guidelines,[45] divides marriages into three categories according to their duration. These categories are used to determine whether spousal support will be awarded and for how long; the longer the marriage, the greater the likelihood and term of the award.[46] Thus, unless a woman can meet the test of length, it appears she may have less chance of having the other factors in her case fully considered.

Length of marriage may have become the paramount factor in awarding spousal support in order to compensate a supported spouse for the contribution to the marriage. However, this does not comport with the intent of section 4801, as amended, to award spousal support on the basis of the supported spouse's need and the supporting spouse's ability to pay. More likely, duration of marriage has been emphasized because courts recognize that the longer the supported spouse is absent from the labor force, the greater the difficulty encountered upon entering or re-entering the job market and thus the greater the need for support. However, courts are reluctant to acknowledge that even a marriage of short duration may result in loss of skills and contacts in the job market. Spousal support should be awarded during the period necessary to update skills in order to enter the labor force successfully.

Subsection 4801(a)(5) expressly directs courts to consider "[t]he time required for the supported spouse to acquire appropriate eduction, training, and employment."[47] However, not only have courts been reluctant to award spousal support for education and training after marriages of short duration, but they have also set automatic reductions, or step-downs, to take effect at the

44. *Id.* § 4801(a)(3).

45. D. KING, *supra* note 26. Judge King's guidelines are the first published by a court.

46. *Id.* These guidelines note that support in short term marriages of seven years or less is "less likely to be awarded unless the needs of young children preclude employment or a spouse can prove, after a good faith effort to obtain employment, that it is not available." *Id.* at 14. If an award is made, its duration will be short, usually for "a period of less than one-half of the time between the dates of marriage and separation." *Id.* In medium term marriages of seven to fifteen years a definite termination date will be set, and the duration will depend on the circumstances of the parties, though "spousal support will rarely be justified on a permanent basis." *Id.* at 15. Finally, in long term marriages of more than fifteen years, the court may order permanent spousal support, if need is established. *Id.* at 15. The longer the marriage, the more likely the support will be permanent.

47. CAL. CIV. CODE § 4801(a)(5) (West Supp. 1978).

time the training is to end.[48] This allows little or no time to find appropriate employment, and the step-down may leave the supported spouse with only a token award.[49]

The supported spouse's effort to secure employment is not a factor enumerated in subsection 4801(a). However, many courts have employed this factor to restrict spousal support, while ignoring the statutorily mandated consideration of ability to work. In a number of cases in which there was either no evidence of ability to work or evidence that the supported spouse was unable to work, courts focused their attention solely on the supported spouse's efforts to secure employment.[50] This focus ignores the reality that a spouse who has been absent from the labor force during marriage may have few prospects for employment. The spousal support orders in these cases were structured to force the supported spouse to obtain poor-paying, unskilled work.[51]

Consideration of a supported spouse's effort to obtain em-

48. *See* notes 97-120 *infra* and accompanying text for a discussion of step-down orders.

49. In *In re* Marriage of Smith, 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (1978), the trial court awarded Mrs. Smith spousal support in the amount of $350 per month for one year, stepped down to $250, $150 and $50 per month for each of the next three years, respectively, while she pursued a degree in business administration. The trial court apparently ordered the step-down assuming that Mrs. Smith would be able to work while attending school. The court of appeal found nothing in the record to support the trial court's conclusion and reversed, ordering support in the amount of $350 per month for the four years Mrs. Smith attended school. *Id.* at 739, 145 Cal. Rptr. at 210. However, the appellate court also approved a jurisdictional step-down to $1 per year for the fifth year, when Mrs. Smith would have completed her education. *Id.* at 740, 145 Cal. Rptr. at 210.

The education for which the court ordered support was indeed appropriate, since Mrs. Smith had managed the family business for ten years prior to the termination of her marriage. However, the step-down portion of the order does not comport with the language of sub-section 4801(a)(7), which requires the court to consider "the time required for the supported spouse to acquire appropriate . . . employment." CAL. CIV. CODE § 4801(a)(7) (West Supp. 1978). Since "appropriate" modifies employment as well as education, Mrs. Smith's award should not have been stepped down to a token amount immediately after completion of her education. The award should have reflected consideration of the time needed to secure appropriate employment, commensurate with Mrs. Smith's education.

50. *See, e.g., In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).

51. In *In re* Marriage of Dennis, the court affirmed a spousal support order for $200 per month for the first year, stepped down to $100 per month for the next three years, stating that "[t]he final and critical factor is the wife's unwillingness in this case—short of 'starvation'—to work." 35 Cal. App. 3d at 283, 110 Cal. Rptr. at 621. The court mentioned that Mrs. Dennis, fifty years old, had been a homemaker all her life and that her weak vision made it impossible for her to obtain employment utilizing her skill as a seamstress. However, the court concluded that "there is absolutely no evidence that she was physically disabled from performing *any* work . . ." *Id.* at 284, 110 Cal. Rptr. at 621 (emphasis added).

ployment as a factor in making spousal support awards was expressly rejected by the California Supreme Court in the recent case of *In re Marriage of Morrison.*[52] The court of appeal stated that "the certain termination of spousal support after 11 years was reasonably calculated to encourage her to seek such employment."[53] In reversing the court of appeal decision on the issue of termination, the California Supreme Court reasoned that "when the supported spouse is unemployed or is earning only a small salary, a court should [not] set a jurisdictional termination date based on the mere hope that this will induce that spouse to become self-supporting."[54]

Another factor to be considered in the award of spousal support pursuant to subsection 4801(a)(7) is the couple's standard of living,[55] defined by the courts as the " '[r]easonable needs of a wife commensurate with her station in life . . . [which] embrace more than bare necessities.' "[56] In situations in which the standard of living has been high, the length of marriage should not be the determining factor. Except in unusual circumstances, the higher the standard of living, the less likely that the ex-wife will be able to support herself in a comparable style[57] and the more difficult it may be for her to find suitable employment. When she does find employment, she may continue to need some spousal support.

Courts are also to consider "[t]he ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the

52. 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). For a detailed discussion of this case see notes 73-96 *infra* and accompanying text.

53. *Id.* at 454, 573 P.2d at 52, 143 Cal. Rptr. at 150.

54. *Id.* at 452, 573 P.2d at 51, 143 Cal. Rptr. at 149.

55. CAL. CIV. CODE § 4801(a)(7) (West Supp. 1978).

56. *In re* Marriage of Kuppinger, 48 Cal. App. 3d 628, 633, 120 Cal. Rptr. 654, 656 (1975) (citations omitted).

57. In *In re* Marriage of Andreen, 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (1978), the court disapproved a spousal support order because "[i]t suppli[ed] the husband a continued standard of living much higher than the wife's." *Id.* at 671, 143 Cal. Rptr. at 97. The husband would have had $2,000 per month net spendable income while the wife, if she had found work at the expected salary range of $500 per month, would only have had $1,000 per month. The court noted that this "would provide her a drab, relatively austere standard of life, hardly comparable to her husband's . . . [T]he decree depresses her standard of living considerably below her husband's." *Id.* at 672, 143 Cal. Rptr. at 97. *See also In re* Marriage of Wright, 60 Cal. App. 3d 253, 131 Cal. Rptr. 870 (1976); *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *In re* Marriage of Siegel, 26 Cal. App. 3d 88, 102 Cal. Rptr. 613 (1972); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972); Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (1962).

spouse."[58] Unfortunately, many courts which consider the best interests of the children view spousal support as the equivalent of child support.[59] Although such awards may provide support adequate to allow the supported parent to remain at home with young children, they neither compensate the parent for the lost opportunity of employment during that period nor take into account that parent's unpreparedness to enter the job market when the children no longer require a parent at home.

The concept of fault provided a clearly delineated theoretical basis for spousal support awards. The advent of the no-fault system brought with it a theoretical vacuum which has not yet been filled. In an attempt to prevent spousal support awards at the unbridled discretion of the courts, the legislature amended subsection 4801(a) so that it would serve as a guideline within which courts are to exercise their discretion. However, as set forth above, the judiciary has failed to adhere faithfully to these guidelines.[60] Thus, subsection 4801(a) has not proven a successful substitute for a coherent theory on which to base spousal support.

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58. CAL. CIV. CODE § 4801(a)(4) (West Supp. 1978).

59. *See, e.g., In re* Marriage of Wright, 60 Cal. App. 3d 253, 131 Cal. Rptr. 870 (1976); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).

In *Wright*, the court affirmed a spousal support award of $2,000 per month for ten years, then a step-down to $1,500 per month with no termination date. The step-down order was to take effect when the youngest of the four children in the wife's custody would have been an adult for not quite a year and a half. The court noted that "[n]o one can quarrel with the implied finding that until the youngest child reaches majority, [the wife] . . . should not enter the job market . . . . [especially since] all children except the youngest were, at the time of trial, very depressed or disturbed." 60 Cal. App. 3d at 257 n.2, 131 Cal. Rptr. at 872 n.2.

The court in *In re* Marriage of Rosan found that it was not "unreasonable for Wife to defer seeking employment or preparation for employment" during the period she had custody of both children, including the older boy "whose behavioral or emotional problems had required Wife to terminate her schooling and her short employment in 1966." 24 Cal. App. 3d at 893-94, 101 Cal. Rptr. at 301.

60. The court in *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977), criticized the trial court for its failure to take the time necessary to consider the facts of the case carefully and noted that such speedy disposition is not uncommon in domestic relations cases:

> Domestic relations litigation . . . too often is given the low-man-on-the-totem-pole treatment . . . . The handling of this case, which involved the breakup of a 25-year marriage, the custody of 2 teenage girls, the disposition of all of the property accumulated during that marriage, and the plotting of the fiscal future of the entire family, is illustrative. Judged by the brevity of the record, not more than 15 minutes of the court's time on a busy Friday afternoon short-cause calendar were involved.

Id. at 422, 136 Cal. Rptr. at 638-39.

B. TERMINATION OF JURISDICTION

Prior to 1965,[61] the courts were empowered to "modify" spousal support awards by extending the award beyond the specified termination date of the original order as long as this was accomplished prior to expiration of the original order.[62] Thus, prior to 1965, a spousal support award could be extended even when the court, in its original order, had not retained jurisdiction. In 1965, the legislature abolished this court-created procedure by enacting former California Civil Code section 139.7, which was recodified as subsection 4801(d).[63] The new law provided that the order "shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction."[64] Express retention of jurisdiction in the original order became crucial; without it, the court lost all power to extend support beyond the specified termination date.[65]

The enactment of subsection 4801(d)[66] produced a controversy in respect to when jurisdiction should be retained. One line of decisions[67] followed the *Rosan/Dennis*[68] doctrine that "after a lengthy marriage a retention of jurisdiction to modify spousal support should be the norm and that the burden of justification is on the party seeking termination";[69] the court is "not warranted

61. In 1965, the California Legislature enacted former Civil Code section 139.7, ch. 1109, § 1, 1965 Stats. 2755, recodified in 1969, current version at CAL. CIV. CODE § 4801(d) (West Supp. 1978).

62. Former section 139, ch. 861, § 1, 1963 Stats. 2097 (current version at CAL. CIV. CODE § 4801(d) (West Supp. 1978). *See* Schraier v. Schraier, 163 Cal. App. 2d 587, 589, 329 P.2d 544, 545-46 (1958). In Tolle v. Superior Court, 10 Cal. 2d 95, 73 P.2d 607 (1937), the court held that by stating a time limitation in the original order, the supporting spouse had been permanently relieved of any support obligation after that time. *Id.* at 97, 73 P.2d at 609.

63. Ch. 1109, § 1, 1965 Stats. 2755, recodified in 1969, current version at CAL. CIV. CODE § 4801(d) (West Supp. 1978).

64. CAL. CIV. CODE § 4801(d) (West Supp. 1978).

65. *Id.*

66. Subsection 4081(d) was enacted as CAL. CIV. CODE § 139.7, Ch. 1109, § 1, 1965 Stats. 2755, recodified in 1969, current version at CAL. CIV. CODE § 4801(d) (West Supp. 1978).

67. *In re* Marriage of Andreen, 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (1978); *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977); *In re* Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976); *In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).

68. *In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).

69. *In re* Marriage of Dennis, 35 Cal. App. 3d at 285, 110 Cal. Rptr. at 622. The *Dennis* court cited *In re* Marriage of Rosan, 24 Cal. App. 3d at 897-98, 101 Cal. Rptr. at 303-04.

in burning its bridges."[70] The other line of decisions, following the *Patrino/Lopez*[71] interpretation of legislative intent, concluded that the language of the statute

> evidences a legislative intent to diminish constant modification proceedings, to provide both parties some degree of post-dissolution economic stability by minimizing the inherent apprehension of the possible loss or extension of spousal support, and in proper cases to eliminate permanent burden or dependence, thus motivating both parties to seek a new life completely free from a former marital failure.[72]

This decisional split awaited resolution by the California Supreme Court. In 1978, the impetus was provided by *In re Marriage of Morrison,*[73] which involved a twenty-eight year marriage. At the time of dissolution, Mrs. Morrison was fifty-four years old and had health problems and no employment skills.[74] The trial court ordered $400 per month spousal support for eight years and reserved jurisdiction for an additional three years, thereby terminating all spousal support at the end of eleven years.[75] The court of appeal upheld the trial court order, relying on the *Patrino/Lopez* line of decisions.[76]

In a unanimous opinion written by Chief Justice Rose Bird, the California Supreme Court forthrightly rejected the *Patrino/Lopez* approach and resolved the controversy strongly on the side of the *Rosan/Dennis* decisions[77] by reversing the *Morrison* trial court on the termination issue.[78] The court conceded that the

70. *In re* Marriage of Dennis, 35 Cal. App. 3d at 285, 110 Cal. Rptr. at 622.

71. *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *In re* Marriage of Patrino, 36 Cal. App. 3d 186, 111 Cal. Rptr. 367 (1973).

72. *In re* Marriage of Lopez, 38 Cal. App. 3d at 119, 113 Cal. Rptr. at 74.

73. 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978).

74. *Id.* at 440, 573 P.2d at 44, 143 Cal. Rptr. at 142. Mrs. Morrison had no marketable skills, although at the time of appeal she was employed part time as a newspaper collator earning approximately $100 per month. She suffered from low blood sugar which left her with little energy. Mr. Morrison's net income was $1,456 per month. *Id.* at 441, 573 P.2d at 44, 143 Cal. Rptr. at 142.

75. *Id.* at 441, 573 P.2d at 44, 143 Cal. Rptr. at 142. The trial court also awarded Mrs. Morrison a 42.5% interest ($167.00 per month) in her husband's military pension. Mrs. Morrison appealed the amount awarded as spousal support and the failure of the trial court to retain jurisdiction; she additionally appealed the trial court's failure to determine her interest in her husband's non-vested pension. Mr. Morrison appealed the division of the community property. *Id.*

76. 1 Civ. No. 38466 (Cal. App. Ct., 1st Dist. 1977).

77. 20 Cal. 3d at 452-53, 573 P.2d at 51-52, 143 Cal. Rptr. at 150.

78. It appears that the ruling in *Morrison* also applies to modification proceedings. The court, in *Morrison,* cites *In re* Marriage of Kuppinger, 48 Cal. App. 3d 628, 120 Cal.

goal of *Patrino/Lopez* to reduce the amount of courtroom litigation was "commendable," but found the means impermissible:

> "[W]e quite agree that any procedure which reduces the amount of courtroom litigation is thoroughly commendable—in the abstract. However, this concept, too, has its limitations. While the speedy disposition of cases is desirable, speed is not always compatible with justice. . . . The courts should not begrudge the time necessary to carefully go over the wreckage of a marriage in order to effect substantial justice to all parties involved."[79]

The court extensively examined the legislative history of subsection 4801(d) of the California Civil Code.[80] It found that the legislative intent was not to curtail modification proceedings,[81] but to avoid the confusion which arose under the previous rule that jurisdiction was retained during the entire payment period and could not be divested until the expiration date of the original order.[82] Thus, the California Supreme Court found that subsection 4801(d) changed the procedure for retaining jurisdiction but did not alter the factors to be considered in deciding whether or not to retain jurisdiction.[83]

In determining whether jurisdiction is to be retained, courts are to be guided by the factors enumerated in Civil Code subsection 4801(a).[84] The *Morrison* court used language almost identical

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Rptr. 654 (1975) and *In re* Marriage of Lovitz, 65 Cal. App. 3d 299, 135 Cal. Rptr. 9 (1976) as cases following *Rosan/Dennis*. *Id.* at 443, 573 P.2d at 45, 143 Cal. Rptr. at 143. Both cases involved modification orders in which the trial court refused to retain jurisdiction even though in the original divorce decree it had retained jurisdiction. In both *Kuppinger* and *Lovitz* the appellate courts reversed, following the *Rosan/Dennis* approach. 48 Cal. App. 3d at 636, 120 Cal. Rptr. at 660; 65 Cal. App. 3d at 304-05, 135 Cal. Rptr. at 13.

In the course of its decision, the *Lovitz* court addressed the issue of whether a modification order which does not retain jurisdiction supercedes an original order retaining jurisdiction. The court held that CAL. CIV. CODE section 4801(d) (West Supp. 1978) applies to the order latest in time. *Id.* at 304, 135 Cal. Rptr. at 12-13. Thus, even though jurisdiction is expressly retained in the original order, the court loses jurisdiction if it does not also expressly retain it in the modification order.

79. 20 Cal. 3d at 450, 573 P.2d at 50, 143 Cal. Rptr. at 148, quoting *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 422, 136 Cal. Rptr. 635, 638 (1977).

80. The court in *Morrison* noted that subsection 4801(d) was not part of the Family Law Act, but had been enacted in 1965 as Civil Code section 139.7 and merely recodified in 1969. 20 Cal. 3d at 445, 573 P.2d at 46, 143 Cal. Rptr. at 144.

81. *Id.*

82. *Id.* at 446-47, 573 P.2d at 47-48, 143 Cal. Rptr. at 145-46.

83. *Id.* at 448-49, 573 P.2d at 49, 143 Cal. Rptr. at 147.

84. *Id.*

to that in *Dennis*[85] in holding that "[a] trial court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction."[86] Furthermore, the court directed, as had the *Rosan* court, that the trial court must rely only on the evidence in the record and the reasonable inferences to be drawn therefrom in making its decision; "[i]t must not engage in speculation."[87]

The California Supreme Court recognized that while an increasing number of women have entered the job market, a great number have devoted their lives to caring for their families.[88] The court, citing the Displaced Homemakers Act,[89] rightfully acknowledged that at dissolution these women may well be unable to find employment outside the home.

After *Morrison,* courts will no longer be able to justify terminating jurisdiction as a means of "encouraging" the supported spouse to become self-sufficient.[90] If a lengthy marriage is involved, termination is only justified if the record "clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction."[91] As the California Supreme Court pointed out, there is nothing in the legislative history of the Family Law Act to indicate that it was "intended to be 'some sort of mandate by the Legislature to the courts to relieve [the supporting spouse in

85. The *Dennis* court held that "after a lengthy marriage a retention of jurisdiction to modify spousal support should be the norm and that the burden of justification is on the party seeking termination." 35 Cal. App. 3d 279, 285, 110 Cal. Rptr. 619, 622 (1973).

86. 20 Cal. 3d at 453, 573 P.2d at 52, 143 Cal. Rptr. at 150. In applying this rule, the *Morrison* court found that "[t]he trial court abused its discretion by divesting itself of jurisdiction to award future spousal support after 11 years without any evidence in the record that the wife would be able to provide for herself at that time." *Id.* at 454, 573 P.2d at 52, 143 Cal. Rptr. at 150. The court further stated that "[a]ll the evidence in the record is to the contrary . . . . At the time the court's jurisdiction terminates in 11 years, the wife will have reached the customary retirement age of 65. The record does not indicate what, if any, retirement benefits she will be eligible to receive at that time." *Id.*

87. *Id.* at 453, 573 P.2d at 52, 143 Cal. Rptr. at 150. The *Morrison* court adopted language almost identical to that in *Rosan.* 24 Cal. App. 3d 885, 896, 101 Cal. Rptr. 295, 303 (1972).

88. 20 Cal. 3d at 452, 573 P.2d at 51, 143 Cal. Rptr. at 149.

89. *Id. See* text accompanying notes 16-18 *supra* for a discussion of the Displaced Homemakers Act.

90. *See* discussion in notes 50 & 51 *supra* and accompanying text.

91. 20 Cal. 3d at 453, 573 P.2d at 52, 143 Cal. Rptr. at 150.

every case] of any long, continuing obligation for spousal support.' "[92]

Morrison settled the issue of when to retain jurisdiction in lengthy marriages. However, two important questions remain. The California Supreme Court did not define "lengthy" marriage, nor did it indicate whether *Morrison* will also apply to marriages of shorter or short duration. The shortest marriage considered in the cases cited in *Morrison* lasted fourteen years.[93] Thus, one might conclude that *Morrison* only applies to lengthy marriages of fourteen years or more.[94] For marriages of less than fourteen years, it is unclear when jurisdiction should be retained. There are two options. If the *Patrino/Lopez* goal of "post-dissolution stability"[95] is adopted, the courts would not retain jurisdiction in shorter or short marriages. Alternatively, the "no speculation"[96] rationale of *Morrison* may apply, thereby placing the burden of termination on the supporting spouse.

The *Morrison* rationale is as appropriate for shorter or short term marriages as for lengthy marriages if there is no evidence on the record showing that the spouse seeking support is employed or readily employable. Employment prospects may be devastating for a woman who has been out of the employment market for even a few years. If a court insists on "speculating" in shorter or short term marriages, it should take judicial notice of the disadvantaged position of women in the job market and thus retain jurisdiction.

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92. *Id.* at 452, 573 P.2d at 51, 143 Cal. Rptr. at 149, quoting *In re* Marriage of Rosan, 24 Cal. App. 3d at 897, 101 Cal. Rptr. at 304.

93. The *Morrison* court cited the following cases: *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977) (25 years); *In re* Marriage of Norton, 71 Cal. App. 3d 537, 139 Cal. Rptr. 728 (1976) (18 years); *In re* Marriage of Lovitz, 65 Cal. App. 3d 299, 135 Cal. Rptr. 9 (1976) (15 years); *In re* Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976) (22 years); *In re* Marriage of Wright, 60 Cal. App. 3d 253, 131 Cal. Rptr. 870 (1976) (16 years); *In re* Marriage of Kuppinger, 48 Cal. App. 3d 628, 120 Cal. Rptr. 654 (1975) (23 years); *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (14 years); *In re* Marriage of Patrino, 36 Cal. App. 3d 186, 111 Cal. Rptr. 367 (1973) (26 years); *In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973) (24 years); *In re* Marriage of Cosgrove, 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (1972) (28 years); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972) (17 years).

94. *See* note 46 *supra* and accompanying text for a discussion of Superior Court Judge Donald King's guidelines for awarding spousal support, pursuant to which a woman married for more than fifteen years is much more likely to receive spousal support.

95. *In re* Marriage of Lopez, 38 Cal. App. 3d at 119, 113 Cal. Rptr. at 74.

96. 20 Cal. 3d at 453, 573 P.2d at 52, 143 Cal. Rptr. at 150.

C. The Role of Automatic Reductions (Step-Downs)

Many spousal support orders provide that a certain amount be paid for an initial period, and that a reduced amount be paid thereafter.[97] This automatic reduction, or step-down, is often insufficient for support. Step-down orders to token amounts originally evolved as a technique to retain jurisdiction at a time when courts retained jurisdiction only during the payment period.[98] However, courts may now expressly retain jurisdiction indefinitely to provide for the eventuality that the supported spouse's needs may change.[99] Thus, the original rationale for step-downs to token amounts is no longer extant.

The courts' use of step-downs has become a technique for limiting spousal support. The present rationale seems to be the same as that given for terminations, to encourage the wife to become employed and to avoid future modification proceedings. For example, some courts[100] have approved step-down orders even when the record contained little or no evidence of the wife's ability to support herself.[101] The court in *In re Marriage of Dennis*[102]

97. *See, e.g.,* Schraier v. Schraier, 163 Cal. App. 2d 587, 589-90, 329 P.2d 544, 546 (1958). *See also* Modglin v. Modglin, 246 Cal. App. 2d 411, 418, 54 Cal. Rptr. 582, 586 (1966) (Herndon, J., dissenting).

98. *See* note 62 *supra* and accompanying text.

99. Cal. Civ. Code § 4801(d) (West Supp. 1978).

100. *See, e.g., In re* Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976); *In re* Marriage of Patrino, 36 Cal. App. 3d 186, 111 Cal. Rptr. 367 (1973); *In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973).

101. In *In re* Marriage of Kelley, the wife had not worked during the twenty-two year marriage and was forty-eight at the time of the trial. Following separation, she had been unsuccessful in obtaining part-time work to help support herself. Spousal support was awarded in the amount of $500 per month for three months, $300 per month for the next six months, $250 for the next six months, and $200 for the next two years, at which time support was to terminate. The trial court assumed that Mrs. Kelley would start earning a salary within three months of the hearing and that her income would rapidly rise every six months thereafter. The appellate court adopted this assumption although it recognized the wife's "lack of demonstrated earning ability." 64 Cal. App. 3d at 95, 134 Cal. Rptr. at 266.

The court in *In re* Marriage of Dennis did not expressly consider the propriety of setting step-downs without any evidence in the record to indicate that the wife's needs would actually have decreased at the designated time. However, the record in *Dennis* certainly provided no evidence that Mrs. Dennis' needs would have decreased a year following the support order, at which time the step-down order was to take effect. Mrs. Dennis was fifty years old at the time of her divorce. During the twenty-five year marriage, she had not been employed outside the home, and there was evidence that her ability to support herself might be affected by the weak condition of her eyes. 35 Cal. App. 3d at 285, 110 Cal. Rptr. at 622.

102. 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973).

acknowledged that the underlying rationale was to motivate a wife who was unwilling, "short of starvation,"[103] to seek work.

The court in *In re Marriage of Kelley*[104] stated that it would uphold step-down orders on a lesser showing of evidence than is required for a nonmodifiable order that the need for spousal support will decrease.[105] The court explained, "*Dennis* teaches that a lesser showing is required to support such a modifiable order than one which burns the court's bridges by divesting it of jurisdiction despite error in its prognostication of the future."[106] Applying this rule to the facts in *Kelley,* the court found:

> Here that lesser showing is present. The first reduction of spousal support from $500 per month to $300 after three months is justified by Husband's anticipated additional expense flowing from the enrollment of a daughter in college. The future annual reductions, first from $300 per month to $250 per month, and then to $200, find support in the expectation that Wife will diligently develop her secretarial skills which will pay off in increased earnings. Should the court's expectations prove erroneous, it will have the power to correct its miscalculation.[107]

Step-downs based on a lesser showing allow the grossest sort of speculation and place a hardship on the supported spouse. Job prospects are often unlikely to fulfill the court's optimistic expectations and the supported spouse will have to move for a modification at the time the step-down is to take effect.[108] Courts at modification hearings are very reluctant to second guess the court which made the original award.

As was the case with terminations, there is a controversy among the courts in respect to the use of step-downs.[109] Some

103. *Id.* at 283, 110 Cal. Rptr. at 620.

104. 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976).

105. *Id.* at 95, 134 Cal. Rptr. at 266.

106. *Id.* (citations omitted).

107. *Id.*

108. Thus, the supported spouse must expend time, energy, and possibly attorney's fees, to prove a change in circumstances. *See* notes 113 & 115 *infra.*

109. While the *Morrison* decision resolved the issue of the appropriate standard for retaining jurisdiction, that case did not present the California Supreme Court an opportunity to review step-down orders. *In re* Marriage of Morrison, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). The *Morrison* court approved four decisions in which step-down orders were reviewed. In two cases the step-down orders were reversed. *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977); *In re* Marriage of Rosan,

refuse to engage in the speculation inherent in automatic step-down orders.[110] The *Rosan* court applied the same reasoning to step-downs that it applied to terminations: "orders for changes in support to take effect in the future must be based upon inferences to be drawn from the evidence, not upon mere hopes or speculative expectations."[111] Rather than engage in speculation and lessen the amount of evidence sufficient to justify a step-down, the *Rosan* court stressed modification proceedings as the appropriate method of accommodating subsequent changes in circumstances.[112]

Although the *Kelley* and *Dennis* and the *Rosan* courts were amenable to reducing spousal support, they placed the burden of initiating modification proceedings on opposing parties.[113] In *Rosan,* the court reversed a step-down order and indicated that if the wife did in fact become self-supporting, the husband could initiate modification proceedings to reduce or terminate spousal

24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972). In the remaining two cases the orders were affirmed. *In re* Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976); *In re* Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973).

110. *See, e.g., In re* Marriage of Brantner, 67 Cal. App. 3d 416, 424, 136 Cal. Rptr. 635, 639 (1977); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 896, 101 Cal. Rptr. 295, 303 (1972).

111. 24 Cal. App. 3d at 896, 101 Cal. Rptr. at 303 (citations omitted).

112. *Id.* The court examined Mrs. Rosan's employment prospects and concluded that "her future earnings and earning capacity were completely unknown, and such unknown future developments are better left to modification proceedings which have been provided for that very purpose, than to automatic reduction provisions operative one and two years, respectively, in the future." *Id.* The court reversed the spousal support order, stating that because "the award of $400 per month for 1971 was inadequate, it is obvious that, unless there is a substantial change in circumstances, the awards for the following years will also be inadequate." *Id.* at 895, 101 Cal. Rptr. at 303.

113. A trial court is without authority to modify an order for spousal support unless there has been a material, or "substantial," change of circumstances occurring subsequent to the last prior order. *In re* Marriage of Kuppinger, 48 Cal. App. 3d 628, 633, 120 Cal. Rptr. 654, 656 (1975); Engelberg v. Engelberg, 257 Cal. App. 3d 821, 823-24, 65 Cal. Rptr. 269, 271 (1968).

In Modglin v. Modglin, 246 Cal. App. 2d 411, 54 Cal. Rptr. 582 (1966), the trial court's refusal to increase spousal support from $1 per month was affirmed. Mrs. Modglin presented evidence of the need for more living space and furniture for herself and two teenaged daughters, of her need for substantial dental work, and of her diminished earnings. Her net salary as a nurse was less than $300 per month while her ex-husband's per month net income was $3,125; thus, there was no question of her need or his ability to pay. *Id.* at 419, 54 Cal. Rptr. at 587. The trial court increased child support but found that there was not enough of a showing of changed circumstances to warrant an increase in spousal support. The appellate court summed up the situation as follows: "There is no showing of physical or mental ill health or any *dire* circumstances on the part of . . . [Mrs. Modglin]." *Id.* at 414, 54 Cal. Rptr. at 584 (emphasis added). Unfortunately, the court did not discuss whether the standard has been changed from "substantial" to "dire," whether the two are equal, or what circumstances would meet the standard.

support.[114] The *Kelley* and *Dennis* courts, on the other hand, affirmed step-down orders, reasoning that the wife could seek modification if the stepped-down amount was insufficient at the time it became effective.[115] The *Kelley/Dennis* rationale thus shifts the burden of justification to the supported party whereas the *Rosan* rationale leaves the burden on the supporting spouse, just as in terminations.[116]

The *Rosan* approach is the more equitable one. Just as the California Supreme Court in *Morrison* adopted the *Rosan* approach for terminations,[117] it should adopt the *Rosan* reasoning with respect to step-downs[118] and reiterate the rule that "orders for changes in support to take place in the future must be based upon reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations."[119] Particularly in cases involving a displaced homemaker, the wife's earning ability is totally unknown, and there is no evidence from which a court can reasonably infer that by a date arbitrarily set by the court the wife will suddenly emerge self-supporting. Therefore, the best solution would be to disallow step-downs and leave future changes in circumstances "to modification proceedings, which have been provided for that very purpose."[120]

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114. 24 Cal. App. 3d at 896, 101 Cal. Rptr. at 303.

115. *In re* Marriage of Kelley, 64 Cal. App. 3d at 95, 134 Cal. Rptr. at 266; *In re* Marriage of Dennis, 35 Cal. App. 3d at 284, 110 Cal. Rptr. at 621. The *Dennis* court did not expressly consider the possibility that the stepped-down amount after the first year might prove inadequate. However, it may be inferred that if this were the case, Mrs. Dennis could move for modification of the order.

The California Supreme Court has recognized unrealized expectations of the supporting spouse as a change of circumstances. In Bratnober v. Bratnober, 48 Cal. 2d 259, 309 P.2d 441 (1957), spousal support was reduced from $50 per month to $1. At the time of the interlocutory hearing, Mr. Bratnober expected to receive a substantial raise in salary or move to a new job with a higher salary; however, neither of these prospects materialized and he was forced to borrow money to make his support payments. The court found that "the question of reasonable expectations is material and a failure to realize them may constitute a change of circumstances justifying modification of the order." *Id.* at 263, 309 P.2d at 444. Applying this reasoning, the supported spouse would also be able to petition the court for modification alleging a change of circumstances based on unrealized expectations. If the step-down order is predicated on the wife's future increased earning ability and the increase does not materialize, this should constitute unrealized expectations.

116. In *In re* Marriage of Rosan, the court stated that "[m]uch of what we have said in reference to those portions of the support order hereinabove considered [step-downs] is applicable also to that part of the judgment ordering absolute termination of spousal support." 24 Cal. App. 3d at 897, 101 Cal. Rptr. at 303.

117. *In re* Marriage of Morrison, 20 Cal. 3d 437, 452-53, 573 P.2d 41, 51-52, 143 Cal. Rptr. 139, 149-50 (1978). *See* notes 77 & 87 *supra* and accompanying text.

118. *See* notes 111 & 112 *supra* and accompanying text.

119. *In re* Marriage of Rosan, 24 Cal. App. 3d at 896, 101 Cal. Rptr. at 303.

120. *Id. See also In re* Marriage of Kuppinger, 48 Cal. App. 3d 628, 120 Cal. Rptr.

D. The Need for Automatic Increases (Step-Ups)

Because courts assume the power to order step-downs,[121] there is no apparent reason to refuse to order step-ups, or automatic increases.[122] Step-downs are predicated on diminished need or diminished ability to pay. Step-ups are correspondingly appropriate when there is increased need or increased ability to pay. As with step-downs and terminations, step-up orders should be based on reasonable inferences derived from evidence in the record.

Step-ups would be appropriate if, at the time of the original order, there is evidence in the record that the supported spouse will have an increased need which the supporting spouse will be able to meet. *In re Marriage of Brantner*[123] is a case in point. The trial court awarded Mrs. Brantner $200 per month for two years, decreased by $50 in each of three succeeding two year periods, reduced to $1 per month for four years, with termination after a total of twelve years.[124] She was suffering from arthritis and an incurable eye condition which often leads to blindness.[125] It would have been reasonable to expect that Mrs. Brantner would be in greater need, not less, as she aged, possibly became blind, and her medical bills increased.[126] Even if she became partially self-supporting, she would have to give up her employment as her physical condition deteriorated. Inasmuch as her husband earned $1,500 per month, there was no question of his ability to pay a reasonably increased amount, barring unforeseen changes in his

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654 (1975), where the court states that

> "the court in proceedings of this nature is not concerned with 'merely a possibility which had not, and might not occur' . . . '[b]ut the power to make such orders must be held to be limited to the conditions and circumstances existing at the time they are made. The court cannot anticipate what may possibly thereafter happen, and provide for the future contingencies.' "

Id. at 639, 120 Cal. Rptr. at 660 (citations omitted).

121. *See* notes 100-03 and accompanying text for a short discussion of the continued use of the court-created tool of step-down orders, even though the original rationale for such orders no longer exists.

122. A "step-up" order is an original spousal support order which provides that a certain amount be paid for an initial period and that an increased amount be paid thereafter.

123. 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977). Step-up orders were not an issue in *Brantner*, but the fact situation presents the author with a good departure point for discussion.

124. *Id.* at 418, 136 Cal. Rptr. at 636.

125. *Id.* at 419, 136 Cal. Rptr. at 636.

126. As the court in *Brantner* noted, "when this lady is 56 years of age (and perhaps blind), there is a substantial likelihood that she will become an object of charity." *Id.*

circumstances.[127] Therefore, the court could have ordered step-ups contingent on Mrs. Brantner's deteriorating physical condition.

It would also be proper to order a step-up if it is necessary to decrease support or to make an initial award below the wife's needs because of the husband's temporarily decreased earning ability. The step-up could be ordered effective at the time the husband's earning ability returned to normal. This would assure the wife that she would not have to subsist on inadequate support payments when the reason for the inadequacy no longer exists.[128] If an increase is not provided by a step-up order, the wife has to seek a modification, thus expending time, energy and attorney's fees.

At least one court had the foresight to order a step-up in this situation. In *In re Marriage of Acosta,*[129] the husband sought to modify spousal and child support orders because he had lost his job. The trial court suspended spousal support and reduced child support payments but ordered that "payments automatically would revert to the amounts originally ordered in the judgment" when the husband returned to full-time employment.[130] The appellate court affirmed, noting that such orders are always modifiable. Moreover, in view of the fact that the husband had sought the decrease based on his unemployment, the need for the decrease would no longer exist once he regained employment.[131]

In addition to the propriety of step-ups to accommodate ascertainable future increased need of the supported spouse and temporary decreases in the supporting spouse's earnings,[132] there are also situations in which step-ups are appropriate because of a projected increase in the supporting spouse's earning capacity. Such step-ups are justified by subsection 4801(a)(1),

127. At the time of trial, Mr. Brantner was paying a total of $400 per month for child and spousal support without any difficulty. *Id.* at 418, 136 Cal. Rptr. at 636.

128. *See, e.g., In re* Marriage of Acosta, 67 Cal. App. 3d 899, 137 Cal. Rptr. 33 (1977).

129. *Id.*

130. *Id.* at 901, 137 Cal. Rptr. at 34.

131. *Id.*

132. The step-up should be ordered to take effect only upon the happening of an event reasonably certain to occur.

In re Marriage of Norton, 71 Cal. App. 3d 537, 139 Cal. Rptr. 728 (1976), presented a situation where a step-up would have been appropriate. The court stated:

> [The wife was in] dire need of financial assistance and, while she was trying to support herself, there was little, if any, assurance of steady employment in the near future. In fact, it was

which directs the court to consider all the circumstances of the parties, specifically "[t]he earning capacity and needs of each person."[133] These step-ups are applicable in instances in which the wife has enabled the husband to attend a professional school or to establish a business. His earnings may increase after the dissolution as a result of what transpired prior to dissolution. Spousal support orders do not presently take cognizance of this contingency; step-ups would.

In spite of sound arguments in favor of step-ups, most courts are reluctant to allot an ex-wife a share in the husband's increased prosperity, either by step-up orders or modification proceedings, even though the seeds of that prosperity were sown during their marriage.[134] The case of *Modglin v. Modglin*[135] illustrates this reluctance, as well as the widely divergent attitudes of the judiciary on the issue. Mr. Modglin, at the time of the divorce, owned a pathology laboratory which was awarded to him in the division of the community property. During the next four years his business skyrocketed.[136] His ex-wife and two young daughters continued to live on $580 per month in a two bedroom house. The trial judge denied Mrs. Modglin's request for spousal support but increased the amount of child support.

The appellate court affirmed the order denying spousal support in a decision which generated three separate opinions. One

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> undisputed that during the 18 years of the marriage appellant devoted herself almost exclusively to the task of being a homemaker and that she does not have the practical experience and training needed to compete successfully in the labor market. On the other hand, respondent will have a substantial earning capacity as soon as he recovers fully from the effects of hepatitis.

Id. at 542, 139 Cal. Rptr. at 730. Spousal support was ordered at $80 per month for a six month period. Instead of forcing the wife to seek modification at the end of the six months, a more equitable result would have been a step-up order contingent upon the ex-husband's full recovery of his health and return to work.

133. CAL. CIV. CODE § 4801(a)(1) (West Supp. 1978).

134. All courts agree, however, that an ex-wife must share in her ex-husband's economic down-turn. *See, e.g.*, Philbin v. Philbin, 19 Cal. App. 3d 115, 96 Cal. Rptr. 408 (1971).

135. 246 Cal. App. 3d 411, 54 Cal. Rptr. 582 (1966). *Modglin* did not involve a step-up order. The wife sought modification of a nominal alimony provision in the interlocutory judgment, which was made pursuant to stipulation of the parties. *Id.* at 417-18, 54 Cal. Rptr. at 587.

136. Mr. Modglin developed a chain of laboratories. The net profits grew from $4,668.99 in 1960 to $28,347.75 for the first *quarter* of 1964. Additionally, the business owned and maintained cars and a private plane and sent Mr. Modglin on trips overseas. *Id.* at 420, 54 Cal. Rptr. at 588.

judge affirmed on the ground that circumstances did not warrant "setting aside a bargain originally made in open court under the supervision of a superior court judge."[137] The concurring opinion, focusing on a different rationale, stated that to allow the wife to share in her husband's new-found prosperity "would imply that an ex-spouse can continue to reap where for many years he or she has not sown."[138] The strongly written dissent found the denial unreasonable and unjust, commenting that

> the very fact that the parties stipulated to the continuation of a nominal award, obviously made for the sole purpose of retaining jurisdiction, plainly shows their mutual understanding that at some time in the future appellant might seek and obtain a modification provided, of course, that she would make the necessary showing of need, changed circumstances, etc.[139]

One of the most serious arguments against step-up orders is that they are too speculative. However, step-downs, which are based on the same kind of speculation, are prevalent.[140] Thus, if courts find step-downs proper, there is no justification for refusing to order step-ups. Both step-downs and step-ups should only be ordered if there is evidence in the record that the predicate contingency is reasonably certain to occur. It seems only equitable that if an ex-wife must share her ex-husband's misfortune, she should also share his prosperity.

III. ALTERNATIVES TO SPOUSAL SUPPORT IN CALIFORNIA

Abandonment of the fault theory has left the courts without a comprehensive theoretical framework in which to consider the award of spousal support.[141] Such a theory is needed to combat the general resistance to spousal support awards as well as the prevalent judicial attitude that spousal support constitutes a "free ride" for the supported spouse. Adoption of a sound theoretical underpinning would provide a more objective perspective from which to view spousal support for both the judiciary and the public at large.[142] This section will briefly suggest a few theories

137. *Id.* at 415, 54 Cal. Rptr. at 584. *See* note 135 *supra.*

138. *Id.* at 417, 54 Cal. Rptr. at 586.

139. *Id.* at 418, 54 Cal. Rptr. at 586.

140. *See* notes 97-120 *supra* and accompanying text.

141. *See* notes 43-60 *supra* and accompanying text for a discussion of the failure of the current statute to provide a workable framework.

142. The California Supreme Court in *In re* Marriage of Morrison quoted a C.E.B.

on which spousal support could be based as well as alternative methods by which the homemaking spouse could be compensated upon dissolution of marriage.

A. CONTRACT THEORY

In *Marvin v. Marvin,*[143] the California Supreme Court recognized the right of meretricious spouses to make express and implied contracts governing their relationships.[144] However, spouses in legal marriages do not have the same freedom of contract because the legislature has retained the exclusive right to prescribe the marriage contract.[145] As Lenore Weitzman has noted, the law does not acknowledge or enforce contracts that alter the essential elements of the marital relationship.[146] Moreover, contracts between married couples providing remuneration for the wife's services are void as against public policy.[147]

If a contract theory or a theory of detrimental reliance were applied to displaced homemakers in dissolution actions, the wife clearly could claim a reasonable expectation of support in exchange for her assumption of the homemaker role and for foregoing employment outside the home during marriage.[148] Her reliance on this support expectation is to her detriment if, after dissolution, she is forced to enter the work force facing possibly insur-

publication: "This word [alimony] evoked an almost automatic glandular reaction, and the resulting accumulations of bile did nothing to ease the unhappy lot of counsel and court." 20 Cal. 3d 437, 449 n.7, 573 P.2d 41, 49 n.7, 143 Cal. Rptr. 139, 147 n.7 (1978), quoting ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 138 (C.E.B. 1970). Unfortunately, the new term, "spousal support," does not seem to have eliminated this "glandular reaction."

143. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

144. *Id.* at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825. The court in *Marvin* did not address the issue of spousal support.

145. For a full discussion of this subject, see Weitzman, *supra* note 3.

146. *Id.* at 1259.

147. *Id.* at 1260-61. Weitzman also notes that contracts for the wife's services are void for lack of consideration on the theory that one cannot contract to do what one is legally bound to do. *Id.*

However, the legislature has provided that spouses may enter into an agreement for their support, which agreement cannot be judicially modified. CAL. CIV. CODE § 4811 (West Supp. 1978). The statute, which applies only to agreements entered into on or after January 1, 1970, and its history are discussed in Knodel v. Knodel, 14 Cal. 3d 752, 764-66, 537 P.2d 353, 360-62, 122 Cal. Rptr. 521, 529-30 (1975).

148. A problem with basing spousal support on contract theory is that there must be a breach. This invites reinstatement of fault into dissolutions. However, one could view the homemaker's consideration as her staying home and foregoing outside employment. In return, the homemaker is bargaining for future support. If she has fulfilled her side of the bargain, she is not in breach regardless of who is at fault for the break-up of the marriage.

mountable obstacles.[149] Therefore, under express or implied contract theory,[150] or under a theory of detrimental reliance, the displaced homemaker would be entitled to spousal support upon dissolution.

Application of these theories should not depend on the length of marriage. In *Marvin v. Marvin*,[151] the California Supreme Court held an implied contract could be found between two persons who were not married and who had lived together only seven years.[152] It is not logical to limit application of contract theory or detrimental reliance to unmarried persons and thus place "meretricious spouses in a better position than lawful spouses,"[153] and especially in a better position than lawful spouses married for a short time.[154]

B. Payment for Homemaking Services

In addition to validating the contract rights of meretricious spouses, the California Supreme Court in *Marvin* also held that "a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward."[155] This is another right which, as yet, has not been extended to spouses legally married.

149. In *Morrison*, 20 Cal. 3d at 452-53, 573 P.3d at 51-52, 143 Cal. Rptr. at 149-50, the California Supreme Court recognized the allocation of roles under the traditional marriage contract and the impact this allocation has on the wife in the event of divorce. In the past, couples married and carried out their married life under the traditional marriage contract, pursuant to which the husband had the duty to support his spouse, and the wife had the duties of homemaking and childcare. Another feature of the traditional marriage contract was that the husband was the designated head of the family and as such had the right to "choose any reasonable place or mode of living, and the wife must conform thereto." Former Cal. Civ. Code § 5101, ch. 1071, § 1, 1972 Stats. 2007 (repealed in 1973 by ch. 987, § 2, 1973 Stats. 1898).

150. The decision to allocate roles in the family may have been verbalized, in which case an express contract existed. If the understanding was tacit, an implied contract was formed when each party proceeded to act in accordance with it.

151. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

152. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

153. *Id.* at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832 (Clark, J., concurring and dissenting). Justice Clark used this language in referring to a quantum meruit system for compensating meretricious spouses, but the quote is also applicable to a contract system.

154. Pursuant to *Marvin*, unmarried spouses need not meet the artificial requirement of living with their mates for a "lengthy" period in order to be awarded spousal support. *See* notes 43-46 *supra* and accompanying text for a discussion of duration of marriage as the key factor considered by courts in awarding spousal support.

155. 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rtpr. at 831-32.

There is great resistance in our society to recognizing the value of a spouse's homemaking services.[156] Such services are not valued partly because they are unpaid and are outside the traditional marketplace.[157] The most common argument against compensating homemakers is that the value of their services is incapable of being measured.[158] However, not only have economists developed methods for valuing homemaking services,[159] but the legal system itself has also overcome this difficulty when evaluating a husband's loss of his wife in a wrongful death action.[160]

Viewing spousal support as payment for homemaking services would remove the notion of a "free ride" or any lingering

156. This resistance is evidenced by the lack of mother's allowances, free maternity care, social security or other retirement or disability plans for homemakers, and the impossibility of purchasing disability insurance for the homemaker. D. AHERN & B. BLISS, THE ECONOMICS OF BEING A WOMAN AND SOCIAL SECURITY: AN INSTITUTIONAL DILEMMA (1977); Telephone interview with Robert Haight, independent insurance broker (Nov. 21, 1978).

157. Zaretsky, *Capitalism, the Family and Personal Life,* in WOMAN IN A MAN-MADE WORLD 55, 56 (2d ed. 1977). Chase Manhattan Bank estimates that a woman's overall work week totals 99.61 hours. K. AMUNDSEN, *supra* note 10, at 10 n.9. Economists estimate that women's unpaid domestic services would amount to at least one-fifth of the United States' total Gross National Product (GNP) in any one year, if included. C. BIRD, BORN FEMALE, THE HIGH COST OF KEEPING WOMEN DOWN 227 (1968). However, since homemaking services are not compensated, they are not counted in the GNP. Failure to include homemaking services leads to the anomalous result that a man may reduce the GNP by marrying his housekeeper. Although the woman may perform the same work after she marries, it will no longer be valued by society. Benston, *The Political Economy of Women's Liberation,* in WOMAN IN A MAN-MADE WORLD 221 (2d ed. 1977).

158. In his *Marvin* dissent, Justice Clark (concurring in part, dissenting in part) saw this as a difficulty in a quantum meruit system. 18 Cal. 3d at 686, 557 P.2d at 123, 134 Cal. Rptr. at 832.

159. The American Council of Life Insurance has estimated the yearly value of a housewife's services at $17,351.88. Reported in CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, BULLETIN, CALIFORNIA WOMEN 5 (Sept. 1978) [hereinafter cited as CALIFORNIA WOMEN].

The value of homemaking services may be evaluated by any one of the following methods:

(1) Estimate the opportunity cost, that is, the earnings foregone by the homemaker in not working in the marketplace;

(2) Sum up the applicable current wage rate for each of the jobs performed as maid, cook, sitter, etc.; or, add up the current rate of the corresponding professionals, that is, home economist, nutritionist, counselor, interior decorator, etc. This method was the one used by the American Council of Life Insurance. CALIFORNIA WOMEN, *supra.*

(3) Add the replacement cost, which can be done as in number 2.

(4) Estimate the value of the housewife's time relative to that of wage-earning women.

These methods are discussed by Kahne, *Women's Roles in the Economy,* in ECONOMIC INDEPENDENCE FOR WOMEN 39, 48 (J. Chapman ed. 1976).

160. *See, e.g.,* Pyun, *The Monetary Value of a Housewife, Economic Analysis For Use In Litigation,* 28 AM. J. ECON. & SOC. 271 (1969).

romantic paternalism connected with spousal support. It would acknowledge the importance of the homemaking spouse's services, add prestige and dignity to those services, and perhaps benefit the nuclear family by providing security and encouragement to those spouses, including men, inclined to devote themselves to a homemaking career. The displaced homemaker's past services would thus be properly valued, and she would be provided the necessary support at dissolution. The custodial parent of dependent children would be provided with ongoing compensation for future homemaking services.

C. RETURN ON AN INVESTMENT

Spousal support might also be viewed as a fair return to the wife on her investment in or contribution to her ex-husband's career.[161] Assumption of traditional family roles frees the husband from the cares and concerns of homemaking and allows him to devote his energy to developing his earning capacity. In addition to maximizing the time the husband can spend working, the services of the wife in social settings is a job asset, particularly if the husband is an executive or a professional.[162]

The extent of the woman's contribution is not necessarily dependent on the length of her marriage. If she terminated her own education early and worked to support the family while her

161. *See* notes 163-70 *infra* and accompanying text for a discussion of expanding the concept of community property to include the wife's contribution to her husband's education.

162. "[T]he woman behind the man [is] important—even crucial—to her husband's chances for success in the corporation." Kanter, *Corporate Wives*, 12 MASTER IN BUSINESS ADMINISTRATION 21 (Feb. 1978). Kanter noted that at least one commentator has viewed the roles of the executive and the executive's spouse as aspects of a two-person career and considered the salary paid by the corporation as compensation for the services of both persons. *Id.* at 23.

The court, in *In re* Marriage of Rosan, also recognized the wife's contribution to her ex-husband's earning capacity:

> In a long marriage during which the wife has not taken outside employment but has devoted herself to wifely and parental duties, the wife has not only failed to develop her own earning capacity . . . the established employment or earning capacity of the husband constitutes the most valuable economic asset of the parties . . . [and] is not to be ignored in considering the problem of continuing support (citation omitted) . . . . [I]t would be grossly inequitable to cut the wife off from any possibilities of support . . . and permit Husband to go his own way with his established earning capacity in excess of $2,000 per month developed during the marriage . . . .

24 Cal. App. 3d 885, 898, 101 Cal. Rptr. 295, 304 (1972).

husband completed his education, her contribution to her husband's future earning capacity is indispensable. If the marriage is dissolved before the husband realizes his potential earning capacity and there is little accumulated community property, the wife's chances of adequate compensation upon dissolution are slim. Spousal support may be the only compensation for women in such marriages. It is only equitable that the wife receive spousal support and that it be viewed as remuneration for her sacrifice and contribution to her husband's future earning capacity.

D. Expanding the Concept of Community Property and Dividing Community Property More Equitably

An expanded concept of community property may be a viable alternative to spousal support. Community property could be defined to include certain intangible poperty rights such as professional education, earning ability, patents, copyrights, franchises, and options.[163] In the division of the marital property these items could be assigned a value and then divided equally between the spouses. The division of intangibles need not occur at one time; the amounts due could be pro-rated and made payable over a number of years.[164] The terms of the division could include a condition precedent that if certain property proves valueless, the supporting spouse would not have to pay the amount projected on the basis of that intangible property. Thus, no injustice would be done.

The courts have already found that professional goodwill, defined as " 'future receipts which the asset will produce,' "[165] is a divisible asset upon dissolution of marriage.[166] Many factors are considered in assessing the future receipts of a professional prac-

163. This is not a new or novel concept. The California Supreme Court has recently expanded community property to include nonvested pension rights. *In re* Marriage of Brown, 15 Cal. 3d 838, 852, 544 P.2d 561, 570, 126 Cal. Rptr. 633, 642 (1976); nonvested stock option plans, *id.* at 843 n.4, 544 P.2d at 564 n.4, 126 Cal. Rptr. at 636 n.4; and railroad retirement benefits, *In re* Marriage of Hisquierdo, 19 Cal. 3d 613, 616-17, 566 P.2d 224, 226, 139 Cal. Rptr. 590, 592 (1977), *reversed*, ___ U.S. ___ (1979) (reversal based on intent of federal law).

164. *See In re* Marriage of Brown, 15 Cal. 3d at 849, 544 P.2d at 567-68, 126 Cal. Rptr. at 639-40.

165. *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 108, 113 Cal. Rptr. 58, 67 (1974) (citations omitted).

166. *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); Golden v. Golden, 270 Cal. App. 3d 401, 404-05, 75 Cal. Rptr. 735, 737 (1969); Brawman v. Brawman, 199 Cal. App. 2d 876, 882, 19 Cal. Rptr. 106, 109-10 (1962).

tice,[167] yet some degree of speculation is inherent in any evaluation. Nevertheless, as the court in *In re Marriage of Lopez* stated: "The fact that 'professional goodwill' may be elusive, intangible, difficult to evaluate and will ordinarily require special disposition, is not reason to ignore its existence in a proper case."[168]

The *Lopez* argument can also be made for considering the value of a professional education, when paid for by community funds, as community property upon dissolution. California courts have not yet been willing to define a professional education as a community asset divisible at dissolution. The court in *Todd v. Todd*[169] echoed a common objection when it stated: "[at] best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses."[170]

Contrary to the conclusion in *Todd,* courts in other jurisdictions have recently found that education can be valued and divided like other assets. The Michigan Court of Appeals affirmed a cash alimony award in place of a property settlement, finding that "[i]t was impossible to award the wife a portion of the husband's medical degree, the only substantial asset acquired during coverture. An award of $15,000 fairly represents the wife's contribution to the acquisition of that asset, financial and otherwise."[171] The Supreme Court of Iowa recently upheld a similar

167. *See In re* Marriage of Lopez, 38 Cal. App. 3d at 107-11, 113 Cal. Rptr. at 66-69, for a thorough discussion of what constitutes "goodwill" and what factors should be considered in evaluating it for purposes of dissolution.

168. *Id.* at 108, 113 Cal. Rptr. at 67.

169. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

170. *Id.* at 791, 78 Cal. Rptr. at 135. The court found that professional goodwill is community property. However, it refused to consider education in the same light, although Mrs. Todd had supported her husband throughout his schooling. The *Todd* court relied on dicta in Franklin v. Franklin, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945), as support for its holding with respect to professional education, but failed to explain why one intangible, professional goodwill, was community property, and another intangible, professional education, was not.

The *Todd* court reasoned that Mrs. Todd had realized the value of her husband's education because the assets of the community were a result of that education. Moreover, she had been awarded approximately $20,000 more of the assets than her husband. Today, however, a wife cannot be indirectly compensated by an unequal division of the community property because courts, by statute, must make an equal division of community property. CAL. CIV. CODE § 4800(a) (West Supp. 1978). Nor is the *Todd* court's reasoning applicable if there is a dissolution after a short-term marriage, during which few assets are acquired.

171. Moss v. Moss, 264 N.W.2d 97, 98 (Mich. App. 1978). In *Moss,* the parties were married seven years, during which time the wife worked and the husband obtained his medical degree. The court commented on the wife's situation: "This case presents the not

property settlement award which represented the value of the wife's contribution to her husband's law degree.[172] The Iowa court held that "it is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court."[173]

In addition to expanding the concept of community property, the division of property could also be made more responsive to the needs of the wife. In dividing community property at dissolution, it is common for the court to award the wife the family residence and the husband the income-producing property.[174] This approach is sometimes incongruous and at cross-purposes with the court's stated objective to foster women's independence from their ex-husbands. The courts could be more effective in advancing this goal if they would be non-sexist in awarding family businesses to wives with demonstrated ability to run them.[175]

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uncommon situation of a wife who, having worked so that her husband could obtain a professional education, finds herself left by the roadside before the fruits of that education can be harvested." 264 N.W.2d at 98.

172. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978). This case involved a divorce after seven years of marriage and one child. The couple married while both parties were in college. The wife left school to get a job, thus enabling her husband to complete his education. The husband obtained a masters degree and then a law degree while the wife, with her parents' help, supported the family.

What is crucial about this case is that the court awarded the wife $18,000 as a property settlement, and did not disguise it as alimony. The wife estimated the value of her contribution to her husband's law degree at $18,000 by adding her earnings to the money received from her parents, and subtracting her husband's earnings from part-time work during the marriage. *Id.* at 887.

173. *Id.* at 891. The Iowa court rejected the California rule of Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969), and relied instead on the Ohio case of Daniels v. Daniels, 185 N.E.2d 773 (Ohio Ct. App. 1961).

In *Daniels*, the parties spent most of their seven year marriage in school, supported by the wife's father. The husband obtained a medical degree. The court awarded the wife $24,000 alimony in gross, based entirely on the husband's future earning capacity, reasoning that the medical degree was an asset acquired with the aid of the wife, through her father's financial support. The court found that "the right to practice medicine, being in the nature of a franchise, constitutes property which the trial court had a right to consider in making the award of alimony." *Id.* at 775.

174. *See In re* Marriage of Smith, 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (1978), where the wife unsuccessfully sought the award of the family business. She had managed the finances of the business for ten years prior to the divorce.

175. In *Smith*, the trial court awarded the family business to the husband. It refused to hear evidence of the husband's drinking problem as possibly affecting his ability to run the family business, stating that "[i]f he wants to be drunk twenty-four hours a day running *his* business, that's his life," and "[i]f he wants to squander it, that's his business." *Id.* at 749, 145 Cal. Rptr. at 216-17 (emphasis added).

On appeal, the court found exclusion of the wife's evidence serious but not prejudicial error, and affirmed the award of the business to the husband. The court also noted that

IV. CONCLUSION

Presently, the category of women receiving spousal support is small.[176] This may be attributed in large part to the trial courts, inasmuch as they have a great deal of discretion in determining when spousal support will be awarded.[177] Unfortunately, some members of the judiciary do not understand, or misunderstand, the goal of the feminist movement to foster women's economic independence and they use the movement as a rationale for denying spousal support.[178] This amounts to inaccurate judicial notice of the tenets of the women's movement, and often merely masks hostility towards the movement and the concept of spousal support.[179]

Courts must recognize that unless, and until, women obtain full equality in the labor market, there is a more equitable division of labor in the family, and society changes its basic expectations of women, spousal support will be needed and required as a means of compensating a woman who has made a commitment to homemaking and child rearing during her marriage. As the California Supreme Court so aptly reiterated, "[t]his has nothing to do with feminism, sexism, male chauvinism. . . . It is ordinary commonsense, basic decency and simple justice."[180]

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the husband was better qualified to run the business. *Id.* at 751, 145 Cal. Rptr. at 218. However, had the wife been awarded the business, which she believed she was capable of running, she probably would have had no need for spousal support either at the time of trial or in the future.

176. *See* notes 3 & 4 *supra* and accomanying text.

177. *See* notes 41-60 *supra* and accompanying text.

178. An article which appeared in the San Francisco Chronicle, June 19, 1974, attributed the following remarks to Judge Francis McCarty of the San Francisco Superior Court: "Judge McCarty said that one reason for these spousal support considerations is the women's movement. 'We're taking women at their word. They say they don't want anything from men.'" San Francisco Chronicle, June 19, 1974, quoted in Brief of Amicus Curiae at 7, *In re* Marriage of Morrison, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). *See* note 179 *infra*. *See also In re* Marriage of Hopkins, 74 Cal. App. 3d 591, 598-99, 141 Cal. Rptr. 597, 601 (1977).

179. The Queen's Bench, an organization of women judges and attorneys, appearing in the *Morrison* case as Amicus Curiae, argued that the tenets of the women's movement are not a suitable subject for judicial notice. They stated that "[w]hile trial judges' remarks rarely appear on the record, 'the movement' is often discussed in settlement conferences, and Amicus believes the practice to be commonplace." Brief of Amicus Curiae at 7, *In re* Marriage of Morrison, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). Respondent agreed that trial courts should not take judicial notice of the tenets of the women's movement and that "such notice is often a mask for hostility toward the concept of spousal support." Respondent's Rebuttal Argument to Amicus Curiae at 9, *id.*

180. *In re* Marriage of Morrison, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978), quoting *In re* Marriage of Brantner, 67 Cal. App. 3d 416, 420, 136 Cal. Rptr. 635, 637 (1977).