University of Arkansas at Little Rock Law Review

Volume 2 | Issue 1 Article 7

1979

Family Law–Divorce–Constitutionality of Arkansas Property Settlement and Alimony Statutes

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FAMILY LAW—DIVORCE—CONSTITUTIONALITY OF ARKANSAS PROPERTY SETTLEMENT AND ALIMONY STATUTES. *McNew v. McNew*, 262 Ark. 567, 559 S.W.2d 155 (1977).

The wife in a divorce proceeding was awarded a divorce on the grounds of general indignities.[1] The husband's counterclaim was dismissed. In accordance with Arkansas statutes, the wife was awarded one-third of the husband's personal property absolutely and one-third of his real property for life.[2]

The husband appealed both the divorce and the division of property. He contended that his wife had failed to present evidence corroborating her allegations of general indignities and that the award of property was in violation of the equal protection clauses of the Arkansas[3] and United States Constitutions.[4] The Arkansas Supreme Court reversed the divorce on grounds of insufficient corroboration but did not rule on the constitutional issues.[5]

Mr. Justice Hickman dissented and stated the divorce decree should have been upheld based on the chancellor's finding of sufficient corroboration.[6] He would have considered the equal protection issue and would have concluded that the Arkansas law regarding property division in divorce actions was violative of equal protection.[7] His dissent questions only the constitutionality of the Arkansas statutes dealing with property settlement. This note, however, will deal with the constitutionality of statutes granting property settlements as well as alimony to females while denying the same benefit to males.

A minority of jurisdictions, including Arkansas,[8] makes property and alimony awards only to the wife and bases the holdings and statutes on the old common law which recognized a husband's duty to support his wife but not a reciprocal duty of the wife to support

1. McNew v. McNew, 262 Ark. 567, 569, 559 S.W.2d 155, 156 (1977). *See* ARK. STAT. ANN. § 34-1202 (1962).

2. McNew v. McNew, 262 Ark. 567, 569, 559 S.W.2d 155, 156 (1977).

3. *Id.* at 572, 559 S.W.2d at 158. ARK. CONST. art. 2, § 3.

4. U.S. CONST. amend. XIV, § 1.

5. McNew v. McNew, 262 Ark. 567, 572, 559 S.W.2d 155, 158. In Arkansas corroboration is required in contested cases. Although only slight corroboration is required, Mrs. McNew failed to meet that burden. *See* the *Family Law* section of the Second Annual Survey of Ark. Law, 2 UALR L.J. 236 (1979) for a more detailed discussion of corroboration.

6. McNew v. McNew, 262 Ark. 567, 573, 559 S.W.2d 155, 158 (1977) (Hickman, J., dissenting).

7. *Id. See* ARK. STAT. ANN. § 34-1214 *infra* note 73.

8. Kurtz, *The State Equal Rights Amendments and Their Impacts on Domestic Relations Law*, XI FAM. L.Q. 101, 131 n.103 (1977).

her husband.[9] Because the church was the foundation from which a marriage began, it seemed quite natural for the dissolution of a marriage to come under the early jurisdiction of the English ecclesiastical courts.[10] Divorce, as an absolute termination of a marriage, was at first allowed only on a limited basis by English law. Prior to 1857, three methods existed for the modification of a marriage.[11] The least common method, and the only method which resembled an absolute termination, was that which was granted by Parliament.[12] It was generally available only to the aristocracy, and it was a common practice for the Parliament to insist upon a provision for the support of the wife before granting the divorce.[13] *A vinculo matrimonii,*[14] a decree similar to the present-day annulment, was granted by the ecclesiastical courts although no property settlement or payment to the wife could be granted.[15] A decree *a mensa et thoro,*[16] also awarded by the ecclesiastical courts, resembled present-day separation. Grounds for this type of divorce were similar to the fault grounds available in many modern American jurisdictions.[17] Under *a mensa et thoro,* the courts would allow the wife to receive income from the husband as alimony.[18] This award was based on the traditional duty of the husband to support his wife, which continued after judicial separation.[19]

Awards of support to the wife under the *a mensa* type divorce were logical in relation to the role that women played in English society during this period. A woman's legal identity became one with her husband's, and she looked to him for support.[20] If this support were terminated, the wife could become a burden to society. Because the *a mensa* type of divorce was basically a separation, the husband's duty to provide this support was not terminated. The wife's dependency on her husband actually increased because of the view of property ownership during this period. Virtually all of the

9. H. CLARK, LAW OF DOMESTIC RELATIONS § 14.6 (1968).

10. Holt, *Support v. Alimony in Virginia: It's Time to Use the Revised Statutes,* 12 U. OF RICH. L. REV. 139, 139 (1977).

11. Kurtz, *supra* note 8, at 129.

12. *Id.*

13. *Id.* at 130.

14. *A vinculo matrimonii* means from the bond of matrimony. BLACK'S LAW DICTIONARY 7 (4th rev. ed. 1968).

15. Kurtz, *supra* note 8, at 129.

16. *A mensa et thoro* means from bed and board. BLACK'S LAW DICTIONARY 6 (4th rev. ed. 1968).

17. Kurtz, *supra* note 8, at 129.

18. *Id.*

19. *Id.*

20. *Id.* at 130.

property of the wife came under the control of her husband at marriage.[21]

Statutes enacted after 1857 increased the availability of the absolute divorce,[22] and the argument that a husband continued to have a duty to support his wife after a complete termination of the marriage lost some of its credibility. The established ecclesiastical practice, however, seems to have made its way into American law.[23] The difficulty in justifying the imposition on the husband of a continuing duty of support in an absolute divorce was "not obviated by labeling alimony a 'substitute' for a wife's right to support. Why should there be such a substitute?"[24]

The traditional view of women, upon which common law divorce statutes were based, is changing. Women have gained full legal capacity to own and control their property.[25] The United States Supreme Court in *Taylor v. Louisiana*[26] took judicial notice of the changing position of women in society. In *Taylor* the Court considered certain statistics of the Department of Labor which revealed that in 1974, 54.2% of all women between eighteen and sixty-four years of age were in the labor force.[27]

In several recent cases of alleged sex discrimination, the Court has supported the proposition that women are the legal equal of men. In *Reed v. Reed*[28] the Court struck down an Idaho statute giving males priority over women as administrators of estates.[29] It was decided that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a "fair and substantial relation" to the object of the legislation.[30] Although the Court did not find that sex-based classifications were "suspect classifications" that require "strict scrutiny," it is obvious that it did apply a more stringent test than the traditional "rational rela-

21. Holt, *supra* note 10, at 139.

22. Kurtz, *supra* note 8, at 129 n.95.

23. H. CLARK, LAW OF DOMESTIC RELATIONS § 14.1 (1968).

24. *Id.*

25. *Id.*

26. 419 U.S. 522 (1975).

27. Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975). Compare with the view of women in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) in which the Court stated that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator . . . . The natural and proper timidity and delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141.

28. 404 U.S. 771 (1971).

29. Reed v. Reed, 404 U.S. 71, 76 (1971). The Court found the statute discriminatory even though the legislative purpose had some legitimacy.

30. *Id.*

tion" test.[31] The latter test would seek only a reasonable or rational relationship to the accomplishment of a valid state purpose. Such a relationship can be found when the classification only indirectly affects the state purpose.[32]

In *Frontiero v. Richardson*[33] a female member of the uniformed services successfully challenged a federal statute under which a serviceman could automatically claim that his wife was dependent upon him for support in order to receive additional pay allowances. A service*woman,* however, had to prove the dependence of her husband before she could receive the same benefits. Four justices held that statutory classifications based on sex were "inherently suspect."[34] Citing the earlier *Reed* decision, Mr. Justice Brennan indicated that the Court had departed from the "traditional" rational-basis analysis with respect to sex-based classifications.[35] His plurality opinion adopted a view that this country had a long history of sex discrimination rationalized by "an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[36] Sex, like race and national origin, was considered by the Court to be a characteristic determined solely by birth and usually had no relevance to ability to perform or contribute to society.[37] The Court concluded that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[38]

Since the decision in *Frontiero,* the United States Supreme Court has declined to apply the strict scrutiny test to sex classifications and has instead applied the "heightened rationality" test of *Reed.*[39] Two years after *Frontiero,* Mr. Justice Brennan again deliv-

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31. Note, *Kahn v. Shevin and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?,* 32 WASH. & LEE L. REV. 275, 280 (1975). A test requiring a "substantial" relation between classification and purpose of the statute applies a higher standard than does a test requiring that a legitimate rational state interest be served. *See also* Craig v. Boren, 429 U.S. 190 (1976) for a discussion of the test used in *Reed.*

32. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) for the application of the "traditional" test.

33. 411 U.S. 677 (1973).

34. Frontiero v. Richardson, 411 U.S. 677 (1973).

35. *Id.* at 684.

36. *Id.*

37. *Id.* at 686.

38. *Id.* at 688.

39. Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aliello, 417 U.S. 484 (1974). The Court in the preceding cases failed to view gender-based classifications as suspect.

ered the opinion of the Court and sustained a sex discrimination claim on equal protection grounds in *Weinberger v. Wiesenfield.*[40] The Court found that a gender-based distinction allowing social security survivor benefits to widows but not widowers was indistinguishable from the classification invalidated in *Frontiero.* The classification in *Weinberger* was considered to be based on "archaic and overbroad" generalizations that male earnings are vital to the support of their families while female earnings do not add significantly to their families' support.[41] The Court stated that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[42] The Court, however, did not invoke strict scrutiny but instead utilized the *Reed* "fair and substantial" standard to refute the government's argument that there was a need to offset the adverse economic situtation of women only. The provision was held to be unconstitutional.[43]

In *Kahn v. Shevin*[44] the Court again relied on the "fair and substantial relation" standard of *Reed* in upholding the constitutionality of a Florida statute which allowed an annual tax exemption to widows but not widowers.[45] Florida's interest in reducing the disparity between the economic capabilities of a man and a woman was found to have a "fair and substantial relation" to the object of the legislation.[46] The Court based its holding on the job market being "inhospitable to the woman seeking any but the lowest paid jobs." It cited 1972 statistics which indicated that full-time working women earn a median income only 57.9% of the median for males.[47] The Court reasoned that while the widower can continue in his occupation, the widow is forced into a job market with which she is unfamiliar, and, because of her former economic dependency, she has fewer skills to offer.[48]

A majority of the states have recognized the changing status of women and developed divorce statutes which allow alimony awards to either spouse.[49] Three states[50] have adopted versions of section 308

40. 420 U.S. 636 (1975).
41. Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975).
42. *Id.* at 645.
43. *Id.* at 653.
44. 416 U.S. 351 (1974).
45. Kahn v. Shevin, 416 U.S. 351, 352 (1974).
46. *Id.* at 356.
47. *Id.* at 353.
48. *Id.* at 354.
49. Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri,

of the Uniform Marriage and Divorce Act.[51] This section enumerates specific circumstances under which the court may order a maintenance award to either spouse.

Several jurisdictions have recently been faced with a question similar to the one the Arkansas Supreme Court would have faced in *McNew* had it granted the plaintiff her divorce. A review of cases from some of these jurisdictions is helpful in understanding the recent judicial reasoning on this subject. In *Stern v. Stern*[52] a husband appealed an award of temporary alimony and challenged the constitutionality of a Connecticut statute which would not require a female in his same situation to pay temporary alimony. The Connecticut Supreme Court utilized the "fair and substantial relation" test of *Reed* to sustain the classification as reasonably related to the state's interest in making judgments about family life and family relationships.[53] The court thereby retained the common law view of the husband's duty to support.[54]

Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia and Wisconsin.

50. Colorado, Kentucky, and Missouri. *See* COLO. REV. STAT. § 14-10-101-103 (1973); KY. REV. STAT. § 403.200 (1973); MO. ANN. STAT. § 452.335 (Vernon 1975).

51. UNIFORM MARRIAGE AND DIVORCE ACT (U.L.A.) § 308 provides as follows:

> [Maintenance] (a) In a proceeding for dissolution of a marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> (b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:
>
> (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age, and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

52. 165 Conn. 190, 332 A.2d 78 (1973).

53. *Id.* at 193, 332 A.2d at 83.

54. *Id.* at 198, 332 A.2d at 82.

The Pennsylvania courts have also considered the constitutionality of their statute dealing with interspousal support. In *Lukens v. Lukens*[55] the court upheld the statutory treatment of men and women and stated that the statute was broad enough that a husband in need could seek support from his wife if she had financial ability to provide it. One year later the Pennsylvania Supreme Court declared the alimony pendente lite statutes, which made awards only to females, unconstitutional in light of the state ratification of the Equal Rights Amendment.[56]

Although the Georgia Supreme Court had previously held the Georgia alimony statutes to be constitutional, the appellee husband in *Murphy v. Murphy*[57] sought reconsideration of the issue in light of the subsequent United States Supreme Court decisions of *Reed* and *Frontiero*. The Georgia court relied on the *Kahn* decision for support in finding the Georgia statutes constitutional.[58] The reasoning in *Kahn* that noted the "economic disparity" of a woman thrown into the job market after the death of her spouse was applied to a dependent wife involved in the demise of a marriage.[59] The United States Supreme Court declined to determine the constitutionality of denying alimony to males when it refused to grant certiorari in *Murphy*.[60]

The Louisiana Supreme Court upheld the constitutionality of a statute authorizing an award of alimony pendente lite only to the wife.[61] The court found support for its decision in the fact that the wife had little control over her property because the civil code made the husband "head and master" over the community property. As a result, it was reasonable for the legislature to seek to provide protection for the wife during the dissolution of the community existence.[62] Utilizing the rationale of *Kahn* and citing *Murphy*, the Louisiana Supreme Court found its statute dealing with permanent

55. Lukens v. Lukens, 224 Pa. Super. Ct. 227, 303 A.2d 522 (1973).

56. Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974). The decision in *Henderson* had little practical effect, however, because the legislature had already amended the statute extending the right of alimony pendente lite to both males and females. Beck, *Equal Rights Amendment: The Pennsylvania Experience*, 81 DICK. L. REV. 395, 408 n.81 (1977). *See* PA. STAT. ANN. tit. 23, § 46 (Purdon Supp. 1976). The legislature, however, took no action to restructure the "divorce from bed and board" statute. Beck, *supra*, at 408.

57. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).

58. *Id.* at 354, 206 S.E.2d at 459.

59. *Id.*

60. 421 U.S. 929 (1975). *But see* an Alabama case, Orr v. Orr, 351 So. 2d. 906 (Ala. 1977) which is currently on appeal to the United States Supreme Court, docket No. 77-1119.

61. Williams v. Williams, 331 So. 2d 438 (La. 1976).

62. *Id.* at 441.

alimony constitutional. The court exercised some rather liberal judicial reasoning, however, and determined that males were also eligible for alimony under the current statutes.[63]

Prior to Florida's enactment of a no-fault divorce law in 1971, its statutes dealing with divorce were based on the English common law.[64] Florida's judicial decisions since that time have recognized the changing role of women in society.[65] A Florida district court recently recognized the right of a husband to obtain an award of alimony and attorney's fees from his wife.[66]

In *Thaler v. Thaler*[67] the New York Superior Court found that statutes allowing the awarding of alimony and attorney's fees exclusively to the wife were unconstitutional as a violation of the equal protection clause of the fourteenth amendment. The court relied on *Frontiero* to consider sex classifications "suspect" and found that the New York statutes were unable to survive strict judicial scru-

63. Whitt v. Vauthier, 316 So. 2d 202 (La. Ct. App.) *aff'd. mem.* 320 So. 2d 558 (La.), *cert. denied*, 424 U.S. 955 (1975). The Code Napoleon of 1804, upon which Louisiana statutes are based, provided for alimony to either spouse. The "wife-only" alimony provision did not appear until 1808. The court, therefore, determined that the 1808 code only repealed inconsistent laws and since this provision was not inconsistent, the 1804 provision was still in effect and males were eligible for alimony. *Id.* at 205.

64. Pacheco v. Pacheco, 246 So. 2d 778, 780-81 (Fla.), *appeal dismissed*, 404 U.S. 804 (1971).

65. *See, e.g.*, Beard v. Beard, 262 So. 2d 269 (Fla. 1971). The court stated "[i]n this era of women's liberation movements and enlightened thinking we have almost universally come to appreciate the fallacy of treating the feminine members of our society on anything but a basis of complete equality with the opposite sex. Any contrary view would be completely anachronistic." *Id.* at 271-72.

66. Lefler v. Lefler, 264 So. 2d 112 (Fla. Dist. Ct. App. 1972) wherein the court stated the following:

> For the first time ever . . . the husband to the marriage could seek and obtain an award of alimony and suit money from the wife. . . . [T]his represents a radical departure from the historical concept of alimony as an award based on the common law obligation of the husband to support his wife, . . . [but] it nonetheless is in keeping with the present trend toward assuring complete equality between the sexes.

Id. at 113. An award of $30,000 lump sum alimony and 18 months of $5000 per month rehabilitative alimony to the husband was upheld in a Florida District Court based on the wife's financial condition and the husband's need. Pfohl v. Pfohl, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977). The wife contributed the majority of support from her family wealth. The husband was not well educated and not capable of post-divorce employment which would support him in the style to which he had been accustomed.

67. 89 Misc. 2d 315, 391 N.Y.S.2d 331 (Sup. Ct.) *rev'd on other grounds*, 396 N.Y.S.2d 815 (App. Div. 1977). The husband was a nonimmigrant alien, unable to legally work in this country and dependent on his wife's income for support. In a very short opinion, however, the Appellate Division of the New York Supreme Court reversed the order on the law stating "alimony should not have been granted to the defendant upon the showing made at Special Term" and thus the court did not consider the constitutional questions.

tiny.[68] The court reasoned that alimony was a support notion within the principle of *Weinberger,* which had involved a social security provision, rather than a tax exemption as in *Kahn.*[69] In *Kahn* the United States Supreme Court was considering an estate tax exemption and found that administrative convenience in determining eligibility might be a "rational" state objective. But in divorce cases, the New York Superior Court stated each situation is considered individually; therefore, ease of administration does not apply.[70] The fact that impact of spousal loss generally falls more heavily on women than men has no bearing in divorce cases. Each case will be considered individually, and the financial conditions of both parties will be taken into account.[71] The court in *Thaler* was not attempting to deny a needy wife this benefit but to make it equally available to a needy husband.[72]

Arkansas statutes concerning alimony and property settlement authorize such awards only to females.[73] The Arkansas statutes are

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68. Thaler v. Thaler, 89 Misc. 2d 315, 319, 391 N.Y.S.2d 331, 336 (Sup. Ct. 1977).

69. *Id.* at 321, 391 N.Y.S.2d at 339.

70. *Id.*

71. *Id.*

72. *Id.*

73. ARK. STAT. ANN. § 34-1210 (1962) provides in part that "[d]uring the pendency of an action for divorce or alimony, the court may allow the *wife* maintenance and a reasonable fee or her attorneys . . . ." (emphasis added). ARK. STAT. ANN. § 34-1211 (1962) provides in part that "[w]hen a decree shall be entered, the court shall make such order touching the *alimony of the wife* and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." (emphasis added). ARK. STAT. ANN. 34-1213 (1962) provides the following:

> The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance, as may be proper, (and may order any reasonable sum to be paid for the *support of the wife,* during the pending of her bill for a divorce).

(emphasis added). ARK. STAT. ANN. § 34-1214 (1962) provides in part,

> In every final judgment for divorce from the bonds of matrimony granted to the husband, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and where the divorce is granted to the wife the court shall make an order that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband, if she shall have actually personally resided in this State for a period of time next before the commencement of the action at least equal to the residence required to enable her to maintain an action for divorce, *shall be entitled to one-third (1/3) of the husband's personal property absolutely, and one-third (1/3) of all the lands whereof her husband was seized* of an estate of inheritance at any time during the marriage for *her* life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled . . . .

(emphasis added).

founded on the traditional common law view of the husband's duty to support.[74] Alimony in Arkansas is the allowance which a husband, by order of the court, pays *to his wife,* being separated from him, for her maintenance.[75] Alimony has also been described as a continuing allotment of sums payable at regular intervals for the *wife's* support.[76] The fact that a wife has more income than her husband does not preclude an award of alimony. That fact, however, will be considered by the court in making an award.[77] The Arkansas Supreme Court has recognized that in matters of child support, statutory interpretation allows contribution by *either* spouse, and the court will consider the condition and means of each spouse.[78] The Arkansas Supreme Court has not considered an equal protection claim grounded on a gender-based distinction.[79]

Ruth McNew had accumulated over $100,000.00 in property during her marriage, and Mr. Justice Hickman considered the chancellor's inability under Arkansas law to award any of the property to the husband an "obvious inequity and discrimination."[80] Mr. Justice Hickman stated that "[t]he Arkansas law regarding property was enacted before the turn of the century and can no longer be defended historically or legally with any confidence. It clearly violates the Equal Protection Clauses of the Arkansas[81] and United States Constitutions."[82]

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74. *See generally* Bowman v. Worthington, 24 Ark. 522, 533 (1867) for a good discussion of the traditional view of alimony in Arkansas.

75. *Id.*

76. Erwin v. Erwin, 179 Ark. 192, 193, 14 S.W.2d 1100, 1100 (1929).

77. White v. White, 228 Ark. 732, 310 S.W.2d 216 (1958).

78. Barnhard v. Barnhard, 252 Ark. 167, 477 S.W.2d 845 (1972).

79. The court, however, did consider an equal protection question in Boshears v. Ark. Racing Comm'n 258 Ark. 741, 528 S.W.2d 646 (1975). This case involved the distinction between a state and a private employee's right to appeal a worker's compensation claim. Considering the statute under traditional equal protection standards, the court found it constitutional. *Id.* at 747, 528 S.W.2d at 650. The appellant's contention that state employees were, as a group, a "suspect class" was found to be without merit. *Id.* The court cited several Supreme Court cases, including *Frontiero,* which would have supported the appellant's contention had membership of the class been based on an accident of birth such as sex or alienage. *Id.*

80. McNew v. McNew, 262 Ark. 567, 559 S.W.2d 155, 159 (1977) (Hickman, J., dissenting).

81. *Id.* (citing ARK. CONST. art. 2, § 3.) That pertinent part of the Arkansas Constitution states that "[t]he equality of all persons before the law is recognized, and shall ever remain inviolate."

82. McNew v. McNew, 262 Ark. 567, 573, 559 S.W.2d 155, 159 (1977) (Hickman, J., dissenting) (citing U.S. CONST. amend. XIV, § 1). That portion of the U.S. Constitution states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

Mr. Justice Hickman did not believe that the Arkansas statutes which permit alimony, child support, and attorney's fees only to the wife were unconstitutional because their application is always based on individual cases and situations.[83] He justified such disparate treatment by finding a historical need for the law since "[s]ome women foresake education to become full-time homemakers. Alimony permits a court to correct any financial inequities because of the party's circumstances."[84] He characterized the divorce laws in Arkansas as generally "archaic" and in need of revision by the legislature.[85]

In light of recent decisions and changes in the treatment of women before the courts, consideration by the Arkansas court of the constitutional issue in the *McNew* case should lead to a finding that the Arkansas divorce statutes dealing with property settlement, as well as alimony, are in violation of equal protection and thus unconstitutional.

The real question, however, is whether the traditional legal view of women is still valid since they have assumed a more prominent place in society. To make up for "economic inequities" the Arkansas courts have always had the discretion to award a needy wife support of property depending on her circumstances. It appears that the same discretion should be allowed in meeting a husband's needs since the court has to consider each case individually. The court would not be denying a benefit to women but only making it equally available to men.[86] Although such disparate treatment has been justified by a "benign purpose" to overcome the disadvantages a divorced female might face in the job market, these disadvantages may no longer exist. The court should make such a determination based on the particular facts presented. A mere recitation of a benign purpose should not be enough to protect against a further inquiry into the actual purpose of the classification.[87]

It appears that the reasoning of *Weinberger* which involved a support statute (social security) is more applicable to divorce and maintenance actions than the reasoning in *Kahn* which allowed a

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

83. McNew v. McNew, 262 Ark. 567, 574, 559 S.W.2d 155, 159 (1977) (Hickman, J., dissenting).

84. *Id.*

85. *Id.*

86. Thaler v. Thaler, 89 Misc. 2d 315, 321, 391 N.Y.S.2d 331, 339 (Sup. Ct.), *rev'd on other grounds*, 396 N.Y.S.2d 815 (App. Div. 1977).

87. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

tax exemption to widows only. In *Weinberger* the Supreme Court found the distinction between the wife and the husband to be irrational in relation to which party might require support even though the Court recognized that men are more likely to be the primary family supporters.[88]

McNew is important because it brings to light a question which the Arkansas Supreme Court will face in the future. In view of recent trends in other jurisdictions it would appear that Mr. Justice Hickman's statement is correct—divorce laws in Arkansas are archaic and in need of revision by the legislature.[89] The legislature should revise these statutes and adopt provisions similar to those of the Uniform Marriage and Divorce Act.[90] Because such a revision may require strong impetus, it is likely that the Arkansas Supreme Court will have to decide these issues before the legislature acts. The *McNew* dissent signals that at least one member of the court is willing to address that issue, and attorneys in divorce appeals should heed this strong invitation to argue a constitutional issue—equal protection.

[Note by Gordon W. Hawthorne]

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88. *Id.* at 651.

89. McNew v. McNew, 262 Ark. 567, 574, 559 S.W.2d 155, 159 (1977) (Hickman, J., dissenting).

90. *See* Newbern & Johnson, *The Uniform Marriage and Divorce Act: Analysis for Arkansas,* 28 ARK. L. REV. 175, 185 (1974).