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NEW JERSEY LAW—"REHABILITATIVE ALIMONY" AS A TOOL FOR THE ENCOURAGEMENT OF SPOUSAL SELF SUPPORT—IS THERE LIFE AFTER ARNOLD?—Arnold v. Arnold, 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979)

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NEW JERSEY LAW—"REHABILITATIVE ALIMONY" AS A TOOL FOR THE ENCOURAGEMENT OF SPOUSAL SELF-SUPPORT—IS THERE LIFE AFTER *ARNOLD*?—*Arnold v. Arnold*, 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979).

I. INTRODUCTION

The obligation of support owed by marital parties to each other after termination of their marriage is a topic of recent interest on both constitutional[1] and practical levels.[2] The recent New Jersey case of *Arnold v. Arnold*[3] illustrates the problem courts have in making alimony awards consistent with changing attitudes about the nature of such awards.

Dale and Helen Arnold were divorced in New Jersey in 1979. Mrs. Arnold, who had been employed both before and during the marriage, ended her employment when the couple's children were born. Upon divorce, the New Jersey trial court awarded alimony of forty dollars a week to Mrs. Arnold, limiting the award to a period of thirty months. The trial judge termed this award "rehabilitative alimony."[4] Under the concept of rehabilitative alimony a court determines the amount of time necessary to allow a supported spouse to recover from the economic effects of a marriage and accordingly limits the duration of the alimony award to that period. The purpose of this time limitation is to encourage the supported spouse to become self-supporting within the specific period.[5]

Mrs. Arnold objected to the time limitation placed upon her award of alimony and appealed the judgment. The New Jersey Su-

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1. *See* Orr v. Orr, 440 U.S. 268 (1979). The United States Supreme Court has recently held that an Alabama statute that placed marital support obligations upon husbands but not wives was in contravention of the constitutional guarantee of equal protection. The Court opined that when inquiries into the actual needs of the parties are made at trial, as a matter of course, there is no justification to use sex as a proxy for need. *Id.*

2. *See, e.g.*, Inker, Walsh & Perocchio, *Alimony Orders Following Short Term Marriages*, 12 FAM. L.Q. 91 (1978) (articulating problems created by the recent increase in divorce after short-term marriages); Miller, *Where Are We Now on Spousal Support?*, 53 CAL. ST. B.J. 302 (1978) (discussion of California's recent reevaluation of support problems and its method of dealing with them); Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse upon His or Her Right to Continue to Receive Alimony*, 17 J. FAM. L. 249 (1979) (general assessment of support problems arising out of "the increasing popularity of informal living arrangements").

3. 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979).

4. *Id.* at 481, 401 A.2d at 263.

5. *See* notes 46-57 *infra* and accompanying text.

perior Court, Appellate Division, held that rehabilitative alimony was not an appropriate method through which to encourage spousal self-support and modified the alimony order to eliminate the termination date.[6] The approach used in *Arnold* stands as an obstacle to the effective use of rehabilitative alimony in New Jersey as a tool for the allocation of spousal support obligations. The wisdom of the decision can be assessed best by a discussion of the changing concepts of alimony awards in New Jersey, the goals of rehabilitative alimony, and the alternatives suggested within the *Arnold* opinion.

II. HISTORICAL DEVELOPMENT OF ALIMONY IN NEW JERSEY

The right to alimony in New Jersey[7] has always been purely statutory.[8] Its original purpose was to enforce the obligation of support incumbent upon a husband who had wrongfully left his wife.[9] Under this concept, a husband had an absolute duty to support his wife and was not permitted to absolve himself by his own misconduct.[10] Alimony was, at first, limited to instances where the husband was guilty of adultery or extreme cruelty. In 1820 the New Jersey statutory scheme changed to permit awards of alimony in instances where the husband had been guilty of other marital misconduct as well.[11] This change was prompted by the view that sup-

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6. 167 N.J. Super. at 481-82, 401 A.2d at 263.

7. New Jersey's concept of alimony developed from the practice of the English ecclesiastical courts. Lynde v. Lynde, 64 N.J. Eq. 736, 52 A. 694 (1902). For a general history of the development of alimony from the English ecclesiastical courts to modern statutes, *see* Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROB. 197 (1939).

8. O'Loughlin v. O'Loughlin, 12 N.J. 222, 229, 96 A.2d 410, 413, *cert. denied*, 346 U.S. 824 (1953); Tonti v. Chadwick, 1 N.J. 531, 536, 64 A.2d 436, 439 (1949).

9. O'Loughlin v. O'Loughlin, 12 N.J. 222, 229-30, 96 A.2d 410, 413, *cert. denied*, 346 U.S. 824 (1953); Lynde v. Lynde, 64 N.J. Eq. 736, 751-52, 52 A. 694, 700 (1902).

10. In Isserman v. Isserman, 11 N.J. 106, 115, 93 A.2d 571, 575 (1952), the court stated, "Alimony in its technical sense in this State is purely statutory and is an expression of the continuing duty which a husband owes his wife, and of which he is not permitted to absolve himself by his own misconduct, although that misconduct brings about the dissolution of the marriage." *Id. See* O'Loughlin v. O'Loughlin, 12 N.J. 222, 229-30, 96 A.2d 410, 413, *cert. denied*, 346 U.S. 824 (1953); Lynde v. Lynde, 64 N.J. Eq. 736, 751-52, 52 A. 694, 700 (1902).

11. The 1974 statute provided: "[W]hen a divorce shall be decreed *on account of the parties being in the prohibited degrees, or for the cause of adultery or extreme cruelty*, the chancery shall, and may, . . . take such order touching the . . . alimony of the wife, . . . as . . . may be fit, equitable and just" (emphasis added). Lynde v. Lynde, 64 N.J. Eq. 736, 752, 52 A. 694, 700 (1902). The statute was revised in 1820 to exclude the italicized portions. *Id.* at 753, 52 A. at 700. *Lynde* contains a good discussion of the nature of alimony and the early statutory changes in New Jersey.

port was a "personal benefit"[12] bestowed upon a wife solely by virtue of a marriage and should continue as necessary, regardless of the nature of the husband's misconduct. The courts held that alimony should serve neither as a punishment for the husband[13] nor as a reward for the wife[14] but rather should depend upon the wife's need for support tempered by the husband's ability to pay.[15]

The New Jersey statute authorizing alimony awards is broad in its terms,[16] with specific factors for consideration being left to judicial pronouncement.[17] Over the years, the courts have focused on the wife's needs and the husband's ability to pay, and accordingly have developed a list of factors to consider.[18] These factors take into account the current needs and means of the parties. No attempt is or has been made to judicially alter the financial status quo of the supported spouse in the fashioning of alimony awards.[19]

In 1971, New Jersey passed the Divorce Reform Act.[20] This act transformed the concept of alimony by authorizing a court to order a wife to pay alimony to her husband.[21] This was the first recogni-

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12. *Id.*

13. Turi v. Turi, 34 N.J. Super. 313, 322, 112 A.2d 278, 283 (App. Div. 1955). "The right to support should not be used as an instrument to punish a husband who is guilty in the matrimonial relation." *Id.*

14. Garlinger v. Garlinger, 129 N.J. Super. 37, 39, 322 A.2d 190, 191 (Ch. Div. 1974). "The distinct objective of alimony is the proper support of the *wife*, and the wife is not entitled to have more from the husband" (emphasis in original). *Id.*; O'Neill v. O'Neill, 18 N.J. Misc. 82, 11 A.2d 128 (Ch. 1939), *aff'd*, 127 N.J. Eq. 278, 12 A.2d 839 (1940).

15. Mcleod v. Mcleod, 131 N.J. Eq. 44, 46, 23 A.2d 545, 547 (1941).

16. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1979). The statute provides that the court shall award such alimony as is "fit, reasonable and just." *Id.*

17. Martindell v. Martindell, 21 N.J. 341, 352, 122 A.2d 352, 357 (1956). *Martindell* held that the legislature vested the courts with wide discretion in determining the proper factors to consider in formulating a proper support award since the statute failed to include an appropriate list of those factors.

18. In Greenberg v. Greenberg, 126 N.J. Super. 96, 312 A.2d 878 (App. Div. 1973), the court listed the following factors:

> (1) the actual needs of the wife; (2) the husband's actual means and his ability to pay support; (3) the physical conditions of the parties; (4) their social position; (5) the separate property and income of the wife, and (6) any other factors which bear upon the question of fair and reasonable support.

Id. at 100, 312 A.2d at 880.

19. Although no New Jersey court has articulated a reluctance to use judicial means to alter the needs of the parties, there is no evidence in the case law that any such attempts had been made prior to the courts being granted the power to allocate marital property between the parties. *See* notes 22-27 *infra* and accompanying text.

20. N.J. STAT. ANN. §§ 2A:34-1 to :34-27 (West Cum. Supp. 1980). For background concerning the policies embodied in this act, *see generally* [1970] NEW JERSEY DIVORCE LAW STUDY COMM'N, FINAL REPORT.

21. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980) provides that the court

tion in New Jersey that a wife also has some obligation of support arising out of a marraige. The concept of alimony has changed radically by the legislative recognition of the wife's support obligation. No longer can alimony be characterized as a husband's "duty" or a wife's "personal benefit." The duty is incumbent upon both parties. This change can be viewed as a legislative directive to consider the wife's support obligation in determining a proper method and amount of support.

The Divorce Reform Act also permitted a court, for the first time, to divide marital property between the parties upon divorce in an equitable fashion, regardless of which party holds title.[22] Under the new statutory scheme a court can balance an award of property[23] with an award of alimony in order to insure that a proper fund is available for the support of the supported spouse.[24] An additional factor to consider in making an alimony award under the Divorce Reform Act is the amount of property received through an equitable distribution[25] of marital property.[26] Since the amount of property owned by a spouse is a factor that the courts consider in assessing the support needs of that spouse,[27] greater

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may make orders "as to the alimony or maintenance of the parties. . . ." Compare this with the old alimony statute which authorized the court to make orders "as to the alimony or maintenance of the *wife*. . . ." N.J. STAT. ANN. § 2A:34-23 (West 1952) (emphasis added).

22. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980) provides: "[W]here a judgment of divorce . . . is entered the court may make such award . . . to effectuate an equitable distribution of the property . . . acquired by . . . [the parties] during the marriage." The old statute made no reference to property division. N.J. STAT. ANN. § 2A:34-23 (West 1952).

23. Not all property held by the parties is subject to distribution by the court. The statute empowers the court to allocate only property "beneficially acquired" by the parties during the marriage. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980). For a general guide to what types of property are included, *see* Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974).

24. The following cases stress the interrelationship between an award of property and an award of alimony: Smith v. Smith, 72 N.J. 350, 359, 371 A.2d 1, 6 (1977); Painter v. Painter, 65 N.J. 196, 218, 320 A.2d 484, 496 (1974); Rothman v. Rothman, 65 N.J. 219, 234, 320 A.2d 496, 504 (1974); Esposito v. Esposito, 158 N.J. Super. 285, 300, 385 A.2d 1266, 1274 (App. Div. 1978). *See* Comment, *Divorce Law—Equitable Distribution of Property in New Jersey*, 28 RUTGERS L. REV. 447, 455 (1975).

25. *See* note 28 *infra*.

26. *See* Smith v. Smith, 72 N.J. 350, 359, 371 A.2d 1, 6 (1977). In *Smith*, the New Jersey Supreme Court remanded the case for a determination of a proper equitable distribution of property. The court held that once this determination is made, the trial court should review the prior alimony award to determine if it would still be equitable.

27. *See* note 18 *supra*.

awards of marital property diminish the support needs of the supported spouse. The courts thus gain the ability to adjust the support status quo of the parties through an award of property.[28] Another such judicially employed means of adjusting the support status quo which is both workable and desirable is rehabilitative alimony.

III. REHABILITATIVE ALIMONY DEFINED

Although courts in other jurisdictions[29] have examined the concept of rehabilitative alimony, and some states have enacted statutes[30] which embrace its theories, New Jersey courts have provided only limited expression on the subject. The first case to introduce rehabilitative alimony in New Jersey was *Turner v.*

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28. In making an award of equitable distribution of property, a court first determines which property is subject to the court's power. Painter v. Painter, 65 N.J. 196, 213-14, 320 A.2d 484, 493-94 (1974). The trial judge then considers various criteria and determines the most equitable allocation of that property between the parties. Among the factors that can be considered are: The respective earning abilities of the parties, the source of the property, the current value and income producing capacity of the property, the present mental and physical health of the parties, the probability of continuing present employment at present earnings or better earnings in the future, the standard of living of the parties during the marriage, and the economic circumstances of each spouse at the time of the property distribution. *Id.* at 211, 320 A.2d at 492. Thus the court takes into consideration a number of support-related considerations when determining an equitable property distribution.

29. *E.g.*, Zildjian v. Zildjian, 1979 Mass. App. Ct. Adv. Sh. 1337, in which the court expressed a reluctance to embrace rehabilitative alimony but showed a willingness to accept its use if proper guidelines could be established. *Id.* at 1353-54. A New York trial court justified its use by finding that the wife had a duty to mitigate the economic damages caused by the marriage and that the husband should subsidize her efforts to mitigate. Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. 1975). South Dakota and Virginia have expressed misgivings about its use and effect. Guindon v. Guindon, 256 N.W.2d 894 (S. D. 1977); Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976).

30. CAL. CIVIL CODE § 4801 (West Cum. Supp. 1979) directs courts to consider, when making an award of alimony, "[t]he time required for the supported spouse to acquire appropriate education, training and employment." The Florida support statute directs the court to consider "the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment." FLA. STAT. ANN. § 61.08 (West Cum. Supp. 1979). Other state statutes use essentially the same language. COLO. REV. STAT. § 14-10-114(2)(b) (Bradford-Robinson Cum. Supp. 1979); ILL. ANN. STAT. ch. 40, § 504(b)(2) (Smith-Hurd Cum. Supp. 1979); KY. REV. STAT. ANN. § 403.200(2)(b) (Bobbs-Merrill Cum. Supp. 1980); MONT. REV. CODES ANN. § 40-4-203(2)(b). Arizona also lists as an additional criteria "whether such education or training is readily available." ARIZ. REV. STAT. ANN. § 25-319(B)(2). For a critique of the California statute *see* Note, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F. L. REV. 493 (1977).

Turner.[31] In *Turner* the parties were divorced after twenty-two years of marriage. At that time the children of the marriage were close to the age of emancipation. The wife, who was forty-five years of age, was employed part-time and was six months away from receiving a degree as a reading specialist. The court found that once this degree was obtained Mrs. Turner would be capable of earning twelve thousand dollars per year. Mrs. Turner received approximately eighty thousand dollars by way of equitable distribution of the marital property. Taking into consideration the wife's future earning potential, the trial court awarded her fifty dollars a week alimony and limited the duration of that award to eighteen months, at which time the award would automatically terminate. The court determined that the eighteen-month period would allow the wife one full year of employment as a reading specialist and that this time would be necessary to enable her to be in a position to adequately maintain herself.[32] The trial judge characterized the award as rehabilitative alimony.

Turner defined rehabilitative alimony as "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support."[33] Under this plan, a court may make findings of reasonable capacity and expectations of future employability in making a present determination of when it would be proper for support to terminate.[34]

The primary goals of rehabilitative alimony, as expressed in *Turner*, are to reduce post divorce recourse to the courts,[35] to provide the supporting spouse with some degree of certainty as to the nature and extent of the support obligation owed to a former spouse,[36] and to encourage a supported spouse to develop

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31. 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978).

32. *Id.* at 324-25, 385 A.2d at 1286.

33. *Id.* at 314, 385 A.2d at 1280.

34. *Id.* at 315, 385 A.2d at 1280-81. The following example illustrates this point. Suppose a supported spouse was a secretary but gave up that employment when the parties married. After four years the parties are divorced. If a judge finds that it will take six months of training to relearn the stale secretarial skills and that it is reasonable to expect that it will take an additional six months to find stable employment, then the court might order that alimony should cease at the end of twelve months. The amount of such alimony would be sufficient to allow the supported spouse the opportunity to reacquire the secretarial skills. In essence, the court would find that, with reasonable efforts and a proper amount of support, the supported spouse will be in a position of self-support in twelve months.

35. *Id.* at 315, 385 A.2d at 1281.

36. *Id.* at 315, 385 A.2d at 1280.

employment skills within a precise period of time so as to become self-supporting.[37]

A. *Limiting Post Divorce Recourse to the Courts*

Post divorce recourse to the courts is increasing. The large amount of litigation in matrimonial matters is severely burdening the New Jersey court system.[38] Parties often seek post divorce alterations of support orders based upon a change in the circumstances of the parties.[39] If a court could anticipate such changes in circumstances and could mold its judgment to reflect these anticipated changes, then the judgment would be less likely to require later modification. Consequently, there would be less recourse to the courts. The use of rehabilitative alimony would allow a court to consider reasonably expected future events concerning the ability of a spouse to become self-supporting within a specific time period. Taking these future events into consideration, the court could make a present determination as to when alimony should cease. By building in an automatic termination date for the alimony award, the parties would need to resort to the courts less frequently for termination of the award when the anticipated changes occur.[40] If the anticipated changes do not occur, then recourse to the courts would be necessary. Since, however, the judgment is based upon events likely to occur, such recourse to the courts would be less probable than if rehabilitative alimony were not used.

B. *Providing Certainty to the Supporting Spouse*

A major purpose of the Divorce Reform Act is to facilitate the termination of dead marriages.[41] Since the declared public policy is

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37. *Id.* at 314-15, 385 A.2d at 1280.

38. *Interim Report of the Supreme Court Committee on Matrimonial Litigation*, 104 N.J.L.J. 107 (1979). This report recommends sweeping changes in the rules governing matrimonial proceedings in New Jersey, in part in response to the ever increasing number of divorce cases. *Id. See also* Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980). "The frequency with which courts are called upon to make or modify support awards needs no documentation." *Id.* at 149, 416 A.2d at 51.

39. The following cases are representative of the various grounds upon which such relief is sought. Fern v. Fern, 140 N.J. Super. 121, 355 A.2d 672 (App. Div. 1976) (reduction in husband's earnings); Grossman v. Grossman, 128 N.J. Super. 193, 319 A.2d 508 (Ch. Div. 1974) (paramour living in same abode with wife); Hallberg v. Hallberg, 113 N.J. Super. 205, 273 A.2d 389 (App. Div. 1971) (increase in wife's earnings); Gulick v. Gulick, 113 N.J. Super. 366, 273 A.2d 792 (Ch. Div. 1971) (inflationary increase in living costs).

40. Turner v. Turner, 158 N.J. Super. 313, 315, 385 A.2d 1280, 1281 (Ch. Div. 1978).

41. The Divorce Law Study Commission was appointed by the New Jersey

to end such marriages, it follows that the ties between parties, created solely by the marriage, should be severed whenever possible.[42] The obligation of support is such a tie and should be severed when the circumstances so allow. With the incidence of divorce after short-term marriages on the rise,[43] divorced spouses are remarrying more frequently than ever. It is natural that a divorced spouse would like to know the extent of ties to an old obligation. Such knowledge would allow a supporting spouse to plan the future in a constructive manner. Whenever equitably possible, supporting spouses should be enabled to make new lives for themselves without unnecessary economic constraints.[44] Therefore, alimony awards that can be avoided should be. By encouraging the supported spouse to become self-supporting, and by determining in advance when this will occur, rehabilitative alimony allows the supporting spouse to know with greater certainty the extent of future support obligations.[45]

C. *Encouraging Spousal Self-Support*

Since its enactment, the Divorce Reform Act has imposed reciprocal obligations of support on both husbands and wives.[46] Be-

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legislature "to study and review the statutes and court decisions relating to divorce. . . ." [1970] NEW JERSEY DIVORCE LAW STUDY COMM'N, FINAL REPORT at i. The committee made recommended changes in New Jersey's divorce laws which were subsequently enacted in near entirety. The committee report states that "[t]he objective to strive for is to make it legally possible to terminate dead marriages." *Id.* at 6. The report characterized this as the "central policy." *Id.* at 7. Courts consistently refer to this as the major policy behind the change in divorce laws. Gazillo v. Gazillo, 153 N.J. Super. 159, 171, 379 A.2d 288, 294 (Ch. Div. 1977); Schneider v. Schneider, 142 N.J. Super. 512, 515, 362 A.2d 61, 62 (Ch. Div. 1976); Altbrandt v. Altbrandt, 129 N.J. Super. 235, 237, 322 A.2d 839, 840 (Ch. Div. 1974).

42. In Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443, 393 A.2d 583, 586 (App. Div. 1978), the appellate division modified a judgment of equitable distribution which had awarded the wife part interest in the husband's business. The court opined that property should be allocated in such a way as to allow the parties to be independent, and not in a way that forces their continued partnership.

43. Inker, Walsh, & Perocchi, *supra* note 2, at 92.

44. "The law should provide both parties with the opportunity to make a new life on this earth. Neither should be shackled by the unnecessary burdens of an unhappy marriage." Turner v. Turner, 158 N.J. Super. 313, 317, 385 A.2d 1280, 1282 (Ch. Div. 1978).

45. *Id.* at 315, 385 A.2d at 1281.

46. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1980) (allowing support to either party as the circumstances require). *See* note 21 *supra*. Also, because the obligation is reciprocal, the terms "husband" and "wife" are inappropriate. The proper terms to use in an inquiry into support matters are "supporting" and "supported spouse." How that designation is made is a function of the arrangements of a particular marriage.

fore this enactment the obligation rested solely upon the husband.[47] At that time, New Jersey courts did not allow a husband to lessen his support obligation merely because his actual income was low. The courts required a husband to fulfill his capacity for earning.[48] Awards of alimony were not based upon a husband's actual earnings, but rather upon what a court determined was his realistic earning capacity. Courts reasoned that a husband should not be allowed to avoid his support obligations by laziness[49] or by inattention to business affairs.[50] By making an award of alimony based upon potential earnings, the court was forcing the husband to achieve his earning capacity. Since the wife's support obligation is now coextensive with that of her husband's, there is no reason why the wife's realistic earning capacity should not be considered in determining a proper support award.[51]

Rehabilitative alimony recognizes that a marriage often imparts an economic disadvantage upon the supported spouse.[52] This spouse must often forego career development in order to fulfill other marital functions. As a result, the circumstances of a marriage can impair the earning capacity of the supported spouse.[53] Under rehabilitative alimony, a court recognizes as a "need" the amount of money necessary to enable a supported spouse to develop new employment skills or to enhance old ones.[54] The resulting alimony awards encompass what is monetarily necessary for the development of these skills. A supported spouse is then able to attain the desired earning capacity without the added pressures that result from being unable to afford the time or money necessary to gain employment skills.[55]

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47. N.J. STAT. ANN. § 2A:34-23 (West 1952). *See* note 21 *supra*.

48. Robins v. Robins, 106 N.J. Eq. 198, 150 A. 340 (1930).

49. Mowery v. Mowery, 38 N.J. Super. 92, 102-03, 118 A.2d 49, 55 (App. Div. 1955). *Mowery* contains a survey of cases in which courts have ignored a husband's actual earnings and have made awards based upon the court's determination of what he could be making.

50. Hess v. Hess, 134 N.J. Eq. 360, 362, 35 A.2d 677, 678 (1943). In *Hess*, the husband claimed that he was able to make a net profit of only 12% of his gross business receipts. The court held that any reasonable businessman could do better and, therefore, based a support award on an amount the court felt was more reasonable.

51. In Turi v. Turi, 34 N.J. Super. 313, 112 A.2d 278 (App. Div. 1955), the court, in dicta, stated that a wife should be encouraged to seek employment. *Id.* at 323, 112 A.2d at 284. The court apparently paid only lip service to the notion because no New Jersey court has since required this.

52. Turner v. Turner, 158 N.J. Super. at 317-18, 385 A.2d at 1282.

53. *Id.*

54. *Id.*

55. *Id.*

Encouragement to actually develop these skills comes through a predetermination of a realistic time within which the projected earning capacity should be realized.[56] The alimony award automatically terminates at the end of this period. This automatic termination of support provides an inducement[57] to reach the determined earning capacity within the established period. As a result, both spouses contribute to the reciprocal obligation of support according to earning capacity in a way that allows full development of such capacity.

IV. LIMITATIONS ON REHABILITATIVE ALIMONY

Turner recognizes that rehabilitative alimony is not a proper disposition in all cases. The opinion suggests that this type of award is not workable when, for example, the supported spouse is elderly and has little job experience.[58] The issue of whether rehabilitative alimony should be employed is a determination to be made by the trial court. *Turner* also envisions a partial use of rehabilitative alimony in conjunction with a traditional award of alimony which has no automatic termination date.[59] A supported spouse may never be able to achieve an earning capacity that will enable him or her to live in the manner which the equities demand. In this situation, a court may order a permanent award of alimony as a supplement to the amount that the supported spouse can earn through a realization of full economic potential. This allows a court to encourage a supported spouse to obtain employment skills, yet to recognize that there is no realistic possibility that the supported spouse will achieve self-support at a level which the equities demand.

Although rehabilitative alimony is not appropriate in all situa-

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56. *Id.* at 317, 385 A.2d at 1282.

57. *Turner* recognizes that any method designed to encourage a person to become employed must have "teeth" in it. *Id.* If this were not the case, the court would lose the ability to know with relative certainty that such employment will occur. It is the "teeth" of automatic termination that induces the supported spouse to seek self-support.

58. The court maintains, however, that "such women are the exception and not the rule." *Id.* In Khalaf v. Khalaf, 58 N.J. 63, 275 A.2d 132 (1971), the New Jersey Supreme Court refused to require a wife to work to support herself when the husband had sufficient income to support her, and the wife had developed no employment skills during the 26-year marriage. The court left unanswered the question whether the result would have been different had there been a short-term marriage involved and a younger supported spouse.

59. Turner v. Turner, 158 N.J. Super. at 318-19, 385 A.2d at 1282.

tions, it does provide a useful tool for achieving the goals outlined above. It provides the court with the means to encourage spousal self-support. Once a spouse does become self-supporting, the dead marriage can be put to rest further, and both parties can plan a future with minimal regard to the past. Furthermore, if the support obligations of the parties can be established effectively during the divorce trial, then future recourse to the courts will be minimized.

V. REHABILITATIVE ALIMONY ATTACKED

In *Arnold v. Arnold*,[60] the only published appellate court decision in New Jersey to discuss the use of rehabilitative alimony, the court dealt a heavy blow to this concept by specifically disapproving the use of rehabilitative alimony as outlined in *Turner*. The appellate division disapproved the use of rehabilitative alimony as a means of encouraging spousal self-support except in the most extraordinary circumstances.[61] The court never defined what circumstances would make rehabilitative alimony a permissible tool but merely stated that no extraordinary circumstances could be found in the trial record. As a result, the order was modified to exclude the termination date.[62] Since the court did not define the extraordinary circumstances in which it would allow an award of alimony, it is difficult to determine whether the concept has died a practical death or remains viable in a limited form.[63]

Arnold is not significant because of the specific result it achieved; the opinion does not relate enough relevant facts. It is significant, however, because of the reasons it offers for disap-

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60. 167 N.J. Super. 478, 401 A.2d 261 (App. Div. 1979). *See* text accompanying notes 3-6 *supra* for the facts and holding of *Arnold*.

61. *Id.* at 481, 401 A.2d at 262.

62. *Id.* at 481, 401 A.2d at 263.

63. There is some support for the proposition that the "extraordinary circumstances" exception of *Arnold* is nothing more than a code for the complete disapproval of rehabilitative alimony. In the recent unreported appellate case of *Osmun v. McGowan*. No. A-1979-78 (N.J. Super. Ct., App. Div. Aug. 17, 1980), *cert. granted*, 106 N.J.L.J. 364 (1980), the New Jersey Superior Court, Appellate Division refused to analyze the factual merits of a trial judge's award of rehabilitative alimony. Instead, the appellate court cited *Arnold* as creating a blanket prohibition of the use of rehabilitative alimony and it reversed the termination date of the award. *Id.*

The New Jersey Supreme Court, however, has recently lent support to the viability of rehabilitative alimony. In dicta, nestled in a footnote, New Jersey's high court expressed the opinion that it did not share *Arnold*'s view that unusual circumstances are needed to employ rehabilitative alimony. Unfortunately, no clearer guidelines for its use were offered. Lepis v. Lepis, 83 N.J. 139, 155 n.9, 416 A.2d 45, 53 n.9 (1980).

proving rehabilitative alimony and for its suggestions of alternatives. *Arnold* at no point takes issue with the goals of rehabilitative alimony. Rather, the court merely states that an automatic termination provision, which is the tool used to implement rehabilitative alimony, is not a proper method for achieving those goals.[64] *Arnold* suggests that two alternatives, molding the quantum[65] of alimony and adjusting the equitable distribution of property,[66] are better suited to meeting those goals. Unfortunately, the *Arnold* court's objection to automatic termination provisions is not well-founded, and its suggested alternatives are not workable.

A. *Automatic Termination*

Arnold argues that automatic termination of alimony is generally unwarranted since the awards are always modifiable in the future based upon a change of circumstances of the parties.[67] If a supported spouse does indeed become self-supporting, then the award can always be terminated through modification by the court. *Arnold* relies on the prior New Jersey decision of *Stout v. Stout*[68] to support the proposition that a court should not automatically reduce alimony based upon the possible happening of a future event as the award is always modifiable if the event actually occurs.[69] In *Stout* the trial court ordered that alimony would cease upon the sale of the matrimonial abode. The sale was to take place two years after the judgment of divorce. The appellate court reversed, arguing that the cessation date was arbitrary because it was not linked to any finding that the sale of the matrimonial abode would in any way affect the support status of the parties.[70] Contrary to the interpretation of the court in *Arnold*, *Stout* more correctly stands for the proposition that automatic reduction of alimony should not be based upon the happening of a future event unless there is a finding that the future event will substantially affect the needs of the supported spouse. Since a court in awarding rehabilitative alimony must make such prior findings,[71] rehabilitative alimony does not violate the rationale of *Stout*.

64. *Id.* at 480, 401 A.2d at 262.
65. *Id.* at 480, 401 A.2d at 263.
66. *Id.*
67. *Id.* at 480, 401 A.2d at 262.
68. 155 N.J. Super. 196, 382 A.2d 659 (App. Div. 1977). In *Stout*, the parties were divorced after an 18-year marriage. They had four children aged 9 through 16 at the time of the divorce.
69. 167 N.J. Super. at 480, 401 A.2d at 262.
70. Stout v. Stout, 155 N.J. Super. at 205, 382 A.2d at 663.
71. Turner v. Turner, 158 N.J. Super. at 315, 385 A.2d at 1280-81.

The court in *Arnold* argues that determination of a supported spouse's ability to become self-supporting, as well as the date that this will occur, requires too much speculation and, therefore, should not be relied on when fashioning an alimony award. Accordingly, the opinion suggests that these determinations are not a proper basis upon which to make a definite order addressing the parties' support needs. It is, however, precisely because of the New Jersey view that alimony judgments are always modifiable[72] that courts should be allowed to broaden the area of permissible inference to include what otherwise might seem to be impermissible speculation.[73] If the award were not modifiable upon automatic termination, then justice might require automatic termination to be ordered only upon a finding of great certainty that "rehabilitation" will occur.[74] Since the award is modifiable, the degree of certainty necessary to make the award is lessened. This modification procedure serves to mitigate the severity of the effect of nonoccurrence of the future event.[75]

Ordinarily, the party seeking a modification has the burden of showing a sufficient change of circumstances to justify the modification.[76] A finding for an award of rehabilitative alimony, in effect, creates a presumption that the supported spouse can become self-supporting within the time designated. If circumstances change so that this goal is no longer realistic, then the supported spouse may rebut the presumption by a showing of this change of circumstances. The supported spouse may then seek modification for a longer fixed term or for traditional permanent alimony. This pre-

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72. Berkowitz v. Berkowitz, 55 N.J. 564, 569, 264 A.2d 49, 52 (1970); Martindell v. Martindell, 21 N.J. 341, 352, 122 A.2d 352, 357 (1956); O'Hara v. O'Hara, 137 N.J. Eq. 369, 375, 44 A.2d 169, 172 (1945).

73. The Florida courts, which are specifically authorized by statute to award rehabilitative alimony, offer this caveat: "[C]are must be taken to avoid confusing the general with the specific and mistaking the promise of the future for the reality of the present." Sisson v. Sisson, 336 So. 2d 1129, 1131 (Fla. 1976). Nevertheless, Florida courts are able to make those determinations.

74. In Johnson v. Johnson, 78 Wis. 137, 254 N.W.2d 198 (1977), the court held that an award of alimony for a specific period of time may not be modified under the Wisconsin statutory scheme. The court, therefore, said that the limitation should be geared to a certain event that will eliminate the present impediment to work. It called such a limited award a "two-edged sword." *Id.* at 146, 254 N.W. 2d 203. It gives both parties certainty, but it does not allow modification.

75. In Morrison v. Morrison, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978), the California court held that "rehabilitative alimony" should only be used if the court retains jurisdiction to modify the award. It is only in this way that the court can oversee the possible injustices that might result from the award.

76. Schiff v. Schiff, 116 N.J. Super. 546, 563, 283 A.2d 131, 140 (App. Div. 1971).

sumption operates to encourage the supported spouse to gain the employment skills necessary to become self-supporting since he or she might be unable to sustain the burden of rebutting the presumption. Mere passage of time, without an attempt to become self-supporting, would not qualify as a sufficient change of circumstances to rebut the presumption. On the other hand, if the circumstances actually do show that the self-support goal cannot be met for reasons outside the control of the supported spouse,[77] then the modifiable nature of the award would temper the injustices that *Arnold* envisions. As this clearly demonstrates, New Jersey's system of modification is such that rehabilitative alimony can effectively encourage spousal self-support without the harsh effects that *Arnold* fears.

B. *Molding the Quantum of Alimony*

In rejecting the automatic termination feature of rehabilitative alimony, an alternative method of encouraging spousal self-support suggested by *Arnold* is molding the quantum of alimony.[78] Although the court fails to explain what this means, it is clear that merely molding the amount of support is not an effective substitute for the role automatic termination serves in encouraging spousal self-support. If the court is suggesting that alimony be awarded in amounts sufficient to satisfy a spouse's needs in his or her effort to gain employment skills, then the court's method is deficient because there is no incentive[79] to actually gain these skills. Since the higher award continues indefinitely until such skills are, in fact, acquired, the supported spouse could elect not to attain the skills, and no penalty would encourage their pursuit. This encouraging factor is the precise purpose that automatic termination serves.

If *Arnold* is suggesting that a court award a supported spouse less than is actually needed for the spouse's support so that there is incentive to seek employment,[80] the draconian implications of such

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77. Such reasons might include illness, unexpected obsolescence of skills, unavailability of employment due to market conditions, change in the care needs of children in custody, and any other unexpected change in physical, emotional or economic conditions.

78. 167 N.J. Super. at 481, 401 A.2d at 263.

79. *See* note 57 *supra* and accompanying text. *Turner* suggests that some "teeth" are necessary.

80. It is likely that this is precisely what *Arnold* is suggesting since it approvingly termed the award of alimony in that case "hardly a munificent amount designed to encourage indolence on the part of the recipient." Arnold v. Arnold, 167 N.J. Super. at 481, 401 A.2d at 263.

a system should lead to its rejection. This is especially apparent when comparison is made with the impact of rehabilitative alimony. Through rehabilitative alimony the supported spouse would receive an amount of alimony that would allow him or her to develop employment skills in an economic atmosphere in which he or she need not be burdened with meeting daily living costs.[81] The encouragement comes in the knowledge that by a certain date support will be terminated or reduced[82] so that a maximization of employment skills is in the supported spouse's best interest. Under the *Arnold* plan, the supported spouse would not have the opportunity to maximize employment skills. His or her first concern inevitably would be to provide funds to meet current living needs. This would place the supported spouse in the inequitable position of entering the job market at a competitive disadvantage. He or she would necessarily have to find a job without first having had the opportunity to increase his or her qualifications through skills development.

This kind of "encouragement" to seek employment seems contrary to one of the major underpinnings of rehabilitative alimony, which is a sensitivity toward neutralizing the detrimental economic impact that a marriage has on a supported spouse.[83] Under the *Arnold* approach, the supported spouse, who has foregone career development in favor of providing other marital functions, would be forced to seek employment without the opportunity to recover from this sacrifice to the marriage. It is clear that molding the quantum of alimony, regardless of the method the court in *Arnold* envisions, will not serve the goals of rehabilitative alimony as productively as would automatic termination. Providing higher awards alone will not serve as an encouragement to gain employment skills and employment. On the other hand, providing lower awards will impose too harsh a burden. *Arnold*'s suggested alternative is, unfortunately, not as viable as the method it disapproves.

C. *Adjusting Property Distribution*

Finally, *Arnold* suggests that a court adjust the distribution of property[84] upon divorce in order to give the supported spouse assets from which to draw for support. If this is done, the

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81. *See* note 55 *supra* and accompanying text.
82. *See* note 56 *supra* and accompanying text.
83. Turner v. Turner, 158 N.J. Super. at 318, 385 A.2d at 1282.
84. 167 N.J. Super. at 480, 401 A.2d at 263. *See also* note 22 *supra*.

extent of the supporting spouse's obligation will be lessened and made more certain. Property distribution addresses the goal of minimizing the support obligation so a supporting spouse can plan the future with fewer ties to obligations arising out of the dead marriage. While this approach does eliminate some of the ties to the dead marriage, it generally does not lead to a total extinction of the support obligation.[85] Today's society is geared toward the overencumbering of assets,[86] a situation which minimizes true equities in assets which could be used for support purposes. Additionally, in marriages of short duration there is often little marital property accumulated so there is often little to divide. As a result, the full intent of the goal usually is not met. This procedure rarely will be an effective substitute for rehabilitative alimony. Property distribution is a method that courts can use, to the extent that property is available, to effectuate an allocation of support obligation in conjunction with rehabilitative alimony; but *Arnold*'s attempt to attack rehabilitative alimony by pointing to property distribution is unjustified.

VI. CONCLUSION

Rehabilitative alimony, although struck with a heavy blow by *Arnold*'s disapproval of its use, hopefully is not yet dead in New Jersey. Instead, it continues to search for more concrete guidelines and definition. Recently the New Jersey Supreme Court Committee on Matrimonial Litigation proposed a rule change which makes reference to rehabilitative alimony.[87] Unfortunately, the committee

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85. *See* Scalingi v. Scalingi, 65 N.J. 180, 320 A.2d 475 (1974), in which the court awarded some alimony even when a substantial amount of property was distributed to the wife.

86. Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 MAINE L. REV. 1, 2 (1975).

87. The committee recommended a change of N.J. R. CIV. P. 4:79-11. The rule is entitled "Trial; Claims for Equitable Distribution of Property (Including Rehabilitative Alimony) and Child Support." The rule provides that when a matrimonial matter is listed for trial the parties must file a "Notice of Application for Alimony." The rule further provides that this notice must contain:

> (4) a statement of the work and employment history of the party applying for such an award, including a list of all positions of jobs held, the education of the party applying for an alimony . . . award, all skills of such party relevant to employability, the condition of his or her health and all other factors having relevancy to the issue of the length and duration of the alimony award to be made and whether the concept of *rehabilitative alimony* should be applied in making an alimony award.

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did not define the term, so it is unclear whether it is intended to embrace the concept as articulated in *Turner*, the limited concept suggested in *Arnold*, or some other concept not yet defined.

Because *Arnold* is the only reported New Jersey appellate case to confront the issue of rehabilitative alimony, it may have a chilling effect upon the use of this technique by the trial courts. Rather than so quickly dismissing rehabilitative alimony, *Arnold* should have taken the opportunity to define further the concept and to suggest specific guidelines for its use. *Arnold*'s suggested alternative methods of achieving the same goals will prove, in practice, less effective than the method employed by rehabilitative alimony.

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N.J.L.J. 107, 109 (1979) (emphasis added). The report does not give a definition of the term rehabilitative alimony nor does it discuss the goals to be achieved by its use. Thus, while it does give recognition to some concept of rehabilitative alimony, the report is not helpful in discerning how that concept should work.