

Oklahoma Law Review

Volume 44 | Number 4

1-1-1991

Support Alimony: The Uncertain State of the Law

Robert G. Spector

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Family Law Commons](#)

Recommended Citation

Robert G. Spector, *Support Alimony: The Uncertain State of the Law*, 44 OKLA. L. REV. 585 (1991), <https://digitalcommons.law.ou.edu/olr/vol44/iss4/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

OKLAHOMA LAW REVIEW

VOLUME 44

WINTER, 1991

NUMBER 4

SUPPORT ALIMONY: THE UNCERTAIN STATE OF THE LAW

ROBERT G. SPECTOR*

I. Introduction

In a rare moment of candor, the Oklahoma Supreme Court noted several years ago that its alimony decisions were “uncertain.”¹ Commentators have agreed that the area of support alimony is today’s enigma.² The reason for the present uncertainty and confusion in the law may be traced to the Oklahoma Supreme Court’s failure to recognize basic legislative changes in Oklahoma’s support alimony statutes.

Prior to 1976, the alimony statute — title 43, section 121 (formerly title 12, section 1276) — contained two statements regarding alimony. First, the statute provided:

When a divorce shall be granted by reason of the fault or aggression of the husband, the wife . . . shall be allowed such alimony out of the husband’s real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable

© 1991 Robert G. Spector.

* Professor of Law, University of Oklahoma. J.D., 1966, B.S., 1963, University of Wisconsin. The author wishes to express his appreciation to his research assistant, Julie Simmons, a third-year student at the College of Law. Her able assistance has greatly aided this as well as other projects of the author.

1. *Funnell v. Funnell*, 584 P.2d 1319, 1323 (Okla. 1979).

2. See Wagner & Grundy, *Support Alimony: Family Law’s Ever Evolving Enigma*, 60 OKLA. B.J. 3197 (1989); C. Thompson, *Preparation of an Alimony Case* (1990) (unpublished seminar presentation given at Oklahoma Bar Association Family Law Section CLE Melange IV, Oklahoma City, Okla., Sept. 28, 1990; Tulsa, Okla., Oct. 19, 1990).

either in gross or in installment, as the court may deem just and equitable.³

The final sentence of the statute provided:

In case of a finding by the court that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper.⁴

In 1976, the legislature amended the statute to eliminate the fault aspect.⁵ The sexes were equalized by removing references to husband and wife. The statute's final sentence was amended to authorize the court to set apart a portion of the separate property of the non-custodial spouse for child support.⁶ The second change was the enactment of title 43, section 134(A) (formerly title 12, section 1289(A)). After several amendments, section 134(A) required tribunals to distinguish between periodic payments pertaining to property division and those payments designated as support.⁷ The former continue until completed; the latter are subject to the provisions of subsections 134(B)-(G).

As noted above, prior to the amendments the major determinant of support alimony was fault. Many of the pre-1976 cases blended the concept of support alimony with the property division award.⁸ The amendments should have required courts to reconsider the basis for support alimony. All prior cases that used fault as the basis for support alimony or confused alimony and property concepts should have been eliminated as precedent. However, except for one case from the court of appeals, the basic statutory changes have been ignored.⁹ Both the supreme court and the court of appeals continue to cite pre-1976 cases as authoritative, resulting in what can, at best, be described as judicially-authorized confusion.¹⁰ The result mandates a discussion of the law that existed prior to 1976.

II. *The Law of Alimony 1908-1975*

A. *The Basis of Support Alimony*

1. *Sex*

The Oklahoma Supreme Court first defined alimony in *Poloke v. Poloke*,¹¹ as "an allowance which the husband pays, by order of court,

3. 12 OKLA. STAT. § 121 (1971).

4. *Id.*

5. 1976 Okla. Sess. Laws ch. 154, § 1.

6. *Id.*

7. 43 OKLA. STAT. § 134(A) (Supp. 1990).

8. *Barnett v. Barnett*, 158 Okla. 270, 13 P.2d 104 (1932); *Dobry v. Dobry*, 203 Okla. 327, 220 P.2d 698 (1950).

9. *See Bowman v. Bowman*, 639 P.2d 1257 (Okla. Ct. App. 1981).

10. *E.g.*, *Ford v. Ford*, 766 P.2d 950 (Okla. 1988) (citing *Eisenreich v. Eisenreich*, 323 P.2d 723 (Okla. 1958)); *Wood v. Wood*, 793 P.2d 1372 (Okla. App. 1990) (citing *Dowdell v. Dowdell*, 463 P.2d 948 (Okla. 1990)).

11. 37 Okla. 70, 130 P. 535 (1913).

to his wife for her maintenance while living separate from him, where no suit is brought for divorce, or during the pendency of a divorce suit or after the divorce is granted.”¹² However, in *Poloke*, the court could not find any authority requiring a former wife to pay alimony to her ex-husband.¹³ Accordingly, the trial court’s order requiring the wife to pay her husband \$50 a month in alimony was reversed.¹⁴

In subsequent cases, such as *Barnett v. Barnett*,¹⁵ the court did authorize the payment of alimony from a wife to a husband.¹⁶ The court based its decision on the last sentence of section 121, which allowed a portion of the separate property of the wife to be set aside to the husband when he had custody of the children. In *Barnett*, the court concluded that the addition of the last sentence to the statute in 1913 reflected an intention to “make the statutes relating to alimony equally applicable to both parties as a matter of common justice, and to cover the numerous cases where all the property is in the wife’s name.”¹⁷ The trial court’s decision granting the husband custody of the children and \$15,000 alimony was affirmed.¹⁸

2. Fault

An alimony award, according to the statute, required the court to determine whether the marriage dissolved because of the “fault or aggression” of the husband.¹⁹ It did not matter whether the wife was also at fault.²⁰ However, if the wife was denied a divorce, she could not receive alimony because she would not be living separate and apart for just cause.²¹

In some cases, the court stated that when the divorce was the husband’s fault the wife was entitled to alimony.²² In one case, the court held that the wife should be awarded alimony even if she did not request it in her pleading.²³ In *Dowdell v. Dowdell*,²⁴ the court went even further and stated that when the divorce was granted because of the husband’s fault, the wife was entitled to receive alimony “in a sum more commensurate

12. *Id.*, 130 P. at 535.

13. *Id.*

14. *Id.*

15. 158 Okla. 270, 13 P.2d 104 (1932).

16. *Id.*, 13 P.2d at 106.

17. *Id.*, 13 P.2d at 105.

18. *Id.*, 13 P.2d at 106-07; *see also* *Bowring v. Bowring*, 196 Okla. 520, 166 P.2d 415 (1946).

19. 43 OKLA. STAT. § 121 (Supp. 1990).

20. *See, e.g.*, *Smith v. Smith*, 275 P.2d 997 (Okla. 1954); *Adams v. Adams*, 30 Okla. 327, 120 P. 566 (1911).

21. *Davis v. Davis*, 61 Okla. 275, 161 P. 190, 192 (1916).

22. *Van Horn v. Van Horn*, 189 Okla. 624, 119 P.2d 825, 827 (1941); *Albert v. Albert*, 120 Okla. 172, 251 P. 476, 478 (1926).

23. *Kupka v. Kupka*, 190 Okla. 392, 124 P.2d 389, 390 (1942). *But see* *Dunham v. Dunham*, 777 P.2d 403, 405 (Okla. Ct. App. 1989) (if alimony is not raised at the trial-court level it cannot be considered on appeal).

24. 463 P.2d 948 (Okla. 1969).

with the mode of living to which she has become accustomed as defendant's wife."²⁵

In other cases, even though the divorce was granted because of the husband's fault, alimony was denied. The seminal case is *Seyller v. Seyller*.²⁶ The court reversed a \$1200 alimony judgment.²⁷ The marriage lasted only nine months.²⁸ The wife was a school teacher and was capable of earning her own living.²⁹ After the separation, she resumed living at her own residence where she lived before the marriage.³⁰ The court noted that she only lived with her husband for nine months. She received \$700 alimony pendente lite.³¹ The court found that this amount was more than sufficient.³² In other cases, the wife was denied alimony because she was too extravagant,³³ was already trained for a career,³⁴ had more money than her husband,³⁵ or, according to the trial court, did not need alimony.³⁶

3. Need

There was some question whether a court could allow alimony when the divorce was granted because of the wife's fault. Early cases did not discuss whether the wife could obtain alimony.³⁷ She was, however, clearly entitled to an equitable division of property regardless of fault.³⁸ In *Newman v. Newman*,³⁹ the court announced that fault was not required before the wife could be awarded alimony:

Under our statutes . . . where a divorce is granted the husband because of the faults of the wife, she is not as a matter of right entitled to alimony out of the husband's estate, but it is discretionary with the court to a very considerable extent, when

25. *Id.* at 952.

26. 96 Okla. 135, 220 P. 626 (1923).

27. *Id.*, 220 P. at 626.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012, 1024 (1933).

34. *Seddicum v. Seddicum*, 167 Okla. 420, 30 P.2d 156, 158 (1934) (no error to deny alimony when wife trained for office work and has been working).

35. *McCarty v. McCarty*, 193 Okla. 18, 141 P.2d 103, 106 (1943) (wife's accumulation of property and alimony from previous marriage between the parties means that she has a greater estate than he does).

36. *Peters v. Peters*, 539 P.2d 26, 27 (Okla. 1975) (no alimony awarded because wife received college degree during the marriage while being supported by her husband who did not have a college degree); *Blesch v. Blesch*, 204 Okla. 426, 230 P.2d 723, 726 (1951) (trial court's discretion not to award alimony sustained without reason); *Weaver v. Weaver*, 545 P.2d 1305, 1309 (Okla. Ct. App. 1975) (absent evidence of need it is error to award alimony).

37. *Hughes v. Hughes*, 131 Okla. 33, 267 P. 620, 621 (1928).

38. *Moody v. Moody*, 120 Okla. 128, 250 P. 916, 917-18 (1926); *Tobin v. Tobin*, 89 Okla. 12, 213 P. 884, 888 (1923); *Thompson v. Thompson*, 70 Okla. 207, 173 P. 1037, 1038 (1918).

39. 144 Okla. 160, 290 P. 179 (1930).

the property of the husband will justify it, to allow her alimony in such amount or amounts as not to leave her destitute or a charge upon society. This rule rests upon a humanitarian reason

...⁴⁰

Eventually the court used the same criteria to measure an alimony award to the wife regardless of fault. Without expressly so indicating, the court abandoned the language that the award was a humanitarian gesture to prevent the wife from obtaining welfare.⁴¹ Eventually, given that all divorces were granted on the grounds of incompatibility, the court rarely utilized any fault language.⁴² However, as late as the 1970s, the court would occasionally opine that if the incompatibility were the fault of the husband, alimony was required.⁴³ Hence, until very recently, trial courts often declared whose fault caused the incompatibility.⁴⁴

B. Determining the Size of the Alimony Award

The amount of alimony awarded was originally held to be within the trial court's discretion.⁴⁵ However, while generally noting the trial court's discretion, the supreme court tended to modify the alimony award. Rarely did the court indicate precisely why the trial court's alimony award was either inadequate or excessive.⁴⁶ The appellate courts' proclivity to substitute their judgment for the trial courts' reached its zenith in *Atteberry v. Atteberry*.⁴⁷ The trial court awarded \$84,000 in support alimony.⁴⁸ The

40. *Id.*, 290 P. at 180; *see also* *Chilton v. Chilton*, 207 Okla. 467, 252 P.2d 121 (1952); *Herd v. Bilby*, 199 Okla. 437, 186 P.2d 833 (1947); *Haynes v. Haynes*, 190 Okla. 596, 126 P.2d 65 (1942) (\$1,000 is adequate alimony when divorce is granted because of wife's fault); *Whitehorn v. Whitehorn*, 178 Okla. 633, 64 P.2d 299 (1937); *Flaxman v. Flaxman*, 177 Okla. 28, 57 P.2d 819 (1936) (court is authorized to declare this rule because when the legislature fails to make a needed change, the courts are authorized to do so in recognition of the elastic nature of the common law).

41. *See* *Bessinger v. Bessinger*, 372 P.2d 870, 873 (Okla. 1962); *Eisenreich v. Eisenreich*, 323 P.2d 723 (Okla. 1958); *Murphy v. Murphy*, 276 P.2d 920, 924 (Okla. 1954).

42. *See* *Zink v. Zink*, 390 P.2d 504 (Okla. 1964) (incompatibility divorces are not those where the conduct of either party constitutes grounds for divorce). The court grounded itself on general language to justify the trial court's award, a situation much like today's cases. *Id.* at 508; *see, e.g.*, *Kirkland v. Kirkland*, 488 P.2d 1222 (Okla. 1971) (alimony award based on wife's need and husband's ability to pay because he has inherited a substantial sum of money).

43. *See* *Dowdell v. Dowdell*, 463 P.2d 948, 949 (Okla. 1969).

44. *See, e.g.*, *Stansberry v. Stansberry*, 580 P.2d 147, 150 (Okla. 1978).

45. *See, e.g.*, *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977); *Mitchell v. Mitchell*, 385 P.2d 462 (Okla. 1963); *Bishop v. Bishop*, 194 Okla. 209, 148 P.2d 472 (1944); *Winslow v. Winslow*, 156 Okla. 260, 10 P.2d 666 (1932); *Doutt v. Doutt*, 73 Okla. 213, 175 P. 740 (1918); *Hildebrand v. Hildebrand*, 41 Okla. 306, 137 P. 711 (1913).

46. *See, e.g.*, *Warr v. Warr*, 386 P.2d 639 (Okla. 1963) (alimony reduced from \$210,000 to \$105,000, no reason given); *Wilson v. Wilson*, 198 Okla. 318, 177 P.2d 1020 (1947) (alimony reduced from \$3,000 to \$1500, "given all the circumstances"); *Sango v. Sango*, 105 Okla. 166, 232 P. 49 (1924); *Derritt v. Derritt*, 66 Okla. 124, 168 P. 455 (1917) (trial court's award of alimony modified as "inequitable").

47. 554 P.2d 1370 (Okla. 1976).

48. *Id.* at 1371.

court of appeals reduced it to \$27,000.⁴⁹ The supreme court concluded that \$72,000 was the appropriate amount.⁵⁰ However, Justices Hodges and Barnes, while concurring in reversing the appellate court, decided that the correct amount was \$42,000.⁵¹ Justices Simms and Doolin thought the trial court was correct.⁵² None of the judges indicated why their particular figures were correct. This willingness of the appellate courts to substitute their sums without reasoning for the trial courts' award amounts remains a hallmark in appellate alimony litigation.

In *Bowman v. Bowman*,⁵³ the court of appeals noted that, prior to the 1976 amendments, the supreme court approved a number of criteria as circumstances the court can consider when awarding alimony. Many of these criteria are duplicative. No court has ever suggested that all criteria should be examined in each case. Additionally, for every case cited there is usually another case that holds precisely the opposite upon the same or similar set of facts.

1. *Inheritance Loss*

The wife's loss of the right of inheritance from the husband and the expectation of a future inheritance from the husband are occasionally mentioned in the cases. In *Harden v. Harden*,⁵⁴ the wife received \$300,000 in support alimony.⁵⁵ The amount represented approximately what the wife would have received by electing against her husband's will had he died.⁵⁶

There are cases in which the court has suggested that alimony be measured by the amount of the elective share.⁵⁷ However, in other cases the court has said that neither the amount of inheritance nor the value of an elective share has anything to do with alimony.⁵⁸

2. *The Husband's Capacity to Pay*

The husband's future earning capacity has often been a major consideration in determining the size of the alimony award.⁵⁹ Sometimes this

49. *Id.* at 1374.

50. *Id.*

51. *Id.* (Hodges, J., concurring, joined by Barnes, J.).

52. *Id.* (Simms, J., concurring, joined by Doolin, J.).

53. 639 P.2d 1257 (Okla. Ct. App. 1981).

54. 182 Okla. 364, 77 P.2d 721 (1938).

55. Because of the year and making allowances for inflation, this is probably the largest amount of alimony ever awarded.

56. *Harden*, 77 P.2d at 724.

57. See *Mosely v. Mosely*, 171 Okla. 150, 42 P.2d 237 (1935) (alimony reduced so that wife receives only one-third); *Stott v. Stott*, 122 Okla. 266, 254 P. 722 (1927) (alimony raised to \$4,000 to ensure wife receives one-third); *Derritt v. Derritt*, 66 Okla. 124, 168 P. 455 (1917).

58. *Smyth v. Smyth*, 198 Okla. 478, 179 P.2d 920, 923 (1947); *Miller v. Miller*, 186 Okla. 566, 99 P.2d 515, 519 (1940); *Burtrum v. Burtrum*, 184 Okla. 61, 84 P.2d 598, 599 (1938), *cert. denied*, 61 S. Ct. 9 (1940).

59. *Mathews v. Mathews*, 186 Okla. 245, 96 P.2d 1054, 1056 (1939); see also *Weekley v. Weekley*, 208 Okla. 651, 257 P.2d 622 (1953) (when husband has no estate, alimony can be

factor was called the earning capacity of the husband,⁶⁰ the probability of the husband's ability to progress financially,⁶¹ the husband's present ability to pay,⁶² or any future increase in the value of the husband's land or other property.⁶³ However, sometimes the court indicated that the husband's future earnings did not affect the measure of the alimony.⁶⁴

3. *The Wife's Need*

Also basic to the size of the alimony award was the wife's condition and means.⁶⁵ This factor included examining the wife's health,⁶⁶ her opportunity for employment,⁶⁷ her earning capacity and its relation to the marriage,⁶⁸ as well as her education.⁶⁹ However, occasionally the court would opine that the award of support alimony was not barred even though the wife had enough money to keep herself in her accustomed style.⁷⁰

4. *The Wife's Contributions*

Even though the role of the wife's contributions to the husband's estate is a property consideration, the court occasionally used it to justify an

figured upon his earning capacity); *Jupe v. Jupe*, 198 Okla. 100, 175 P.2d 976 (1947) (the husband's estate is of no consequence since he is regularly employed and possesses no estate).

60. *Funk v. Funk*, 319 P.2d 599, 601 (Okla. 1957); see also *Whayman v. Whayman*, 207 Okla. 371, 249 P.2d 1004 (1952) (alimony awarded even though the husband will have to find another job after retirement to pay it).

61. *Conrad v. Conrad*, 471 P.2d 892 (Okla. Ct. App. 1969) (ability to progress financially did not mean that the husband had to hold a job). See *Wise v. Wise*, 175 Okla. 310, 52 P.2d 175 (1935) (alimony can be awarded even though husband has never held a job because he has wealthy parents who have maintained him).

62. *Jupe*, 175 P.2d at 978.

63. *Johnston v. Johnston*, 440 P.2d 694, 697-98 (Okla. 1968); see also *Seelig v. Seelig*, 460 P.2d 433 (Okla. 1969) (alimony may exceed the total of the marital and separate estates, based on husband's earning capacity); *Swanson v. Swanson*, 207 Okla. 423, 250 P.2d 40 (1951) (evidence showed that husband's headright would become more valuable in the future, thus allowing for alimony).

64. *Laster v. Laster*, 370 P.2d 823 (Okla. 1962) (alimony reduced on appeal because at trial the husband was unable to work fulltime, even though testimony showed he would be able to resume fulltime employment); *Smyth v. Smyth*, 198 Okla. 478, 179 P.2d 920 (1947) (alimony award should be reduced when it appears husband would have to pay it out of his inheritance); *Miller v. Miller*, 186 Okla. 566, 99 P.2d 515 (1940) (allowance for alimony should be with a view to the circumstances of the parties as they are at the date of divorce; subsequent financial conditions should not be considered); *Moseley v. Moseley*, 171 Okla. 150, 42 P.2d 237 (1935) (alimony must be based on size of estate and cannot exceed the estate's value); *West v. West*, 114 Okla. 279, 246 P. 599 (1926) (same as *Miller*).

65. *Eisenreich v. Eisenreich*, 323 P.2d 723, 724-25 (Okla. 1958) (wife is handicapped).

66. *Henley v. Henley*, 428 P.2d 258, 260 (Okla. 1967).

67. *Kirkland v. Kirkland*, 488 P.2d 1222, 1227 (Okla. 1970) (wife untrained to earn a living); *Fitzer v. Fitzer*, 460 P.2d 888, 891 (Okla. 1969); *Kennedy v. Kennedy*, 461 P.2d 614, 616 (Okla. 1969).

68. *Conrad v. Conrad*, 471 P.2d 892, 893 (Okla. 1969).

69. *Kirkland*, 488 P.2d at 1227.

70. *De Roin v. De Roin*, 198 Okla. 430, 179 P.2d 685, 687-88 (1947).

alimony award.⁷¹ However, the court usually found this factor appropriately irrelevant to an alimony discussion.⁷²

5. *The Nature of the Marriage*

A factor of some importance in the fault era was whether the marriage was one of affection or convenience.⁷³ Such factors as the duration of the marriage and ages of the parties were also considered.⁷⁴ However, there are cases suggesting that the reason why the parties married is irrelevant.⁷⁵

6. *The Standard of Living*

The mode of living to which the wife had become accustomed during the marriage has been deemed important.⁷⁶ In one case, the supreme court granted certiorari solely to increase alimony from \$36,000 to \$48,000 based on the couple's standard of living.⁷⁷ However, the court has also said that the parties' station in life should not be used to allow the wife to continue to live in extravagance.⁷⁸

7. *The Degree of Fault*

Prior to 1976, fault was not only a basis for alimony but was also used to determine the size of the alimony award. The court considered the conduct of the parties.⁷⁹ In other cases the court dismissed fault as a factor in the alimony calculation.⁸⁰

8. *Children*

The ages of the children and the need to maintain a home for them were also factors in determining the amount of alimony.⁸¹ Other cases rejected

71. *Id.* (husband should pay because the wife supported the family for fifteen years and he owns land that produces an income).

72. *Van Horn v. Van Horn*, 189 Okla. 624, 119 P.2d 825, 827 (1941) (wife's lack of contributions toward the accumulation of the marital estate appear irrelevant in setting alimony).

73. *Dobry v. Dobry*, 203 Okla. 327, 220 P.2d 698, 700 (1950); *Mathews v. Mathews*, 186 Okla. 245, 96 P.2d 1054, 1057 (1939).

74. *Hughes v. Hughes*, 363 P.2d 155, 159 (Okla. 1961); *see also Whitehorn v. Whitehorn*, 178 Okla. 633, 64 P.2d 299 (1937) (when wife had married husband for his money she should not receive much alimony).

75. *Albert v. Albert*, 120 Okla. 172, 251 P. 476, 477-78 (1926) (for alimony purposes why wife married husband and what the nature of their marriage was does not matter).

76. *Dowdell v. Dowdell*, 463 P.2d 948, 952 (Okla. 1969) (the parties' station in life before the divorce); *Herndon v. Herndon*, 503 P.2d 545, 547 (Okla. 1972).

77. *Durland v. Durland*, 552 P.2d 1148, 1149 (Okla. 1976).

78. *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012, 1024 (1933).

79. *Kirkland v. Kirkland*, 488 P.2d 1222, 1227 (Okla. 1971); *see also Drake v. Drake*, 187 Okla. 1, 100 P.2d 887 (1940); *Doutt v. Doutt*, 73 Okla. 213, 175 P. 740 (1918) (amount of alimony justified because of husband's adultery).

80. *See, e.g., Noel v. Noel*, 206 Okla. 16, 240 P.2d 739 (1952) (alimony award should be reduced from \$1200 to \$700 even though husband is at fault; alimony should not be a penalty); *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012 (1933) (husband's fault does not justify awarding wife alimony).

81. *Price v. Price*, 484 P.2d 532, 536 (Okla. 1971); *see also Barnett v. Barnett*, 158 Okla. 270, 13 P.2d 104 (1932); *Gist v. Gist*, 537 P.2d 460 (Okla. Ct. App. 1975) (alimony justified because wife will find it impossible to raise a minor child with no special training and education).

this as a factor.⁸²

C. *Relationship to Property Division*

Prior to the creation of section 134 and its subsequent amendments from 1965-1979, the relationship between property division, monetary awards, and support alimony was obscure.⁸³ Fault was clearly necessary for an alimony award but irrelevant to the property division. Since, at the time, neither property awards nor alimony awards were modifiable or terminable, it rarely mattered what the trial court called the award. The following cases illustrate the confusion.

In *Barnett v. Barnett*,⁸⁴ the trial court awarded the husband alimony under the last sentence of the old version of section 121:

In the case of a finding by the court that such divorce should be granted on account of the fault or aggression of the wife, the court may set aside to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper.⁸⁵

The sentence does not use the word "alimony." The trial court's finding, upon which the award of alimony in the amount of \$15,000 was based, and which the appellate court affirmed, was as follows:

The court further finds that inasmuch as defendant has lived with plaintiff for a period of fifteen years, and has used his efforts during said time for the benefit of plaintiff and in the management of her property, and has not, during said time, used the plaintiff's property or money to improve his own business affairs, or to improve his own individual property, that said defendant is entitled to alimony.⁸⁶

Similarly, in *Dobry v. Dobry*,⁸⁷ the property of the husband consisted only of \$30,000 worth of stock, which had been acquired before marriage.⁸⁸ No property was awarded to the wife.⁸⁹ The trial court awarded her \$10,800 as alimony.⁹⁰ The supreme court upheld the award and reasoned in two not easily reconcilable sentences that "[t]he basic idea of alimony is that it is an allowance for the support of the wife. . . . Under the circumstances the

82. *Seddicum v. Seddicum*, 167 Okla. 420, 30 P.2d 156 (1934) (fact that wife has the children does not justify giving her alimony when she is trained as an office worker); *Kunc v. Kunc*, 186 Okla. 297, 97 P.2d 771 (1939).

83. *Funnell v. Funnell*, 584 P.2d 1319 (Okla. 1979).

84. 158 Okla. 270, 13 P.2d 104 (1932).

85. *Id.*, 13 P.2d at 105-06 (citing 12 OKLA. STAT. § 1289 (1971) amended by 1976 Okla. Sess. Laws ch. 154, § 1).

86. *Barnett*, 13 P.2d at 106.

87. 203 Okla. 327, 220 P.2d 698 (1950).

88. *Id.*

89. *Id.*

90. *Id.*

award in its nature is a division of the defendant's property arising from the plaintiff's former relation and the defendant's aggression."⁹¹

Given the extreme confusion of the pre-1976 cases, they should only be used as precedent with a large amount of caution.

III. *The Modern Law of Support Alimony*

A. *The Basis for Support Alimony*

The 1976 amendments to section 121 eliminated both fault and gender as bases for support alimony.⁹² As a result, most of the earlier cases which determined those issues should be obsolete. Unfortunately, only one court has decided what remains as the basis for support alimony. In *Bowman v. Bowman*,⁹³ the court concluded that with fault excised from the statute, "need has become the primary, if not the sole criterion as a basis for an alimony award."⁹⁴ The court went further and held that the need must be rationally connected to the marriage itself.

If the need arises out of or is aggravated by the marriage itself or some event connected to the marriage, i.e., illness, postponement of education, or any other cause rationally connected to the marriage, then it qualifies as a "basis" on which alimony should be properly granted where the circumstances of the parties otherwise justify an award of alimony.⁹⁵

In *Bowman*, the court concluded that the trial court erred in awarding any alimony to Ms. Bowman.⁹⁶ At the time of the marriage, Ms. Bowman had been employed by the Federal Aviation Administration (FAA) for seventeen years.⁹⁷ She owned her own home valued at \$33,000, a car, furnishings, and had \$1000 in savings.⁹⁸ During the two-year marriage, the wife lived with the husband, and the husband paid all the parties' expenses.⁹⁹ The wife allowed her disabled adult children to live in the house she owned prior to the marriage.¹⁰⁰ She also used her salary to support her children, one of whom was in college.¹⁰¹ When the parties divorced, she was in a

91. *Id.*, 220 P.2d at 700-01. For other cases to the same effect, see *Hildebrand v. Hildebrand*, 41 Okla. 306, 137 P. 711 (1913); *Sango v. Sango*, 105 Okla. 166, 232 P. 49 (1924); *Winslow v. Winslow*, 156 Okla. 260, 10 P.2d 666 (1932); *Turlington v. Turlington*, 189 Okla. 352, 117 P.2d 527 (1941); *De Roin v. De Roin*, 198 Okla. 430, 179 P.2d 685 (1947); *Jahn v. Jahn*, 276 P.2d 225 (Okla. 1954).

92. 1976 Okla. Sess. Laws ch. 154, § 1.

93. 639 P.2d 1257 (Okla. Ct. App. 1981).

94. *Id.* at 1263.

95. *Id.*

96. *Id.* at 1262.

97. *Id.* at 1259.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

better financial position than she had been prior to the marriage.¹⁰² The wife's need related solely to the financial drain caused by her children of a previous marriage.¹⁰³ Thus, the court stated, she did not suffer economically because of the divorce.¹⁰⁴ It followed that the trial court was in error in awarding her \$5,000 in support alimony.¹⁰⁵

When the court held that need is the sole basis for the award for support alimony, it continued a theme which had appeared earlier. In *Seyller v. Seyller*,¹⁰⁶ the court reversed a \$1200 alimony judgment.¹⁰⁷ The marriage lasted only nine months.¹⁰⁸ The wife was a school teacher, who was capable of earning her own living.¹⁰⁹ After the separation, she once again lived where she had resided before the marriage.¹¹⁰ According to the court, the \$700 alimony pendente lite was all that she should receive.¹¹¹ In most of the early cases in which the wife was denied alimony when the husband was at fault, it was because she could not demonstrate an economic need connected to the marriage.¹¹²

The *Bowman* court defined economic need as one resulting from "illness, postponement of an education or other cause."¹¹³ This idea has also been expressed in earlier cases. In *Conrad v. Conrad*,¹¹⁴ the parties divorced after a five-year marriage. The husband, an osteopathic physician, had acquired a new practice, a clinic, and a pharmacy in a new town during the marriage.¹¹⁵ The wife, on the other hand, resigned her job as an auditor and spent her time during the marriage tending to his children by a prior marriage "while giving him the stability of a home."¹¹⁶ The trial court did not award the wife alimony.¹¹⁷ This judgment, the supreme court held, was error.¹¹⁸ "The earning capacity of the defendant [wife] was virtually destroyed by the marriage, while the earning capacity of the plaintiff [husband] was enhanced during this period."¹¹⁹ The court awarded the wife \$10,000 in alimony.¹²⁰

102. *Id.* at 1262.

103. *Id.*

104. *Id.*

105. *Id.*

106. 96 Okla. 135, 220 P. 626 (1923).

107. *Id.*, 220 P. at 626.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Seyller v. Seyller*, 96 Okla. 135, 220 P.2d 626 (1923); *Seddicum v. Seddicum*, 167 Okla. 420, 30 P.2d 156 (1934).

113. *Bowman v. Bowman*, 639 P.2d 1257, 1263 (Okla. Ct. App. 1981).

114. 471 P.2d 892 (Okla. 1969).

115. *Id.* at 893.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Thus, it would seem that the need for alimony should be defined as an economic disparity between the spouses that has occurred during the marriage, as a result of the marriage, or has been exacerbated by the marriage. If the disparity has no relationship to the marriage, then no alimony should be awarded. As the court noted in *Bowman*, the fact that the husband has more money than the wife is not a basis for support alimony.¹²¹ If the trial record contains no evidence of need, the reviewing court will reverse.¹²²

B. Measuring the Support Alimony Award

1. The Trial Court's Discretion

Since the enactment of the new alimony statutes, the supreme court has consistently affirmed the trial court's award of alimony.¹²³ The same cannot be said about the court of appeals. Although that court has indicated the standard of review for an alimony award is not the substitution of the reviewing court's judgment for the trial court's,¹²⁴ it continues to modify or reverse almost as many alimony judgments as it affirms.¹²⁵ Between 1987 and 1990, the court of appeals decided forty support alimony cases by unpublished opinion.¹²⁶ In twenty-one of the cases, the court modified or reversed the trial court and affirmed only nineteen cases.¹²⁷ This percentage is somewhat higher than the general rate of modifications or reversals of trial court decisions in domestic relations cases.¹²⁸

2. The Scope of the Need Concept: Standard of Living

While all agree that the alimony recipient must show a marriage-related need to receive support alimony, there is extreme disagreement as to how that need should be measured. According to one theory, the alimony recipient is only entitled to income sufficient enough to make a transition to gainful employment.¹²⁹ In other jurisdictions, this concept is called rehabilitative alimony.¹³⁰ The other theory holds that upon showing need, an

121. *Id.* at 1262-63.

122. See *Mastromonaco v. Mastromonaco*, 751 P.2d 1106, 1108 (Okla. Ct. App. 1988).

123. See *Henderson v. Henderson*, 764 P.2d 156 (Okla. 1988); *Ford v. Ford*, 766 P.2d 950 (Okla. 1988); *Rice v. Rice*, 762 P.2d 925 (Okla. 1988); *Johnson v. Johnson*, 674 P.2d 539 (Okla. 1983); *Harmon v. Harmon*, 770 P.2d 1 (Okla. 1983) (rehearing denied in 1988); *Stansberry v. Stansberry*, 580 P.2d 147 (Okla. 1978) (reversing the court of appeals).

124. *Garvey v. Garvey*, 606 P.2d 618, 619 (Okla. Ct. App. 1980).

125. See, e.g., *Horn v. Horn*, 695 P.2d 561 (Okla. Ct. App. 1985) (modification); *Charles v. Charles*, 713 P.2d 1050 (Okla. Ct. App. 1985) (modification); *Agent v. Agent*, 604 P.2d 862 (Okla. Ct. App. 1979) (affirmance); *Primrose v. Primrose*, 663 P.2d 755 (Okla. Ct. App. 1983) (affirmance).

126. See Spector, *The Hidden Law, An Analysis of the Unpublished Family Law Opinions of the Court of Appeals and a Proposal for Publication* (pt. 1), OBA FAM. L. SEC. UPDATE, Mar. 31, 1991, at 1 (vol. 6, no. 1).

127. See *id.* (pt. 2), OBA FAM. L. SEC. UPDATE, June 30, 1991, at 13 (vol. 6, no. 2).

128. *Id.*

129. See, e.g., *McDowell v. McDowell*, 670 S.W.2d 518 (Mo. Ct. App. 1984); *Reback v. Reback*, 296 So. 2d 541 (Fla. Dist. Ct. App. 1974).

130. See *Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197; *Ellman, The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

alimony recipient is entitled to sufficient income to continue living in the same lifestyle that existed before the divorce.¹³¹ Current Oklahoma cases exhibit much confusion over the appropriate theory and its application.¹³²

Prior to 1976, one of the factors considered in determining the size of the alimony award was the standard of living the parties enjoyed prior to marriage. In *Dowdell v. Dowdell*,¹³³ the court stated that when the divorce was granted because of the husband's fault, the wife was entitled to receive alimony "in a sum more commensurate with the mode of living to which she has become accustomed to as defendant's wife."¹³⁴ In *Durland v. Durland*,¹³⁵ the supreme court relied on *Dowdell* and granted certiorari solely to increase alimony from \$36,000 to \$48,000 based on the couple's standard of living.¹³⁶ In *Stansberry v. Stansberry*,¹³⁷ the court approved a support alimony award of \$240,000 because

it would be erroneous to limit the alimony award to the bare necessary maintenance requirements, where, as here, there is full justification for a much larger award. The determination of the amount of alimony to be allowed in a divorce action *requires the consideration of the station in life of . . . the parties.*¹³⁸

However, in the first post-*Bowman* opinion on support alimony, the supreme court appeared to strike a different chord. In *Johnson v. Johnson*,¹³⁹ the wife raised on appeal the failure of the trial court to award support alimony. She had been married for thirty-two years, during which she worked intermittently.¹⁴⁰ She was not working at the time of trial.¹⁴¹ Writing for a 5-3 majority, Justice Opala noted that the wife had received property valued at \$116,024, consisting of the homestead, an office building, and a 90-acre undeveloped tract.¹⁴² He set out the following rule: "Where a substantial amount of spousal property is granted by the court, an alimony claim must be supported by proof of excess monetary needs to cushion the economic impact of transition and readjustment to gainful employment. Alimony is based on *demonstrated need.*"¹⁴³

131. While not necessarily advocating a sharing of earning capacity, the use of the concept of rehabilitative alimony in long-term marriages is unmercilessly criticized in Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988).

132. Compare *Rice v. Rice*, 762 P.2d 925 (Okla. 1985) and *Henderson v. Henderson*, 764 P.2d 156 (Okla. 1985) with *Ford v. Ford*, 766 P.2d 950 (Okla. 1988).

133. 463 P.2d 948 (Okla. 1970).

134. *Id.* at 952.

135. 552 P.2d 1148 (Okla. 1976).

136. *Id.* at 1149.

137. 580 P.2d 147 (Okla. 1978).

138. *Id.* at 150 (emphasis in original).

139. 674 P.2d 539 (Okla. 1983).

140. *Id.* at 545-46.

141. *Id.*

142. *Id.*

143. *Id.* at 546 (emphasis in original).

The burden of proof in support alimony cases lies with the person requesting the alimony.¹⁴⁴ In *Johnson* the record was silent on (1) the cost of maintaining the wife during the period of economic readjustment; (2) the amount of income from the income-producing property set aside to her; and (3) the length of time necessary for rehabilitation.¹⁴⁵ The supreme court could not presume need from a silent record, and therefore the trial court was affirmed.¹⁴⁶

Justice Opala relied on two cases for the statement that alimony is based on demonstrated need. In *Weaver v. Weaver*,¹⁴⁷ the parties had lived separately for several years.¹⁴⁸ They had entered into a separate maintenance arrangement under Virginia law.¹⁴⁹ The husband was captured in Vietnam and held prisoner.¹⁵⁰ Upon his release the wife sought a divorce and division of his prisoner-of-war funds as either property division or alimony.¹⁵¹ The trial court's order awarding part of the fund as support alimony was reversed by the court of appeals because there was no evidence of a "need for support."¹⁵² In the other cited case, *Kirkland v. Kirkland*,¹⁵³ the wife could do nothing but type slowly.¹⁵⁴ While this evidence clearly showed need, there was no evidence indicating when, if ever, Ms. Kirkland could be economically rehabilitated.¹⁵⁵

Justice Opala did not cite or discuss any of the cases where the award of alimony was based on the married couple's lifestyle. The language of *Johnson* strongly suggested that the only measure of support alimony is to ensure economic rehabilitation for the disadvantaged marital partner.

For the most part, after *Johnson*, the court of appeals accepted the rehabilitative alimony theory. In *Primrose v. Primrose*,¹⁵⁶ the trial court's refusal to award support alimony was affirmed because alimony is for need only, and the wife had sufficient income from the property division award to support herself.¹⁵⁷ In *Horn v. Horn*,¹⁵⁸ the support alimony award was reversed because there was no evidence in the record that the wife, a healthy 38-year-old woman, was in need.¹⁵⁹ The court also noted that the amount awarded provided her with more income than the family of four lived on before the divorce.¹⁶⁰ Finally, in *Charles v. Charles*,¹⁶¹ a \$500 temporary

144. *Id.* at 545.

145. *Id.*

146. *Id.*

147. 545 P.2d 1305 (Okla. Ct. App. 1975).

148. *Id.* at 1306.

149. *Id.*

150. *Id.*

151. *Id.* at 1308-09.

152. *Id.* at 1309.

153. 488 P.2d 1222 (Okla. 1971).

154. *Id.* at 1227.

155. *Id.*

156. 663 P.2d 755 (Okla. Ct. App. 1983).

157. *Id.* at 759.

158. 695 P.2d 561 (Okla. Ct. App. 1985).

159. *Id.* at 564.

160. *Id.*

161. 713 P.2d 1048 (Okla. Ct. App. 1985).

alimony award was reversed because the wife testified that she did not need all of the money she removed from the couple's bank accounts for living expenses.¹⁶² The court also noted the wife's economic needs were not included in the record.¹⁶³

However, not all of the court of appeals cases in the years following *Johnson* accept a rehabilitative alimony ideal. In *Hubbard v. Hubbard*,¹⁶⁴ the court of appeals doubled the trial court alimony award from \$1000 a month to \$2000 a month for ten years.¹⁶⁵ This amount, the court said, fully comported with the parties' standard of living prior to the divorce.¹⁶⁶ The court relied on *Dowdell* and stated that the trial court should consider the mode of living to which the wife had become accustomed during marriage.¹⁶⁷ *Johnson* and the ideal of rehabilitative alimony was not mentioned.

The cause célèbre which focused the attention of the Oklahoma bar on the issue of support alimony was *Silverstein v. Silverstein*.¹⁶⁸ The wife was awarded property valued at \$970,515.¹⁶⁹ She was free of debt and was receiving \$1600 per month in child support.¹⁷⁰ The court also awarded her alimony of \$8300 a month for ten years.¹⁷¹ The wife appealed, contending that the alimony award was insufficient.¹⁷² While the court of appeals cited *Bowman* to the effect that alimony depends upon need, it then noted that "need appears to have many meanings."¹⁷³ The husband called the court's attention to *Johnson* and suggested in his brief that an alimony award was inappropriate.¹⁷⁴ However, the court stated that the husband did not appeal the alimony award, and therefore the court could only consider *Johnson* as part of the argument against increasing the alimony award.¹⁷⁵ Given the context of the appeal, whether the alimony award should be increased beyond \$1 million, the court of appeals found the award proper.¹⁷⁶ The court also noted that the alimony constituted only 19% of the husband's monthly disposable income.¹⁷⁷

Following *Silverstein*, the supreme court added to the confusion with three inconsistent cases. In *Rice v. Rice*,¹⁷⁸ decided on July 12, 1988, the court dismissed an attempt by the wife to increase the amount of support alimony as follows:

162. *Id.* at 1050.

163. *Id.*

164. 56 OKLA. B.J. 407 (Okla. Ct. App. 1985), *withdrawn for other reasons*, 56 OKLA. B.J. 1633 (Okla. 1985).

165. *Id.* at 409.

166. *Id.* at 408.

167. *Id.*

168. 748 P.2d 1004 (Okla. Ct. App. 1987).

169. *Id.* at 1006.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1008.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. 762 P.2d 925 (Okla. 1988).

A claim for alimony for support must be supported by proof of excess monetary needs to cushion the impact of the transition from marriage and readjustment to gainful employment. The decision to grant alimony for support is discretionary with the trial court and will not be disturbed on appeal without a showing that the court abused that discretion. Neither showing has been made here. Accordingly, the judgment of the district court is Affirmed.¹⁷⁹

However, in *Ford v. Ford*,¹⁸⁰ decided on September 22, 1988, the court opined:

The husband appeals the award of support alimony. The wife asserts that the award of support alimony of \$2,000.00 per month for 24 months should not be reduced. The husband testified that his income from the practice of law after deducting taxes was \$4,300.00 per month at the time of the divorce. In light of the wife's monthly expenses and accustomed mode of living the award cannot be construed as an abuse of discretion. The wife received the benefit of an education while married, but has not been employed, except for a short period, since the beginning of the marriage. An education is relevant to determine the possibility of employment, and a possibility of employment is to be considered in determining alimony. However, this award for 24 months is not beyond the bounds of sound judicial discretion in the case before us.¹⁸¹

Finally, in *Henderson v. Henderson*,¹⁸² decided October 18, 1988, the court appeared to return to the *Johnson* standard:

Wife in this case was awarded the sum of \$57,000 in support alimony payable at \$2,000 per month for six months, \$1,500 per month for the next six months and \$1,000 per month thereafter. Wife indicated at trial that she had worked as a real estate broker prior to the marriage and was reentering that business since the last breakup of the marriage. Her claim for a greater alimony award is simply that the present award is inadequate to maintain the lifestyle to which she and her children by a previous marriage are accustomed. Although her children appear to be adults, wife appears to claim that both she and they should be supported to the same degree by husband that they were prior to the divorce. Wife's argument on this point does not indicate the nature of her need for maintenance beyond the award already made to her, nor does it recognize her own income producing capacity or the

179. *Id.* at 928 (citations omitted).

180. 766 P.2d 950 (Okla. 1988).

181. *Id.* at 954 (citations omitted).

182. 764 P.2d 156 (Okla. 1988).

time necessary to make the transition to self-support. In the absence of such evidence we will presume the correctness of the trial court's provision for wife's needs. See *Johnson v. Johnson*, 674 P.2d 539 (Okla.1983).¹⁸³

The court of appeals in *Wood v. Wood*¹⁸⁴ — the same panel as in *Silverstein* — added further confusion. The parties were married for twenty-seven years.¹⁸⁵ The husband was a successful financial consultant.¹⁸⁶ The wife worked only briefly during the marriage.¹⁸⁷ She raised the parties' children and helped care for the husband's relatives.¹⁸⁸ The court noted that she greatly assisted the husband socially and actively participated in school and civic functions.¹⁸⁹ The trial court awarded the wife a divorce on the ground of adultery and the husband a divorce on the ground of incompatibility.¹⁹⁰ The wife was awarded substantial property division, property-division alimony, and \$507,000 of support alimony payable over fifteen years.¹⁹¹

With regard to support alimony, the husband argued that the wife failed to prove sufficient need to justify the amount awarded.¹⁹² The court acknowledged that need of the recipient and the ability to pay control the award of support alimony.¹⁹³ In this case, the court noted that the wife's economic need grew out of the marriage because she had not been regularly employed over the couple's twenty-seven-year marriage.¹⁹⁴ She had no job training, and her college degree was twenty-seven years old.¹⁹⁵ While the evidence was clear that she was entitled to support alimony, the issue was whether she was entitled to over \$500,000.

The court of appeals held that when need is shown, the party requesting alimony is *entitled* to it in a sum "commensurate with the mode of living to which she has been accustomed as a wife."¹⁹⁶ The court cited the standard-of-living cases of *Dowdell v. Dowdell*¹⁹⁷ and *Stansberry v. Stansberry*¹⁹⁸ as authoritative.¹⁹⁹ It did not discuss, or even cite, the effect of the *Johnson* opinion on the calculation of support alimony.

183. *Id.* at 160.

184. 793 P.2d 1372 (Okla. Ct. App. 1990).

185. *Id.* at 1373.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1374.

191. *Id.*

192. *Id.* at 1375-76.

193. *Id.* at 1376.

194. *Id.*

195. *Id.*

196. *Id.*

197. 463 P.2d 948 (Okla. 1969).

198. 580 P.2d 147 (Okla. 1978).

199. *Wood*, 793 P.2d at 1376. This division of the court of appeals reaffirmed its commitment to lifestyle awards in *Archer v. Archer*, 813 P.2d 1059, 1062 (Okla. Ct. App. 1991). The court

Thus, both the supreme court and the court of appeals have left the bench and bar in disarray. It is apparent that the appellate courts do subscribe to both rehabilitative and lifestyle approaches to alimony. A case that attempts to determine when each approach applies is essential.

3. *Scope of the Need Concept: Income from Property Division Alimony*

In *Johnson v. Johnson*,²⁰⁰ the court held that in measuring need, it is necessary to look at the amount of income from income-producing property set aside to the wife.²⁰¹ One oft-raised issue is whether a court should deny support alimony if a spouse is receiving a sufficient amount of property division alimony each month to cover that spouse's needs. In *Carter v. Carter*,²⁰² the husband agreed at the time of the divorce in 1984, to pay \$360,000 in support alimony at \$3000 per month for 120 months.²⁰³ He also agreed to pay property division alimony beginning in 1987 at a rate of \$5,772.41 per month, with a total of \$502,000.²⁰⁴ On December 30, 1986, the husband filed a motion to modify the amount of support alimony, claiming that the wife's receipt of property division alimony constituted a change in circumstances which would justify modifying or eliminating support alimony.²⁰⁵ The trial court reduced the amount of support alimony; however, it extended the number of payments.²⁰⁶ The trial court's decision was affirmed on appeal.²⁰⁷

The court of appeals affirmed the trial court's refusal to consider property division payments when determining the wife's need for support alimony.²⁰⁸ The court held that these were not income but rather monetary payments in lieu of the property she should have received.²⁰⁹ The trial court could look to the income earning potential of the property division alimony award but it would be improper to require the wife to liquidate her property to provide for her support.²¹⁰

Carter is the court's first attempt to grapple with the precise point. Courts should be consistent when considering the need for alimony and the ability to pay alimony. Thus, when determining whether the proposed recipient of alimony has received sufficient marital property to cushion the economic

said that the pre-divorce standard of living had long been a factor in setting alimony. It then extended that factor to child support and approved a trial court award in excess of the top amount listed in 43 OKLA. STAT. § 119 (Supp. 1990). *Archer*, 813 P.2d at 1061.

200. 674 P.2d 539 (Okla. 1983).

201. *Id.* at 546.

202. No. 70,652 (Okla. Ct. App. Tulsa Dec. 19, 1990).

203. *Id.*, slip op. at 2.

204. *Id.*, slip op. at 4.

205. *Id.*, slip op. at 3.

206. *Id.*, slip op. at 3.

207. *Id.*, slip op. at 1.

208. *Id.*, slip op. at 3.

209. *Id.*, slip op. at 4.

210. *Id.*, slip op. at 4-5.

transition to single status, the court should only consider the *income* produced by the property, which would alleviate the future need for support. To the extent that the payor of alimony is not required to liquidate any of his share of marital property to pay alimony, principles of equality require that the recipient should not be required to liquidate any of her marital property in order to provide for daily living expenses. It should therefore be error to consider the receipt of property division alimony in determining whether support alimony should be ordered.²¹¹

4. *Measuring the Alimony Award: Proving Need and the Ability to Pay*

In addition to showing need on the part of the recipient, it is necessary to show that the payor has the ability to pay alimony.²¹² The court of appeals will examine the entire record to determine if the amount ordered is beyond the payor's ability. In *Carroll v. Carroll*,²¹³ the amount ordered came to 57% of the payor's estimated gross income and left him only \$1,083 for taxes and his own maintenance.²¹⁴ The court modified the alimony downward.²¹⁵ The court approved imputing income to the payor to determine his ability to pay.²¹⁶ While it is proper to do so, counsel should carefully base the imputation on prior labor experience. Thus, in *Carroll* the trial court heard witnesses concerning the amount that the husband could earn based on his prior earning record.²¹⁷ However, in *Sugerman v. Sugerman*,²¹⁸ the trial court imputed a \$30,000 annual salary to the wife in order to determine whether she needed alimony.²¹⁹ The court of appeals held that this practice was improper because the wife had no history of earning that amount. Indeed, the wife had never worked at all, and the figure was based on her testimony about speculative future earnings.²²⁰

In considering available funds for the alimony award, the attorney must distinguish between those funds available for property division and those

211. Otherwise, the appellate courts have shown a willingness to review the entire record to determine whether the evidence realistically indicates that the level of support alimony awarded was warranted. For example, in *Braatz v. Braatz*, No. 71,458 (Okla. Ct. App. Tulsa, June 26, 1990), the court reduced the alimony award because the wife's estimate of her expenses was inflated. She included the fair rental value of a residence that was part of the marital property awarded to her and an amount for child care when her parents cared for the child. In fact her parents did not charge for caring for the child and she did not have to pay rent for the property she owned. For a further discussion of how to prove need and ability to pay, see C. Thompson, *supra* note 2.

212. For an excellent discussion, see C. Thompson, *supra* note 2.

213. No. 71,233 (Okla. Ct. App. Oklahoma City Aug. 21, 1990).

214. *Id.*, slip op. at 5.

215. *Id.*

216. *Id.*

217. *Id.*, slip op. at 4.

218. No. 71,628 (Okla. Ct. App. Tulsa Feb. 6, 1990), *cert. denied*, 61 OKLA. B.J. 1529 (Okla. 1990) (Opala, Hargrave, JJ., dissenting).

219. *Id.*, slip op. at 5.

220. *Id.*, slip op. at 6-7.

funds available for support alimony and child support. This rule is particularly true for government benefits. In some cases, Congress or the Oklahoma legislature has declared that the funds cannot be divided as marital property.²²¹ However, Congress will often allow the same funds to be used to support the recipient's family.²²² Each government program must be separately examined to determine whether the benefits may be used as a source of funds for alimony. Thus, social security disability benefits and workers' compensation funds are available.²²³ However, funds in the Oklahoma Public Employees Retirement System cannot be executed upon to satisfy an alimony judgment.²²⁴

One argument that often arises when determining ability to pay occurs when marital property that is awarded to a spouse in equitable distribution is then considered as a source of income in determining that spouse's support alimony obligation. An asset that produces an income stream — such as a pension or accounts receivable — is the type of asset that most frequently produces a claim of “double dipping.”

In *Holeman v. Holeman*,²²⁵ the wife's alimony award was reduced on appeal from \$200 to \$90 per month and the gross amount from \$16,600 to \$13,410.²²⁶ The wife also contended that she should receive a portion of the husband's retirement benefits.²²⁷ The husband was due to retire in two years from the postal service with a monthly benefit of \$260.²²⁸ The court denied the wife's request.²²⁹ It noted that the husband would be obligated to pay the wife \$90 in support alimony.²³⁰ If the pension were divided equally between the parties, the husband would only have \$130 a month.²³¹ If he were required to pay the \$90 alimony out of his share of the pension benefits, he would be left with only \$40 a month.²³² Obviously, this would be grossly inequitable. The court held:

If the retirement fund is divided at this time as jointly acquired property this would in effect destroy plaintiff's future livelihood

221. See, e.g., *Mansell v. Mansell*, 490 U.S. 581 (1989) (Congress has not authorized state courts to divide military and veteran disability benefits as marital property).

222. See, e.g., *Rose v. Rose*, 481 U.S. 619 (1987) (military and veteran disability benefits may be used as a source of alimony and child support).

223. *Meadows v. Meadows*, 619 P.2d 598 (Okla. 1980) (social security disability benefits and workers' compensation funds available for alimony); *Commons v. Bragg*, 183 Okla. 122, 80 P.2d 287 (1930) (workers' compensation funds available for alimony); *Huskey v. Batts*, 530 P.2d 1375 (Okla. Ct. App. 1974) (social security disability benefits available for alimony).

224. *Udall v. Udall*, 613 P.2d 742 (Okla. 1980); see also *Sessions v. Sessions*, 525 P.2d 1269 (Okla. Ct. App. 1974) (court may not order National Service Life Insurance policy to be kept in force on behalf of wife until alimony judgment is paid).

225. 459 P.2d 611 (Okla. 1969).

226. *Id.* at 613.

227. *Id.*

228. *Id.*

229. *Id.* at 614.

230. *Id.*

231. *Id.* at 613-14.

232. *Id.* at 614.

and means of complying with the alimony award. The trial court obviously took into consideration the retirement fund in regard to setting an award for alimony out of plaintiff's future income or earning capacity. It would be unfair to divide the retirement fund and then make a provision for payment of the majority of the alimony award out of his monthly retirement income.²³³

This solution is clearly correct when considered as a matter of support alimony. If the trial judge divided the pension, the husband would not have the ability to pay, and the support alimony award would have to be vacated. On the other hand, if the pension in *Holeman* had been divided, it is doubtful whether the wife would have qualified for support alimony.

The *Holeman* decision was later misinterpreted. In *Baker v. Baker*,²³⁴ the court held that *Holeman* required that the pension could only be utilized for support alimony purposes and thus could not be considered marital property.²³⁵ *Baker* was departed from in *Carpenter v. Carpenter*,²³⁶ which held that the husband's pension and profit sharing plan was marital property.²³⁷ The *Carpenter* trial court awarded the pension plan to the husband with offsetting benefits to the wife.²³⁸ The value of the pension and profit sharing plan was \$163,278, which constituted over 50% of the value of the husband's portion of the marital estate.²³⁹ The wife was also awarded support alimony of \$162,000, payable at \$1500 a month.²⁴⁰ Both the property division and the alimony award were upheld on appeal.²⁴¹

When reviewing prior Oklahoma case law, the court in *Carpenter* indicated that *Holeman* is authority for two propositions: (1) a pension may not be divided as marital property and utilized as the basis for an alimony award; and (2) "if the husband's financial circumstances are such that a division of a pension as jointly acquired property would destroy his future livelihood and means of complying with an alimony award, it would be unfair to divide the pension and then make provision for the payment of the majority of an alimony award out of his monthly retirement income."²⁴²

However, in *Greer v. Greer*,²⁴³ Justice Lavender correctly noted that a reading of *Holeman* indicates that only the second proposition was before

233. *Id.*

234. 546 P.2d 1325 (Okla. 1976), *overruled*, *Carpenter v. Carpenter*, 657 P.2d 646 (Okla. 1983).

235. *Id.* at 1326.

236. 657 P.2d 646 (Okla. 1983).

237. *Id.* at 650-51.

238. *Id.* at 649.

239. *Id.*

240. *Id.* at 648.

241. *Id.* at 653.

242. *Id.*

243. 807 P.2d 791 (Okla. 1991).

the court.²⁴⁴ Indeed, in *Carpenter* itself, the court's affirmation of the support alimony award required that the husband pay the support alimony award out of the pension and profit-sharing receipts.²⁴⁵ Thus, the language and the result in *Carpenter* are at odds as to whether dual consideration is allowed in Oklahoma.

In *Greer* the wife had returned to court to claim a portion of her ex-husband's military pension.²⁴⁶ The husband argued that the trial court had "taken the pension into account" in originally awarding support alimony; hence, the pension could not now be divided as marital property.²⁴⁷ The court disagreed because the record did not indicate that by dividing the pension the husband would be unable to comply with the alimony award.²⁴⁸

Greer should categorically end the argument that an asset cannot be divided as marital property and at the same time provide support alimony. Thus, the practice of some judges of either dividing accounts receivable as marital property or providing support alimony has no basis. Instead, the issues of property division and support alimony should both be examined on their own merits.

The following suggested method depends upon how the pension or profit-sharing plan is divided.

(a) *Unmatured pension and profit-sharing plan awarded to employee-spouse with offsetting property awarded to the non-employee spouse.*

In this situation the pension, usually a defined-benefit plan,²⁴⁹ is awarded to the employee-spouse at its present value.²⁵⁰ The non-employee spouse receives offsetting property, usually equal to one-half of the value of the marital portion of the pension from the rest of the marital estate. The value of the marital property received by the non-employee spouse may be considered, but only to determine the amount of the support alimony

244. *Id.* at 795.

245. *Carpenter v. Carpenter*, 657 P.2d 646, 651 (Okla. 1983). Justices Barnes and Opala noted this point in their dissent in *Carpenter*. *Id.* at 653-54. The basis of their disagreement with the majority was a perceived double charge against the pension. They took the position that a pension could be found to be marital property and divided, or be found to be separate property and utilized as the basis for a support alimony award, but not both. *Id.*

246. *Greer*, 807 P.2d at 795. The court found that the prohibition against retroactive modification of property division awards did not apply in this case because the parties had otherwise acquiesced in their settlement agreement. *Id.*

247. *Id.*

248. *Id.*

249. A defined-benefit plan is the most common type of pension plan. Generally, the employer is obligated to provide a certain monthly or annual benefit upon retirement which is paid from the date of retirement until the date of death. The benefit to be paid upon retirement will be arrived at by the use of a mathematical formula. Frequently the formula will be a percentage of "relevant compensation" multiplied by the number of years of credited employment. Generally, in a defined benefit plan, a separate account does not exist for each participant. The employer contributes periodically to one large fund from which all benefits are paid. For a discussion of employment benefits in property division, see R. SPECTOR, *FAMILY LAW: OKLAHOMA STYLE* 374-91 (1991).

250. See the discussion in *Pulliam v. Pulliam*, 796 P.2d 296 (Okla. 1990), and Spector, *Methods of Distributing Pension Benefits*, OBA FAM. L. SEC. UPDATE, Oct. 1989, at 6 (vol. 4, no. 3).

to the extent that the property produces income in the future, which would alleviate the need for support. However, the value of the pension awarded to the employee-spouse should not be considered when determining that spouse's ability to pay support alimony. The rationale for not considering the value of the pension for the employee-spouse is because the pension is not presently producing income that can be used to pay support alimony. Property that does not produce current income should not be considered in either the need for support alimony or the ability to pay support alimony. The reason has nothing to do with "double-dipping" but with the basis for support alimony.

Assume that support alimony is awarded to the non-employee spouse, and during the time that alimony is to be paid, the employee spouse retires and begins to receive the pension. In a modification proceeding, should the receipt of the pension benefits be considered? The answer to that question depends on the issue before the court. If the recipient spouse is contending that the receipt of the pension is itself a change of circumstances under title 43, section 134(E) that justifies an upward modification in support alimony, the answer should be "no." If the receipt of the pension increases the income of the payor spouse, then, by analogy to child support, an increase in the payor's income is not, by itself, such a change of circumstances that would justify an increase in support alimony.²⁵¹

The more common scenario is when the payor contends that retirement has reduced the income available for support alimony, and therefore a change of circumstances has occurred. However, if the payor's retirement was foreseen, it should have been calculated into the length and level of support alimony. Retirement under those circumstances would not constitute a change of conditions. This result is absolutely necessary because if retirement constituted a change of conditions, and if dual consideration of a pension were generally prohibited, practically all support alimony would end at the retirement of the employee-spouse. If the payor's retirement could not have been foreseen and is not for the purpose of avoiding the payment of support alimony, then, if the substitute of the pension for salaried earnings substantially reduces the income available to the payor, a change of circumstances may exist, and the reduced income of the payor may result in a lower alimony award.²⁵²

If either the recipient or the payor of alimony can show a change of circumstance — apart from the contemplated retirement of the payor — that would justify modification of support alimony under section 134(E), then the receipt of pension income can and should be considered in

251. *Cf. Wells v. Wells*, 648 P.2d 1223 (Okla. 1983). In *Colbert v. Wilson*, No. 73,257 (Okla. Ct. App. Oklahoma City Apr. 30, 1991), the court indicated that child support modification cases should be persuasive in interpreting § 134(E).

252. *Cf. Wilson v. Wilson*, 738 P.2d 1382 (Okla. Ct. App. 1987) (substantial decrease in supporting parent's income constitutes a change of circumstances justifying reducing child support).

determining the level of support alimony. Should the recipient spouse demonstrate that the need for alimony has increased, the next issue is whether the payor-spouse has the ability to pay. Income currently being received from the pension and profit-sharing plan is certainly relevant in determining the level of support alimony. Conversely, if the payor of the alimony can demonstrate that the need for support alimony has diminished, then the level of the payor's disposable income, including pension benefits, is also relevant to the amount of support alimony.

(b) *Unmatured pension and profit-sharing plan valued and divided but distribution postponed until received or, under a Qualified Domestic Relations Order (QDRO),²⁵³ until earliest retirement date of employee-spouse.*

Under this method, the pension is valued and the division of the marital portion is accomplished. However, neither party receives any portion of the pension at the time of the decree. Income from the pension will be received by the parties when the employee-spouse retires and begins to draw benefits. If a QDRO is used, then benefits may be received at different times by the spouses. The non-employee spouse may receive benefits at the earliest retirement age of the employee-spouse, but the employee-spouse does not draw benefits until actual retirement.

When this method of dividing the pension is used, the pension is irrelevant for the present setting of support alimony. Because neither spouse is receiving benefits, the value of the pension may not be used either to compute the need for support alimony or the ability to pay support alimony.

When the alimony-recipient spouse begins to receive benefits from the pension plan at the employee-spouse's earliest retirement, does this receipt constitute a change of circumstances under section 134(E)? The answer to this question should be "no." At the time of the divorce, the trial court presumably had before it the information concerning the present and future need of the recipient of alimony and the ability of the employee-spouse to pay. The future receipt of pension benefits should have been considered when determining the length and scale of the alimony payments. The receipt of pension benefits by either party is not a new matter unforeseen at the time of the original decree. It is a future event that was known when the decree was pronounced and should be an essential element of the support alimony calculation.

253. A full discussion of the methods of dividing a pension plan in a divorce proceeding is beyond the scope of this article. However, if the parties' desire to have payments made by the pension plan directly to the employee's ex-spouse, the terms of the Retirement Equity Act of 1984 (Pub. L. No. 98-397) are applicable. See Retirement Equity Act of 1984, 29 U.S.C. § 1052 (Supp. II 1984). The parties will have to draft a Domestic Relations Order for the trial judge to approve. If it is then approved by the administrator of the pension plan it will become a QDRO and the employee's ex-spouse will receive benefits directly from the plan. See Miers, St. Ville & Schaunaman, *The Division of Pension Benefits in Divorce*, "You Can Have the Condo, And I'll Take a QDRO, 57 O.F.L.A. B.J. 2601 (1986).

The utilization of retirement benefits in the case of an unrelated change of circumstances, including the unforeseen retirement of the employee-spouse, should be determined as in the first scenario.

(c) *Matured pension and profit-sharing benefits distributed according to a percentage of the total benefit currently being received.*

This situation occurs when the divorce is granted at the time the pension is in pay-out status. The usual method of dividing the marital portion of the pension is to allocate to each spouse a percentage of the monthly benefit. Each spouse is then receiving income from the pension on a monthly basis. The amount of the monthly benefit received by each spouse should be included in the alimony calculations. After the benefit has been included, there may still exist a need for support alimony. The amount of the pension benefit awarded to the paying spouse should be included when determining whether that spouse has the ability to pay support alimony.

The misnomer "double-dipping" should be abolished because it inhibits analysis. The actual issue to be determined is whether there is a need for support alimony and whether there is an ability to pay support alimony. Pension and profit-sharing benefits should be considered when reviewing both the need and the ability to pay. To the extent that pension benefits currently contribute to the income stream of either spouse, the benefits should be considered when determining the need for and amount of support alimony. Now that *Greer* has eradicated the misperception concerning the *Holeman* decision, these issues may be squarely addressed.

5. *The Alimony Award*

Currently an alimony award is normally a money judgment. The Oklahoma statute, section 121, provides that alimony may be awarded out of real or personal property, or in the form of a money judgment.²⁵⁴ A number of cases have approved the award of specific property as support alimony.²⁵⁵ In earlier times, awarding real property to the wife was the normal method of supplying alimony.²⁵⁶

6. *The Relationship to Property Division Alimony*

In 1965, the Oklahoma legislature created what is now title 43, section 134.²⁵⁷ In 1967, it added section B, which, at the time of enactment, allowed the trial court the discretion to designate, at the time of the

254. 43 OKLA. STAT. § 121 (1981).

255. See *Mabray v. Mabray*, 550 P.2d 997 (Okla. 1976) (trial court awarded the wife a life estate in the husband's separate property); *Fulton v. Fulton*, 460 P.2d 114 (Okla. 1969) (trial court may award the wife a life estate in the husband's separate property); *Clark v. Clark*, 460 P.2d 936 (Okla. 1969) (trial court can award the beneficial interest in an insurance policy as alimony); *Harris v. Harris*, 606 P.2d 619 (Okla. Ct. App. 1980) (court awards wife the homestead as support alimony).

256. See *Hughes v. Hughes*, 131 Okla. 33, 267 P. 620 (1928); *Doutt v. Doutt*, 73 Okla. 213, 175 P. 740 (1918); *Hildebrand v. Hildebrand*, 41 Okla. 306, 137 P. 711 (1913).

257. See 1965 Okla. Sess. Laws § 4.

original decree, those periodic payments that were payments for support and were in lieu of a division of property. Payments designated for a division of property were to continue until paid. Property division alimony payments cannot be modified²⁵⁸ and do not terminate at the death of either the payor or the payee.²⁵⁹

Prior to 1979, the trial court could largely determine without limitation which payments were for property and which were to be designated alimony. In 1979 this method changed. The legislature amended section 134 and required the trial court to distinguish between property division payments and support payments.²⁶⁰ The trial court can no longer designate payments that are properly for support as property to escape modifiability.

This statutory change has occasionally escaped consideration by the court of appeals. In two recent cases, *Savage v. Savage*²⁶¹ and *Hughes v. Hughes*,²⁶² the court struggled with an unorthodox support alimony award. The trial judge awarded to the wife the following:

Defendant [husband] is ordered to pay Plaintiff's educational expenses for tuition, books and fees in a sum not to exceed \$4,000 per year for four of the next seven years, such years to be Plaintiff's choice. Such payment shall be made directly to the institution of higher learning which is chosen by Plaintiff, or to the entity which sells the books.²⁶³

This provision was attacked by the husband on appeal as a support alimony provision which violated Oklahoma's settled policy in requiring alimony to be in a sum certain.²⁶⁴ The husband contended that the amount might be considerably less than \$4000.²⁶⁵ The amount could vary depending on where the wife went to college.

The court of appeals ignored both briefs on this issue and struck out on its own. It found that the sum certain rule did not apply because the monetary award was not support alimony.²⁶⁶ The court stated that the decree did not designate the amount to be paid as support and that such designation could only be made at the time of the entering of the original decree.²⁶⁷ Because the trial court did not specifically designate the award as support, the court of appeals, citing *Diment v. Diment*,²⁶⁸ decided that it must be a

258. See, e.g., *Clifton v. Clifton*, 801 P.2d 693 (Okla. 1990); *Barth v. Barth*, 803 P.2d 1117 (Okla. 1990).

259. *Tiger v. Estate of Ackers*, 554 P.2d 1213 (Okla. Ct. App. 1976); *Thomas v. Thomas*, 518 P.2d 1294 (Okla. Ct. App. 1973).

260. 1979 Okla. Sess. Laws ch. 278, § 1.

261. No. 72,062 (Okla. Ct. App. Tulsa Apr. 30, 1991).

262. No. 71,886 (Okla. Ct. App. Tulsa Apr. 23, 1991).

263. *Savage*, No. 72,062, slip op. at 4.

264. *Id.*, slip op. at 3-4.

265. *Id.*, slip op. at 4.

266. *Id.*, slip op. at 5.

267. *Id.*, slip op. at 4.

268. 531 P.2d 1071 (Okla. Ct. App. 1974).

property division award.²⁶⁹ The court concluded that, as in *Diment*, the award for educational expenses was for the wife's contributions to the marriage, which enabled the husband to finish his education and enhance his earning capacity.²⁷⁰

The opinion of the court of appeals is misplaced and perverts settled Oklahoma statutory and case law. The court's first mistake was concluding that the award must be a property award since it was not designated as support. This court's conclusion is supported by cases like *Diment* and *Shea v. Shea*.²⁷¹ These cases, however, were based upon the pre-1979 version of section 134(A).²⁷² In *Diment* and *Shea*, the court was concerned with a trial court decree that did not designate the nature of the payment.²⁷³ The statute, at that time, did not require that the payment be designated as either property or support, but only that the court could so designate. The holding of both cases was that an undesignated award would be considered as a property payment.²⁷⁴

In *Colvert v. Colvert*,²⁷⁵ the same result occurred. The husband and wife were divorcing in the husband's last year of medical school.²⁷⁶ The divorce decree contained a judgment for alimony "as property division and in settlement of all of her property rights against the plaintiff, in the total sum of \$35,000."²⁷⁷ The supreme court, specifically approving the decree, noted that it could have designated the wife's alimony as property settlement rather than support.²⁷⁸

These cases sparked a legislative response.²⁷⁹ The statute now requires the trial court, at the time of original decree, to state plainly which payment is support and which payment is property. This amended section was before the court in the well-known case of *Hubbard v. Hubbard*.²⁸⁰ The court in *Hubbard* remanded the case to the trial court to determine the value of the wife's direct contributions to the husband's medical career.²⁸¹ She was to be awarded these contributions as restitutionary alimony.²⁸² The court also requested the trial court to reconsider the issue of support alimony.²⁸³ The court noted that in *Colvert* it held that the trial court could, at the time of

269. *Savage*, No. 72,062, slip op. at 5; see also *Diment*, 531 P.2d at 1072.

270. *Savage*, No. 72,062, slip op. at 5.

271. 537 P.2d 417 (Okla. 1975).

272. 12 OKLA. STAT. § 1289 (1968).

273. *Diment*, 531 P.2d at 1074; *Shea*, 537 P.2d at 418.

274. *Diment*, 531 P.2d at 1073-74; *Shea*, 537 P.2d at 419.

275. 568 P.2d 623 (Okla. 1977), *overruled*, *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

276. *Id.* at 624.

277. *Id.* at 625.

278. *Id.*

279. See 1979 Okla. Sess. Laws ch. 278, § 1.

280. 603 P.2d 747 (Okla. 1979).

281. *Id.* at 752.

282. *Id.*

283. *Id.*

the decree, designate all or a portion of each alimony payment as support or alimony pertaining to a division of property.²⁸⁴ It then stated:

Our holding in that case should not be read to mean that a court can consider the future earnings of a spouse in setting the amount of alimony, then designate the alimony payments based on future income as property division alimony. Insofar as *Colvert*, supra, appears to stand for that proposition, it is overruled.²⁸⁵

Since *Colvert* was based on *Diment*, *Shea*, and the repealed version of section 134(A), those cases should likewise be considered overruled on this issue.

In *Savage* and *Hughes*, the court of appeals was clearly incorrect in relying on *Diment* to determine that non-designated payments must be considered property. Prior court of appeals cases indicate that when the trial court fails to follow the statute and designate the nature of each payment, the proper procedure would be to construe the decree or agreement to determine whether the payments were meant to be property division or support alimony.²⁸⁶ If the payments are to be made out of future earnings, they must be specified as support alimony and not as property division. In *Savage*, it is clear that the payment of the education expenses is to come from the husband's future earnings.²⁸⁷ It is not addressed as a division of current assets, i.e., as a property division provision.²⁸⁸

The court of appeals also attempted to further justify the award by indicating that it was for the wife's support of the husband's education.²⁸⁹ The court cited to *Diment's* finding that the "alimony" award was justified on the efforts of the wife in supporting her husband while he obtained his education.²⁹⁰ Awards to one spouse for efforts spent in furthering the education of the other spouse are presently governed by *Hubbard v. Hubbard*²⁹¹ and not by *Diment*. In *Hubbard*, the court noted the marriage possessed few assets because most of the marital funds went toward Dr. Hubbard's education.²⁹² The court further stated that it was not powerless to do equity simply because the divorce occurred at the beginning of Dr. Hubbard's professional career.²⁹³ The equitable "restitutionary" award occurred because the divorce happened before the accumulation of a substan-

284. *Id.*

285. *Id.*

286. *See, e.g.*, *Johnston v. Griffith*, 675 P.2d 1038, 1040 (Okla. Ct. App. 1984).

287. *Savage v. Savage*, No. 72,062, slip op. at 5 (Okla. Ct. App. Tulsa Apr. 30, 1991).

288. Indeed, if this is property division, then the trial judge was incorrect in requiring that the husband make the payments directly to the educational institution. The wife is entitled to have the payments made directly to her. The trial court may direct one party to pay a debt as part of the property division but it cannot set aside part of the property for third parties. *Williams v. Williams*, 428 P.2d 218 (Okla. 1967); *Roberts v. Roberts*, 357 P.2d 980 (Okla. 1960).

289. *Savage*, No. 72,062, slip op. at 5.

290. *Id.*

291. 603 P.2d 747 (Okla. 1979).

292. *Id.* at 751.

293. *Id.*

tial marital estate.²⁹⁴ The court allowed Ms. Hubbard a fair return on her investment.²⁹⁵ That amount consisted of direct contributions to Dr. Hubbard's education plus amounts representing interest and inflation.²⁹⁶

The *Savage v. Savage* facts did not justify an equitable award to Ms. Savage for her support of her husband's education. First, Ms. Savage's sacrifices for her husband's education occurred in the first three years of a seventeen-year marriage. In contrast, Ms. Hubbard supported her husband throughout the marriage. The court specifically noted that the divorce occurred before Dr. Hubbard had embarked on his medical career. In *Diment*, the husband was in school the entire fifteen years. The wife supported him as he went from an eleventh-grade education through medical school. Dr. Diment had been practicing only two years before he filed for divorce. In both *Diment* and *Hubbard* the divorce came before there had been any marital accumulation. In *Savage*, the total marital estate was very large. The wife received in alimony and property division almost \$250,000. It clearly appears that she received a return on her investment.²⁹⁷

Second, even if Ms. Savage was entitled to an award to compensate her for aiding in her husband's education, the court incorrectly measured it. Under *Hubbard*, the wife is entitled only to her direct expenses plus interest and inflation. There is nothing in the *Savage* record to suggest that the award for Ms. Savage's future education is based on her direct contributions to Mr. Savage's education.

Third, if the award was for Ms. Savage's efforts, it should have been paid directly to her. She is the party entitled to the restitution and not an educational institution. The court of appeals decision that the educational award is a property award is clearly incorrect.

IV. *The Peculiar Problem of the Alimony "Cap"*

Oklahoma law requires that a money judgment alimony award be set in a definite amount — a sum certain.²⁹⁸ Historically, an alimony award that

294. *Id.*

295. *Id.*

296. *Id.* at 752.

297. In another case, the court of appeals had concluded that a wife in the position of Ms. Savage could not receive a *Hubbard* award. In *Hubbard v. Hubbard*, 56 OKLA. B.J. 407 (Okla. Ct. App. 1985), *withdrawn for other reasons*, 56 OKLA. B.J. 1633 (Okla. 1985) (not the same Hubbard!), the husband, a retinal ophthalmologist had practiced for five years, and the couple had accumulated a marital estate well over \$600,000. The court concluded that no restitutionary alimony should be granted to the wife. *Id.* at 410. This decision is in accord with the majority of cases in the country. See *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988) (thirty year marriage; "present earnings and business assets provide a more accurate measure of the true worth of the wife's investment in husband's degree"); *Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987) (no award when wife worked to support husband for first two years of a 17-year marriage); *Martin v. Martin*, 358 N.W.2d 793 (S.D. 1984) (reimbursement alimony inappropriate when parties had reaped advantage of husband's law degree for fourteen years); see also CAL. CIV. CODE § 4000.3 (West Supp. 1988) (presumption that the community has substantially benefitted from the advanced education, if education occurred more than ten years before filing of divorce petition).

298. *Steincamp v. Steincamp*, 593 P.2d 495 (Okla. 1979).

depended upon a contingency was void.²⁹⁹ One of the major issues today is whether Oklahoma law still requires a sum certain.

Oklahoma law was not always so. Prior to statehood, Arkansas law prevailed. Under Arkansas law, alimony could not be set in a definite amount. Support alimony was required to be periodic and would terminate upon certain contingencies.³⁰⁰ After statehood, our divorce law was derived from Kansas law. The original version of section 121 provided that the court could decree “to her such sum of money, payable either in gross or in installments”³⁰¹ This statutory phrase was at issue in *Dutton v. Dutton*.³⁰² The husband filed to modify his support alimony award because his ex-wife had remarried.³⁰³ The court noted that previous Kansas decisions had held that a trial court had no power to modify an alimony award.³⁰⁴ The rationale for non-modifiability was that alimony had to be set in a certain sum.³⁰⁵ The court further noted that if the amount is not set in a fixed sum, it was not alimony within the context of the statute and therefore was modifiable.³⁰⁶ Thus, the original adoption of the “sum certain” rule was that alimony could not be modified because it was set in a sum. A possible implication of *Dalton* could have been that if alimony was not set in a sum it could be modified. If this implication had come to pass, Oklahoma would have had two different types of alimony: that set in a sum which could not be modified, and that not set in a sum which could be modified. This would have corresponded to the periodic-permanent and alimony “in gross” found in all other states.³⁰⁷

However, Oklahoma did not take this approach. The court continued to focus on the word “sum” in the statute. The next case, *Boulanger v. Boulanger*,³⁰⁸ interpreted the *Dutton* case to mean that an alimony award must be set in a definite amount.³⁰⁹ If it does not do so, it is “void.”³¹⁰ Since the *Boulanger* award was not set in a definite amount, the court concluded that the award must be for child support.³¹¹ In other cases, the court concluded that if the amount was set in a sum certain, it was alimony even if the clause granting the money referred to the “wife and children.”³¹²

299. *Vanderslice v. Vanderslice*, 195 Okla. 496, 159 P.2d 560 (1945).

300. *See Ecker v. Ecker*, 22 Okla. 873, 98 P. 918, 920 (1908); *Adams v. Adams*, 30 Okla. 327, 120 P. 566, 568 (1911).

301. OKLA. REV. LAWS § 4869 (1910).

302. 97 Okla. 234, 223 P. 149 (1923).

303. *Id.*, 223 P. at 149.

304. *Id.*, 223 P. at 150.

305. *Id.*, 223 P. at 150-51.

306. *Id.*

307. *See H. CLARK, DOMESTIC RELATIONS* 655 (2nd ed. 1987).

308. 127 Okla. 103, 260 P. 49 (1927).

309. *Id.*, 260 P. at 50.

310. *Id.*

311. *Id.* at 50-51; *see also Hadley v. Hadley*, 129 Okla. 219, 280 P. 1097, 1098 (1928). In separate maintenance actions alimony is based upon the spouse's current needs and not future needs. As a result the court may not set the amount of alimony as a fixed sum. The amount must be periodic and may be modified based upon the needs and conditions of the recipient spouse. *Hughes v. Hughes*, 363 P.2d 155, 157 (Okla. 1961).

312. *Alcorn v. Alcorn*, 187 Okla. 196, 102 P.2d 121, 123 (1940).

In later cases, the court adopted an additional rationale to explain why support alimony must be in a sum certain.³¹³ It determined that the alimony judgment could attain definite finality, just like any other judgment.³¹⁴ Therefore, it had to be set in a definite amount.³¹⁵ The court then determined that alimony judgments must be measured by the same rule as to finality, and “that in no case does the husband have a right to modification of the alimony judgment after the same has become final.”³¹⁶ This rationale also required that the monthly amount be as immutable as the total amount.³¹⁷

The court soon was faced with issues interpreting the term “definite amount.” The court concluded that if the total amount of alimony could be calculated from the face of the decree, it was not indefinite.³¹⁸ Alternatively, if the total amount cannot be calculated from the decree, the alimony award is uncertain and must be stricken.³¹⁹ The classic example is *Vanderslice v. Vanderslice*.³²⁰ The decree provided that the husband was to pay \$50 a month until the youngest child became of age.³²¹ The judge failed to provide for the contingency that the youngest child might die before majority. It therefore followed that the alimony award was indefinite and must be recalculated.³²²

The sum certain rule does not apply if one spouse is awarded a specific asset in lieu of alimony. For example, in *Mayhue v. Mayhue*³²³ the court upheld an award of a percentage of royalties from an oil lease as support alimony.³²⁴

Finding an alimony award to be indefinite and therefore void does not relieve the payor of responsibility. In *Oder v. Oder*,³²⁵ the court vacated an order requiring the husband to pay the wife alimony of \$75 for an indefinite

313. *Gilcrease v. Gilcrease*, 186 Okla. 451, 98 P.2d 906, 907 (1939); *Murphy v. McElroy*, 185 Okla. 369, 92 P.2d 369, 371 (1939).

314. *Gilcrease*, 98 P.2d at 907.

315. *Id.*; see also *Murphy v. McElroy*, 185 Okla. 369, 92 P.2d 369 (1939) (the sum certain rule is required because it is sound public policy that “judgment liens should be definite and certain in amount.”).

316. *Gilcrease*, 98 P.2d at 907; see also *Bishop v. Bishop*, 194 Okla. 209, 148 P.2d 472, 475 (1944); *Bowen v. Bowen*, 182 Okla. 14, 76 P.2d 900, 902 (1938).

317. *Canada v. Canada*, 190 Okla. 203, 121 P.2d 989, 990 (1942).

318. *Javine v. Javine*, 134 Okla. 283, 273 P. 267, 268 (1929).

319. *Vanderslice v. Vanderslice*, 195 Okla. 496, 159 P.2d 560 (1945).

320. 195 Okla. 496, 159 P.2d 560 (1945).

321. *Id.* at 561.

322. *Id.* at 562. Another indefinite award occurred in *May v. May*, 596 P.2d 536 (Okla. 1979). The wife was awarded a possessory interest in the homestead. The couple remained as tenants-in-common in the homestead. She was to retain the home until she married or died. The husband was to pay taxes and other expenses. The court found the gross amount of alimony indefinite and the provision on terminating upon death or remarriage violative of the finality rule. *Id.* at 540.

323. 706 P.2d 890 (Okla. 1985).

324. *Id.* at 894; see also *Clark v. Clark*, 460 P.2d 936 (Okla. 1969) (an alimony award requiring husband to continue his wife as beneficiary on an insurance policy was upheld); *Frensley v. Frensley*, 177 Okla. 221, 58 P.2d 307 (1936) (award of husband’s one-half interest in the net proceeds of a trust was upheld).

325. 149 Okla. 63, 299 P. 202 (1931).

time.³²⁶ It said that a void judgment neither operated as an adjudication denying alimony nor as one awarding alimony.³²⁷ This result left undetermined the original proceeding as to alimony still pending before the court.³²⁸ The trial court was ordered to set it for a hearing.³²⁹

As the court stated in *Clark v. Clark*,³³⁰ "The trial court perforce retains jurisdiction to modify a provision of its decree void because of uncertainty, in order to achieve validity thereof. This continuing jurisdiction is retained by the trial court *to the exclusion of any other court.*"³³¹ This statement constitutes an exception to the normal rule that in an equity case the appellate court may enter the judgment that should have been rendered if the trial court had not abused its discretion.³³² This point is often neglected by attorneys and the court of appeals.³³³

326. *Id.* at 203.

327. *Id.*

328. *Id.*

329. *Id.*; see also *Munsy v. Munsy*, 385 P.2d 902 (Okla. 1963); *Finley v. Finley*, 174 Okla. 457, 50 P.2d 643 (1935); *Flaxman v. Flaxman*, 169 Okla. 65, 35 P.2d 950 (1934); *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012 (1933); *West v. West*, 157 Okla. 89, 10 P.2d 1088 (1932).

330. 460 P.2d 936 (Okla. 1969).

331. *Id.* at 941 (emphasis in original); see also *Steincamp v. Steincamp*, 593 P.2d 495, 497-98 (Okla. 1979).

332. Attorneys appealing a divorce case must remember that the standard of review for equity cases is different than the standard of review in law cases. The equitable standard is alluded to in many cases but is most completely set forth in *Carpenter v. Carpenter*, 645 P.2d 476 (Okla. 1982):

[Divorce] contests are of equitable cognizance. The court may exercise continuing jurisdiction of disputed claims. On appeal, the trial court's disposition is reviewed by the standards applicable to chancery cases. The court's decision is presumed to include a finding favorable to the successful party upon every fact necessary to support it. While an appellate court may and will examine and weigh the evidence, the findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence. Whenever possible, an appellate court must render, or cause to be rendered, that judgment which in its opinion the trial court should have rendered. A decree need not rest upon uncontradicted evidence. It is not fatal to the validity of an equity decision if, on the basis of the evidence presented, the chancellor might have been equally correct in reaching a conclusion different from that which he actually did. If the result is correct, the judgment is not vulnerable to reversal because the wrong reason was given for the decision or because the trial court considered an immaterial issue or made an erroneous finding of fact. We are not bound either by the reasoning or the findings of the trial court. Whenever the law and the facts warrant, we may affirm the judgment if it is sustainable on any rational theory and the ultimate conclusion reached below is legally correct. Unless the decision is found to be against the clear weight of the evidence, the appellate court must indulge in the presumption that it is correct.

Id. at 480.

333. See *Hughes v. Hughes*, No. 71,886 (Okla. Ct. App. Tulsa Apr. 23, 1991), where the appellate panel reduced an education award to two years at \$3,000. In *Ingham v. Ingham*, No. 73,670 (Okla. Ct. App. Oklahoma City Mar. 12, 1991), an educational expense provision was simply deleted as violative of the sum certain rule. In *Branch v. Branch*, No. 74,440 (Okla. Ct. App. Oklahoma City July 9, 1991), the trial court required the husband to pay his wife's health insurance and for uncovered medical expenses as support alimony. The court of appeals simply

Neither reason for requiring alimony to be set in a definite amount retains validity today. The statute — title 43, section 121, as amended in 1976 — no longer uses the word “sum.”³³⁴ It merely requires that “alimony may be allowed from real or personal property, or both, or in the form of a money judgment.”³³⁵ There is nothing in the current statute that continues the “sum certain” requirement.

The fact that alimony is a judgment does not require that it be set in a definite amount. The legislative amendments adding section 134(E), which allow retroactive modification of support alimony, have eliminated the rationale of the *Gilcrease* case.³³⁶ There is nothing in the concept of “judgment” that requires non-modifiability.³³⁷

Hopefully, the supreme court will, in an appropriate case, abolish the “sum certain” rule as an anachronism. If so, then Oklahoma law will be in a better position to assess the differences between rehabilitative and permanent alimony.

V. Modification of Alimony

Prior to 1967, Oklahoma law did not allow an alimony judgment to be modified.³³⁸ This precept was considered part of the “sum certain” rule. Alimony was a final judgment. “The court has no power, on subsequent application showing circumstances thereafter arising, to increase or diminish the allowance given in the original judgment.”³³⁹ Even after Oklahoma law allowed for termination or modifiability upon certain possibilities, those contingencies had to be strictly observed. In *Abler v. Abler*,³⁴⁰ the husband had a disabling heart attack and was unable to work.³⁴¹ The court of appeals stated that this change of circumstances was not a ground for reducing support alimony.³⁴² However, his child support was reduced to one dollar a month.³⁴³

deleted the award. All of these cases should have been remanded to the trial court to re-determine the amount of support alimony.

334. 43 OKLA. STAT. § 121 (Supp. 1989).

335. *Id.*

336. 1983 Okla. Sess. Laws ch. 86, § 1.

337. *Witter v. Witter*, 762 P.2d 919, 919 (Okla. 1988); *Bingham v. Bingham*, 751 P.2d 732, 732 (Okla. 1988); *Nantz v. Nantz*, 749 P.2d 1137, 1140-41 (Okla. 1988).

338. *E.g.*, *Abler v. Abler*, 586 P.2d 761 (Okla. Ct. App. 1978).

339. *Dutton v. Dutton*, 97 Okla. 234, 223 P. 149, 150 (1924) (quoting with approval as authoritative interpretation of statute *Mitchell v. Mitchell*, 20 Kan. 665, 668 (1878)).

340. 586 P.2d 761 (Okla. Ct. App. 1978).

341. *Id.* at 762.

342. *Id.* at 763.

343. *Id.*; see also *Shotwell v. Shotwell*, 603 P.2d 1140 (Okla. 1979) (husband’s obligation to pay the house mortgage as support alimony survives the sale of the house; husband must pay the amount directly to the wife); *Fisher v. Fisher*, 558 P.2d 391 (Okla. 1976) (husband cannot collaterally attack alimony provisions as excessive, even if amount has become more than his net pay).

A. Remarriage and Death

The first grounds approved by the legislature for modification or termination of alimony were death and remarriage. Section 134(B) now requires that the trial court “decree that upon the death or remarriage of the recipient, the payments for support, if not already accrued, shall terminate.”³⁴⁴ Accrued payments that are delinquent are a debt due to the deceased’s estate if properly claimed by the executor or administrator within ninety days after the payee’s death.³⁴⁵ The supreme court equalized the spouses by providing that alimony would also terminate upon the death of the payor.³⁴⁶

Section 134(B) provides that a recipient spouse who remarries may petition the court for continuance of the support alimony.³⁴⁷ The recipient must file the motion within ninety days after the remarriage.³⁴⁸ She must also show that some amount of support is still needed and that circumstances have not rendered payment of support inequitable.³⁴⁹ The ninety-day period given to the recipient to show a continued need for support alimony begins when the recipient remarries. In *Overton v. Overton*,³⁵⁰ the trial court provided that the wife’s support alimony was not to begin until three years after the divorce.³⁵¹ This event would occur at the time that the wife’s property division alimony ended.³⁵² The wife remarried one year after the divorce.³⁵³ She did not file a petition within ninety days after her remarriage.³⁵⁴ The husband filed his petition to declare the support alimony terminated before the time to begin payment of the support alimony.³⁵⁵ The wife argued that she had ninety days to file her petition commencing on the date that the support alimony began.³⁵⁶ The court rejected this argument and held that the ninety days runs from the date of remarriage, regardless of when the payment of alimony commences.³⁵⁷

In *Kildoo v. Kildoo*,³⁵⁸ the court held that an annulment of the remarriage did not revive the alimony award. The court was concerned that the wife, by electing to obtain an annulment rather than a divorce, could choose to make her first husband responsible for alimony rather than her second

344. 43 OKLA. STAT. § 134(B) (Supp. 1990).

345. *Id.*

346. *Funnell v. Funnell*, 584 P.2d 1319, 1324 (Okla. 1979).

347. 43 OKLA. STAT. § 134(B) (Supp. 1990).

348. *Id.*

349. *Id.*

350. 578 P.2d 1216 (Okla. Ct. App. 1978).

351. *Id.* at 1216.

352. *Id.* at 1217.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*; see also *Acker v. Acker*, 594 P.2d 1216 (Okla. 1979) (90-day period may not be construed as extending the time of termination while the court determines whether wife is entitled to a continuation of the payments under the separation agreement).

358. 767 P.2d 884 (Okla. 1989).

husband.³⁵⁹ Concluding that the wife should not have that choice, the court determined that her alimony ended upon her remarriage.³⁶⁰ The court noted that she had ninety days upon remarriage to commence an action continuing her alimony.³⁶¹ That she misunderstood her rights and did not do so, did not excuse the failure to proceed.³⁶²

The court's reasoning is somewhat flawed. The second marriage lasted only two months. The circumstances of the second marriage do not suggest that Ms. Kildoo would be entitled to any alimony from her second husband. There was no need for support that was related to that marriage. Thus, to suggest that the wife could choose what husband to fasten an alimony obligation upon suggests that the wife is always entitled to alimony. This position has never been adopted in Oklahoma. Indeed, as Justice Simms pointed out in his dissent, the case did not really involve the issue of whether an annulment of the second marriage revived the support alimony.³⁶³ The annulment occurred prior to the ninety-day period for filing the petition. Hence, she was not required to seek relief under section 134(B).

Other states are split on whether an annulled remarriage revives the alimony payments. In some jurisdictions the remarriage, whether annulled or not, terminates the alimony.³⁶⁴ In other states the annulment automatically reinstates the alimony payments.³⁶⁵ The more modern position does not take a strict "all or nothing" approach. It allows a court to exercise discretion to restore alimony if it is necessary to rectify serious inequity or injustice.³⁶⁶

If the parties remarry each other, the alimony provisions in the decree terminate.³⁶⁷ Mere cohabitation with a former spouse for a period of time, not constituting a common-law marriage, does not terminate the alimony.³⁶⁸ It is still an open question whether cohabitation with one's former spouse could cause alimony to terminate under section 134(D).

B. Cohabitation

In 1979, the legislature reacted to a spate of couples who lived together after divorce in an arrangement short of a common-law marriage. The lawmakers determined that under certain circumstances a voluntary cohabitation ought to affect the alimony judgment and enacted section 134(D).³⁶⁹ Previously, a court had no authority to modify or terminate support alimony simply because the recipient was engaged in a cohabitation relationship.³⁷⁰

359. *Id.* at 885-86.

360. *Id.* at 886.

361. *Id.*

362. *Id.*

363. *Id.* at 887 (Simms, J., dissenting).

364. *Falk v. Falk*, 158 Wis. 2d 184, 462 N.W.2d 547, 549 (Ct. App. 1990); *Hodges v. Hodges*, 118 Ariz. 572, 578 P.2d 1001, 1005-06 (1978).

365. *Johnston v. Johnston*, 3 Kan. App. 2d 208, 592 P.2d 132, 135 (1979).

366. *Williams v. Williams*, 208 Mont. 252, 677 P.2d 585, 587 (1984).

367. *Carson v. Carson*, 143 Okla. 274, 288 P. 475, 475 (1930).

368. *Rice v. Rice*, 603 P.2d 1125, 1128 (Okla. 1979).

369. 1979 Okla. Sess. Laws ch. 278, § 1. The statute's constitutionality was upheld in *Roberts v. Roberts*, 657 P.2d 154 (Okla. 1983).

370. *Allgood v. Allgood*, 626 P.2d 1323, 1326 (Okla. 1990).

The statutory provisions are triggered by the voluntary cohabitation of a former spouse with a member of the opposite sex. Cohabitation is defined as the “dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship.”³⁷¹ The statute does not define the term “conjugal.” However, *Black’s Law Dictionary* defines the term as “belonging to . . . the married state.”³⁷² Conjugal rights refer to “society, comfort and affection.”³⁷³ The question of whether the statute requires that the man and woman have sexual relations in order to trigger the statute has not been determined.³⁷⁴

The cohabitation arrangement is required to be with a member of the opposite sex.³⁷⁵ Thus, there is no basis to modify or terminate alimony under this statute if the recipient has established a homosexual cohabitation arrangement, or has lived with friends or with relatives. Those relationships would not qualify under the statute.

The statute also requires that the cohabitation be “habitual and continual.”³⁷⁶ The purpose of the statute, according to the concurring opinions in *Roberts v. Roberts*,³⁷⁷ is to treat de facto marriages as de jure marriages. However, in *Roberts*, the trial court applied the statute when the recipient and her boyfriend spent twenty nights together over a six-month period. This aspect of the case apparently was not raised on appeal.³⁷⁸ Recent unpublished cases indicate that the trial courts are more sensitive to the requirement of continual cohabitation.³⁷⁹

It appears that the statute is available to a paying spouse who forms a cohabitation arrangement. The wording of section 134(D) indicates that it applies to a “former spouse” who is in a conjugal cohabitation arrangement.

371. 43 OKLA. STAT. § 134(D) (Supp. 1990).

372. BLACK’S LAW DICTIONARY 302 (6th ed. 1990).

373. *Id.*

374. *Cf.*, under a comparable Illinois statute, *Sappington v. Sappington*, 106 Ill. 2d 456, 478 N.E.2d 376 (1985) (conjugal does not imply sexual relations but merely living in a marriage-like relationship), *rev’g* 123 Ill. App. 3d 396, 462 N.E.2d 881 (1984) (alimony cannot be terminated absent proof that the parties were engaging in sexual relations; statute specified “conjugal” relationship).

375. 43 OKLA. STAT. § 134(D) (Supp. 1990).

376. *Id.*

377. 657 P.2d 153, 155 (Okla. 1983) (Opala, J. concurring).

378. *Id.* at 158 (Opala, J., concurring).

379. For example, in *Lynch v. Lynch*, No. 72,959 (Okla. Ct. App. Oklahoma City Apr. 23, 1991), the evidence showed that the ex-wife had engaged in sexual relations with her boyfriend outside the home during the last six years. The fact that her boyfriend had stored clothing in the barn and had stayed in the home for a six-day period was not sufficient to prove continued and habitual cohabitation. The trial judge’s sustention of the wife’s demurrer to the evidence was upheld. In *Hyroop v. Hyroop*, No. 74,998 (Okla. Ct. App. Oklahoma City July 2, 1991), the evidence showed only that the ex-wife spent a lot of time with her boyfriend. They took vacations together and spent a lot of time in each other’s company. However, she maintained her own home. The trial court’s order to reduce the alimony slightly was justified under section 134(E). The court of appeals noted that the trial court had applied an erroneous standard to determine cohabitation. The payor must prove cohabitation only by a preponderance and not by clear and convincing evidence.

The paying spouse who forms a cohabitation relationship may be able to petition for a reduction in the amount. The voluntary cohabitation of the paying spouse with a member of the opposite sex cannot be used by the recipient spouse to raise the amount of alimony. Under this section, the trial court is only given authority to terminate or reduce the amount of alimony.

The amount of support alimony can be modified or terminated if the trial court finds that there has been a substantial change of circumstances relating to the need for support or the ability to support.³⁸⁰ There have as yet been no cases interpreting this part of the statute. In all probability, the interpretations of the practically identical language in section 134(E) will also be applicable to this section.

C. *Changed Circumstances*

The last of the amendments to section 134 is subsection E. This section authorizes the trial court to modify the provisions of a decree pertaining to support alimony upon proof of changed circumstances relating to the need for support or the ability to support.³⁸¹ If the court finds that the changes are substantial and continuing as to make the terms of the decree unreasonable to either party, the judge may modify the decree.³⁸²

There are no published cases interpreting section 134(E). Several issues arise under this section. First, what is a provision pertaining to the payment of alimony as support? In particular, is a clause which says no alimony should be paid a "provision pertaining to the payment of alimony as support?" Can a spouse return to court after a period of time and ask for alimony because conditions have now changed and there is a need for alimony? Can a court reserve jurisdiction over alimony?

Other jurisdictions are split over this issue. In some states, a spouse is entitled to return to court at any time if his or her circumstances have changed so as to require alimony.³⁸³ Other states do not allow for alimony if it was not granted in the original decree.³⁸⁴

A different result may be reached, however, if a spouse is returning to court to obtain additional alimony after the expiration of the original alimony award. In *Marshall v. Marshall*,³⁸⁵ the wife filed to modify the support alimony award four months after it expired. She had cancer.³⁸⁶ The Iowa Supreme Court said public policy required that courts hear cases where support is necessary.³⁸⁷ The court distinguished cases where no alimony was ever awarded.³⁸⁸ There, the court has no power to modify.³⁸⁹

380. 43 OKLA. STAT. § 134(D) (Supp. 1990).

381. *Id.* § 134(E).

382. *Id.*

383. See *Cherrington v. Cherrington*, 404 Mass. 267, 534 N.E.2d 1159, 1162 (1989).

384. *In re Woita*, 98 Or. App. 83, 778 P.2d 504, 506 (1989).

385. 394 N.W.2d 392 (Iowa 1986).

386. *Id.* at 393.

387. *Id.*

388. *Id.* at 397.

In some states, the courts are authorized to reserve jurisdiction with regard to alimony. If jurisdiction is reserved, a spouse may return to court to seek support. If jurisdiction is not reserved, a spouse may not seek further alimony.³⁹⁰ This method is particularly appropriate if the wife needs alimony at the time of the divorce and the husband is unable to afford it. The decree should recite that fact, decline to award a specific amount, and reserve jurisdiction to award alimony as circumstances change.³⁹¹ Usually, in order for the court to reserve jurisdiction, there must be a determination that alimony is necessary at the time of the divorce.³⁹² It is inappropriate absent an express reservation of jurisdiction to award nominal alimony in order to preserve modifiability.³⁹³

The second issue in interpreting section 134(E) is determining what occurrences will justify a modification in alimony. The statute requires that the changes be "substantial and continuing so as to make the terms of the decree unreasonable to either party."³⁹⁴ There appears to be no reason why the statutory formula would not allow increases as well as decreases. This fact is particularly true when the language of section 134(E) is compared with section 134(D), which only allows the judge to reduce or terminate support alimony.³⁹⁵ Additionally, because the purpose of section 134(E) was to allow for modifiability, the trial court can modify both the total amount of alimony and the amount of the payments, and, if the sum certain rule has disappeared, require periodic alimony.³⁹⁶ The court of appeals has suggested that cases involving modification of child support will provide persuasive authority for modification of alimony cases.³⁹⁷

The following are the types of circumstances that most jurisdictions consider when deciding modification of alimony cases.

388. *Id.* at 397.

389. *Id.* at 394-95; *see also* *Aldinger v. Aldinger*, 813 P.2d 836, 839-40 (Colo. App. 1991). It was not appropriate, the court said, to limit the dependent spouse's access to court, nor to limit the court's jurisdiction, with regard to the issue of whether a modification was appropriate even though an actual need for further or continued support might not have been apparent during the term of limited maintenance. *Id.* at 839.

390. *See* *McNally v. McNally*, 516 So. 2d 499, 502 (Miss. 1987); *Branson v. Branson*, 411 N.W.2d 395, 398-99 (N.D. 1987); *Becker v. Becker*, 262 N.W.2d 478, 483 (N.D. 1978).

391. *See, e.g.*, *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77, 79 (1988).

392. *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741, 747 (1989); *Turrissi v. Sanzaro*, 308 Md. 515, 520 A.2d 1080, 1086 (1987).

393. *See* *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741 (1989) (award of \$1 a month disapproved); *Grady v. Grady*, 295 Ark. 94, 747 S.W.2d 77 (1988) (award of \$10 a month disapproved).

394. 43 OKLA. STAT. § 134(E) (Supp. 1990).

395. *Id.* § 134(D).

396. *See* *Wilkins v. Wilkins*, No. 74,355 (Okla. Ct. App. Tulsa Aug. 27, 1991) (holding trial court erred in dismissing for failure to state a claim the wife's petition to modify alimony by increasing the amount and the number of payments).

397. *Colbert v. Wilson*, No. 73,257 (Okla. Ct. App. Oklahoma City Apr. 30, 1991).

1. Reduction in the Payor's Income

If the payor is claiming there has been a reduction in income, the court will scrutinize the reason for the decline. If the decline is not within the control of the payor, a reduction may be warranted. In *Marriage of Schradle*,³⁹⁸ the payor, a trucker, was entitled to modification in light of a change in circumstances constituted by, inter alia, deregulation in the trucking industry resulting in tremendous growth in competition, the adverse impact of the Tax Reform Act of 1986, and the husband's need to repair or replace his truck to secure his future earning capacity.³⁹⁹

However, if it appears that the payor's changed economic circumstances are self-induced, the court may refuse to modify alimony. In *Marriage of Kelly*,⁴⁰⁰ the husband's financial difficulties were attributable, at least in part, to his decision to resign his employment. The court may impute income to him in deciding on an appropriate support award.⁴⁰¹ If the payor can still afford to pay the support, the court may require it in spite of changed circumstances.⁴⁰²

2. Increase in the Payee's Income

Most jurisdictions agree that a substantial increase in the earnings of the payee spouse may be the basis for reducing or terminating support alimony, particularly if the alimony was rehabilitative originally. In *Schofer v. Schofer*,⁴⁰³ a modification was approved. At the time of dissolution, the former wife worked part-time for less than minimum wage earning only \$241 gross per month.⁴⁰⁴ At the time of the modification, she was working on a permanent full-time basis and earning \$855 net per month.⁴⁰⁵ However, if the payee spouse still has a need for support regardless of the increase in income, a modification may be denied.⁴⁰⁶

398. 462 N.W.2d 705 (Iowa Ct. App. 1990).

399. *Id.* at 708-09; *see also* Reep v. Reep, 565 So. 2d 814 (Fla. Ct. App. 1990) (participation in a legal strike, accompanied by diligent efforts to seek reemployment may form the basis for a petition for modification of alimony); Kalif v. Ballanco, 538 So. 2d 1100 (La. Ct. App. 1989) (payor's present wife had become unemployed, forcing the former husband to pay all household expenses; an increase in medical malpractice insurance premiums and forced participation in a retirement plan, all combine to produce a change of circumstances).

400. 769 S.W.2d 466 (Mo. Ct. App. 1989).

401. *Id.* at 468.

402. Edmons v. Bisbano-Edmons, 590 A.2d 97, 99 (R.I. 1991) (although the husband testified that he had reduced his salary and cut back on his business expenses, he continued to have a Jaguar as well as a second automobile at his disposal and possessed several corporate credit cards).

403. 780 S.W.2d 69 (Mo. Ct. App. 1989).

404. *Id.* at 70-71.

405. *Id.* at 71; *see also* Colbert v. Wilson, No. 73,257 (Okla. Ct. App. Oklahoma City Apr. 30, 1991) (approving as within the trial court's discretion a termination of support alimony when the wife is employed and her income had substantially increased).

406. Curzi v. Curzi, 21 Conn. App. 5, 570 A.2d 1134 (1990); *see* Capehart v. Capehart, No. 72,425 (Okla. Ct. App. Oklahoma City Nov. 13, 1990) (no modification because even though

3. Increase in Payor's Net Income

Normally, an increase in the payor's net income alone is insufficient to call for an increase in alimony. Even under a California statute designating the marital standard of living as one of the factors to be weighed in determining spousal support, a former wife was not entitled to an upward modification of such support.⁴⁰⁷ The wife argued that she must maintain the same standard of living she allegedly enjoyed during the marriage.⁴⁰⁸ The actual marital standard was unreasonably high because the former husband was working excessive hours during the marriage and the parties were living beyond their means.⁴⁰⁹ The mere fact that the former husband's income level had risen to the point where he could afford such support did not mandate the upward modification sought by the former wife.⁴¹⁰

However, in *Schlesinger v. Emmons*,⁴¹¹ the husband received a substantial post-divorce inheritance, which the court said justified an increase in alimony. The case fell within an exception that when there is insufficient money at the time of divorce to provide for the wife at the couple's standard of living they enjoyed during their marriage, it is proper to grant the increase.⁴¹² The couple had planned on the inheritance to establish their standard of living during the marriage.⁴¹³ It followed the other general rule that an increase in the payor's funds may justify an increase in support when the payor does not have sufficient funds to satisfy the support required at the original decree.⁴¹⁴

4. Increased Needs of Payee

If the payee suffers from a change that requires increased support, courts are usually willing to grant it. This adage is particularly true if the needs are medical. In *Marriage of Polette*,⁴¹⁵ the wife had been diagnosed before the dissolution as having an adjustment disorder and a dependent personality.⁴¹⁶ She also suffered from alcohol abuse.⁴¹⁷ The trial court awarded gradually decreasing support for five years based on its belief that her health would improve and that she would become self-

wife is employed, husband showed neither a substantial decrease in wife's need, nor a substantial decrease in his ability to pay); *cf.* *Lane v. Lane*, 35 Ill. App. 3d 276, 340 N.E.2d 705 (1976) (wife entered a convent; husband's motion to terminate alimony denied).

407. *Marriage of Smith*, 225 Cal. App. 3d 469, 274 Cal. Rptr. 911, 963 (1990).

408. *Id.*, 274 Cal. Rptr. at 923.

409. *Id.*, 274 Cal. Rptr. at 917.

410. *Id.*, 274 Cal. Rptr. at 920.

411. 566 So. 2d 583 (Fla. Ct. App. 1990).

412. *Id.* at 584.

413. *Id.* at 585.

414. *Bedell v. Bedell*, 561 So. 2d 1179 (Fla. Dist. Ct. App. 1991).

415. 99 Or. App. 327, 781 P.2d 1253 (1989).

416. *Id.*, 781 P.2d at 1254.

417. *Id.*

supporting.⁴¹⁸ However, the mental health experts' testimony showed that the wife's condition had not improved and in fact appeared to have deteriorated.⁴¹⁹ The court stated that the wife showed a substantial change in circumstances warranting an upward modification of spousal support.⁴²⁰ In *Brashier v. Brashier*,⁴²¹ the former wife's continued psychiatric disability and its hindrance on her effort to become self-sufficient justified an increase in alimony. Even though most of the adverse conditions experienced by the wife existed at the time of divorce and were anticipated, the wife's continued inability to alleviate those conditions was not anticipated.⁴²² It is not necessary that the change of condition relate to a need that occurred during the marriage. In *Marriage of Perlmutter*,⁴²³ the court increased alimony from \$195 per month to \$600 per month when the ex-wife was seriously injured in an automobile accident and the ex-husband had a substantial increase in his reported income.

5. Retirement of the Payor

One of the more controversial issues is whether the retirement of the payor can constitute a change of circumstances and justify a decrease in the amount of support. In some states, retirement is such a change, even when the husband knew at the time of divorce that he would be retiring shortly.⁴²⁴ If the ex-wife is able to support herself, courts seem quite willing to reduce or terminate the support.⁴²⁵

418. *Id.*

419. *Id.*

420. *Id.*, 781 P.2d at 1255. *McNutt v. McNutt*, No. 70,496 (Okla. Ct. App. Oklahoma City Dec. 19, 1989) (unpublished) appears to be the first and only case involving an attempted upward modification of support alimony under § 134E. The husband filed a motion to reduce support alimony, and the wife countered with a motion to increase. The trial court denied the husband's motion and granted the wife's to increase the alimony by \$150 per month over the time previously set. The court of appeals reversed the trial court's decision to increase. It noted that the original decree was a "consent decree" where the wife did not prove a need for alimony. The husband testified that he agreed to that amount of support alimony in return for the wife's relinquishment of any claim to a property division of the family business. The court concluded without rationale that the increase was against the weight of evidence and reversed. The cases suggest that in order to justify an increase in support alimony, it is necessary to show that there is a record from the merits hearing indicating a need for alimony. This result makes little sense when compared with the rest of Oklahoma case law on support alimony.

421. 80 Md. App. 93, 560 A.2d 44 (1989).

422. See also *Alder v. Alder*, 229 N.J. Super. 496, 552 A.2d 182 (Super. Ct. App. Div. 1988) (ex-wife's loss of employment due to the deterioration of a preexisting congenital eye condition known at the time of divorce constitutes a change in circumstance).

423. 772 P.2d 621 (Colo. 1989).

424. See *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. Dist. Ct. App. 1990); *McFadden v. McFadden*, 386 Pa. Super. 506, 563 A.2d 180 (1989).

425. See *Reeves v. Reeves*, 803 S.W.2d 52 (Mo. Ct. App. 1990) (husband's retirement coupled with ex-wife's career as a nurse where she earns \$40,000 justifies a reduction in alimony). This appeared to have been the case in *Colbert v. Wilson*, No. 73,257 (Okla. Ct. App. Oklahoma City Apr. 30, 1991). The court noted that the husband had retired and the wife was now gainfully employed; hence alimony should be reduced.

When the payor voluntarily takes early retirement, courts carefully scrutinize the case. Courts first determine whether the early retirement decision was made in good faith. If it was not, there will be no reduction in the alimony.⁴²⁶ In addition to good faith, many courts require a further inquiry into whether the early retirement was reasonable under the circumstances.⁴²⁷ This probe includes an examination of the parties' expectations at the time of the divorce, their age, health, ability to pay maintenance after retirement, and the ability of the recipient spouse to provide for him or herself.⁴²⁸

6. Bankruptcy

The cases have generally held that bankruptcy can create a change of circumstances which may justify modification of the alimony payments. For example, in *Seigel v. Seigel*,⁴²⁹ the husband's voluntary bankruptcy discharged his equitable distribution payout to his ex-wife. This justified, according to the court, an increase in his alimony obligation.⁴³⁰ Conversely, in *Marriage of Clements*,⁴³¹ the wife took voluntary bankruptcy. The court held that the discharge of her debts reduced her need and thereby her alimony.⁴³²

VI. The Role of the Settlement Agreement

A. General Validity

As Oklahoma cases begin to decide when support alimony decrees may be modified, the role of separation and settlement agreements gains in importance. Counsel who are concerned about whether a future court might modify or terminate alimony upon retirement, bankruptcy, or other foreseen events, should attempt to draft for these contingencies.

Oklahoma law has always favored various types of matrimonial contracts, including reconciliation, separation, and settlement agreements. In *Howell v. Howell*,⁴³³ the parties separated and entered into a contract upon reconciliation. Ms. Howell later sued on the contract when the parties again separated.⁴³⁴ The supreme court noted the normal rule — that contracts providing for the separation of the husband and wife in the future are void.⁴³⁵ However, this contract was for the reconciliation of the parties and

426. See *In re Sinks*, 204 Cal. App. 3d 586, 251 Cal. Rptr. 379 (1988) (husband's voluntary retirement was suspect; court did not abuse its discretion in setting alimony based upon husband's ability to earn).

427. See, e.g., *Dilger v. Dilger*, 242 N.J. Super. 380, 576 A.2d 951 (Ch. 1990).

428. *In re Smith*, 77 Ill. App. 3d 858, 396 N.E.2d 859 (1979).

429. 243 N.J. Super. 211, 578 A.2d 1269, 1270-71 (1990).

430. *Id.* at 1272; see also *Eckert v. Eckert*, 144 Wis. 2d 770, 424 N.W.2d 759, 763 (Ct. App. 1988).

431. 134 Cal. App. 3d 737, 184 Cal. Rptr. 756 (1982).

432. *Id.*, 184 Cal. Rptr. at 758.

433. 42 Okla. 286, 141 P. 412 (1914).

434. *Id.*, 141 P. at 413.

435. *Id.*

therefore was favored.⁴³⁶ Because there was no fraud in procuring the contract, the court enforced it.⁴³⁷

Separation contracts also received approval early in Oklahoma's history.⁴³⁸ Unlike reconciliation agreements, separation agreements are nullified if the parties resume cohabitation.⁴³⁹ However, if the parties do separate and partially perform the contract, the contract will govern their separation, and it can be enforced in the same manner as any other contract.⁴⁴⁰ The agreement does not have to be presented to any court. The parties are required to have entered into the agreement and have separated. If the wife later sues for separate maintenance and the contract mentions nothing about alimony, she will not be allowed to obtain it.⁴⁴¹

Settlement agreements were given the court's blessing in *King v. King*.⁴⁴² The court noted that since statehood Oklahoma statutes have allowed husband and wife to contract, in writing, for an immediate separation and make provisions for property division, alimony, and custody.⁴⁴³ In *King*, the court approved an agreement in which the wife was to receive certain promissory notes when she procured the divorce decree.⁴⁴⁴ The husband later argued that because the contract required obtaining the divorce in the future, it fell under the ban of the *Howell* case. The supreme court disagreed and indicated that even if the clause requiring the wife to obtain a divorce was void, it did not effect the remaining agreement.⁴⁴⁵

The court reconsidered the issue in *Wheeler v. Wheeler*.⁴⁴⁶ This time the court, after examination of opinions from a number of other states, concluded that Oklahoma law should allow parties to contract for the property division provisions of their divorce.⁴⁴⁷ The supreme court noted such agreements are generally valid, absent overreaching that would amount to fraud.⁴⁴⁸

However, the court did hold that if an agreement is presented to the court as a settlement of their rights during a divorce proceeding, "the court in every case should scrutinize such a transaction very closely to ascertain whether the same was fairly entered into and whether or not the same is reasonable, just and fair to the parties to the agreement."⁴⁴⁹ In determining whether the agreement is fair, the court must look beyond the terms of the contract. It has the right to consider all the circumstances surrounding the

436. *Id.*, 141 P. at 414.

437. *Id.*

438. *See Hale v. Hale*, 40 Okla. 101, 135 P. 1143 (1913).

439. *Fowler v. Fowler*, 119 Okla. 95, 248 P. 629, 631 (1926) (cohabitation for four months nullified separation agreement); *Ahrens v. Ahrens*, 67 Okla. 147, 169 P. 486, 487 (1917).

440. *Witt v. Witt*, 280 P.2d 709, 711 (Okla. 1954).

441. *Horn v. Horn*, 80 Okla. 60, 194 P. 102, 103 (1920).

442. 138 Okla. 40, 280 P. 271 (1929).

443. *See* 43 OKLA. STAT. §§ 205-206 (Supp. 1990); OKLA. REV. LAWS §§ 3354, 3355 (1910).

444. *King*, 280 P. at 273.

445. *Id.*, 280 P. at 272-73.

446. 167 Okla. 598, 32 P.2d 305 (1934).

447. *Id.*, 32 P.2d at 308.

448. *Id.*

449. *Id.*

contract, including the ages of the parties, their needs, health, financial conditions, opportunities to provide for themselves, and their contributions to the marital estate.⁴⁵⁰

If a property settlement presented for approval of a court in a divorce proceeding meets all equitable and statutory requirements, then there is no reason why the trial court should not approve the agreement entered into between the husband and wife, for in so doing justice is administered. However, if the trial court is of the opinion that such a division of the jointly acquired property does not appear reasonable, just and fair, it becomes his duty to reject and disapprove said contract in whole or in part, and to make a just, fair and reasonable division between the parties. A property settlement entered into between husband and wife without regards to a divorce is unquestionably valid and enforceable, in the absence of fraud, duress, coercion, and undue influence, but when the same is presented affirmatively or defensively in a divorce proceeding for the sanction of the trial court, the trial court is not required to follow the same in whole or in part, if, in its opinion, the same is not fair and just.⁴⁵¹

This holding continues as a foundation in Oklahoma law. The settlement agreement, insofar as it is presented to the divorce court, must be approved by the court before it can become part of the decree. If the court disapproves of the agreement, it has no effect.⁴⁵²

B. Incorporation, Merger, and Extinguishment

If, after entering into a separation or settlement agreement, the parties reconcile, the contract is extinguished.⁴⁵³ If the parties obtain a divorce and the court awards alimony or divides property under the terms of the contract, the contract disappears. The judgment replaces it, and the parties' rights must be in accord with the judgment.⁴⁵⁴ Even if the trial court denies the divorce, so long as it divides the property, the contract is extinguished.⁴⁵⁵ If the parties do not file for a divorce or reconcile, the contract continues to be valid. If sued upon, a court must enforce it. The court cannot, as part of its judgment enforcing the contract, reserve the right to modify it in the future.⁴⁵⁶

450. *Id.*

451. *Id.*

452. *Wheeler*, 32 P.2d at 307; *see also* *Campanello v. Mason*, 571 P.2d 449 (Okla. 1977); *Miller v. Miller*, 456 P.2d 113 (Okla. 1969) (trial court expressly disapproves agreement as inequitable); *Blount v. Blount*, 425 P.2d 474 (Okla. 1967); *Limb v. Limb*, 195 Okla. 249, 156 P.2d 1013 (1945); *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012 (1933).

453. *Fowler v. Fowler*, 119 Okla. 95, 248 P. 629, 631 (1926).

454. *Finley v. Finley*, 174 Okla. 457, 50 P.2d 643, 645 (1935) (separation agreement); *McRoberts v. McRoberts*, 177 Okla. 156, 57 P.2d 1175, 1178 (1936) (settlement agreement).

455. *Privett v. Privett*, 93 Okla. 171, 220 P. 348, 349-50 (1923).

456. *Stark v. Stark*, 185 Okla. 348, 91 P.2d 1064, 1068 (1939).

In *Murphy v. McElroy*,⁴⁵⁷ the court discussed what happened to a settlement contract when it was not presented to the divorce court. The parties' settlement agreement provided that the husband would pay \$175.10 per month as alimony.⁴⁵⁸ The payments would stop upon the death of either party or the remarriage of the wife.⁴⁵⁹ The agreement also divided the property of the parties.⁴⁶⁰ The divorce decree made no reference either to the settlement agreement, property rights, or alimony.⁴⁶¹ Upon the wife's remarriage, the husband stopped paying alimony.⁴⁶² She sued under the contract, contending that the alimony was still due because the remarriage clause was invalid.⁴⁶³ The court disagreed, holding that the sum certain rule only applied to judgments.⁴⁶⁴ The parties were free to contract for whatever terms they liked.⁴⁶⁵ This contract was not presented to the trial court and was therefore neither merged into nor extinguished by the divorce decree. Therefore, it continued to exist as a separate contract, which by its terms extinguished the wife's right to alimony.⁴⁶⁶

The next variation on the problem occurred in *Dunham v. Dunham*.⁴⁶⁷ The parties presented the settlement agreement to the trial court, which approved the agreement and ordered the husband to perform it.⁴⁶⁸ The trial judge provided for alimony payments in the decree corresponding to the amounts mentioned in the agreement.⁴⁶⁹ The decree did not mention any of the other items which were contained in the agreement.

The husband contended that when the court approved the agreement, ordered it performed, and incorporated the alimony provisions in the decree, the agreement was extinguished.⁴⁷⁰ The supreme court disagreed, stating that when the trial court incorporated the alimony provision, it left the contract, as modified by the decree, in full force and effect.⁴⁷¹ Insofar as the court does not set the agreement out in the decree, but resort to the contract is necessary to determine the rights of the parties, then the contract continues

457. 185 Okla. 388, 92 P.2d 369 (1939).

458. *Id.*, 92 P.2d at 370.

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*, 92 P.2d at 371.

464. *Id.*

465. *Id.*, 92 P.2d at 373.

466. *Id.* at 371-73; *see also* Pielsticker v. Callahan, 428 P.2d 203 (Okla. 1967); Sullins v. Sullins, 280 P.2d 1009 (Okla. 1955); Herd v. Bilby, 199 Okla. 437, 186 P.2d 833 (1947) (court approves contract to pay alimony which will terminate on wife's remarriage; approval of contract and ordering it performed does not extinguish it); Seyller v. Seyller, 190 Okla. 250, 122 P.2d 804 (1942) (reaffirming *Murphy*; upholding contract which provided for acceleration of alimony payments upon husband's default).

467. 191 Okla. 395, 130 P.2d 534 (1942).

468. *Id.*, 130 P.2d at 537.

469. *Id.*

470. *Id.*

471. *Id.*

and is not extinguished.⁴⁷² However, if the trial court holds that the agreement is "approved and referred to and made a part hereof, as if fully written herein, then the decree supersedes the agreement and the agreement is extinguished."⁴⁷³

Those agreements that exist independently of the decree continue to be enforceable as contracts. However, because they are not incorporated into the decree, they cannot be enforced as a judgment, and the contempt remedy is unavailable.⁴⁷⁴

C. Settlement Agreements: Enforcement and the Ability to Contract Around Existing Law

The interesting remaining issue concerns whether the parties can contract for an alimony arrangement outside the power of the court, have it incorporated in the decree, and then enforce it as a judgment. The court first discussed this issue in *Perry v. Perry*.⁴⁷⁵ The husband filed to terminate his ex-wife's alimony because she remarried.⁴⁷⁶ The trial court denied his motion because the divorce decree specifically provided otherwise.⁴⁷⁷ That decree referred to the parties' agreement and ordered that, pursuant to that contract, the alimony provisions should not terminate upon remarriage, "notwithstanding provisions of the statute to the contrary."⁴⁷⁸ The court noted that prior cases had approved of the parties entering agreements at variance with statutory and case provisions.⁴⁷⁹ It then found that the legislature did not intend to preclude parties from freely contracting with respect to the disposition of their property and as to alimony.⁴⁸⁰ All that is necessary, the court stated, is that there be a voluntary and intentional relinquishment of a known right.⁴⁸¹ For the first time, the court allowed the parties to incorporate the agreement into the decree, allowing it to be enforced as part of the decree.

Unfortunately, within a year after *Perry*, the court rendered a decision which cast doubt upon the entire area. In *Stuart v. Stuart*,⁴⁸² the husband filed to terminate his ex-wife's support alimony on the ground that she had

472. *Allen v. Allen*, 196 Okla. 36, 162 P.2d 193, 194-95 (1945); *Eatman v. Eatman*, 549 P.2d 389, 391 (Okla. Ct. App. 1975) (only those aspects incorporated in the decree are extinguished).

473. *Eatman*, 549 P.2d at 391; *Barnett v. Barnett*, 207 Okla. 234, 249 P.2d 88 (1952).

474. *Dickson v. Dickson*, 637 P.2d 110, 112 (Okla. 1980); *Grimshaw v. Grimshaw*, 581 P.2d 1329, 1332 (Okla. Ct. App. 1978).

475. 551 P.2d 256 (Okla. 1976).

476. *Id.* at 256.

477. *Id.* at 257.

478. *Id.*

479. *Id.* at 258. In addition to the cases involving support alimony, see *Mills v. Mills*, 512 P.2d 143 (Okla. 1973) (parties may agree to waive the requirement that the joint titles be severed); *Hicks v. Hicks*, 417 P.2d 830 (Okla. 1966) (agreement providing for child support through college).

480. *Perry*, 551 P.2d at 258.

481. *Id.*

482. 555 P.2d 611 (Okla. 1976).

remarried.⁴⁸³ The parties' agreement did not mention whether the support alimony would terminate upon remarriage.⁴⁸⁴ The divorce decree incorporated the agreement and likewise did not mention terminability of alimony.⁴⁸⁵ Justice Barnes, speaking only for a plurality of the court, determined that the alimony could not be modified.⁴⁸⁶ The plurality opinion ignored all the prior cases on the effect of an agreement incorporated in a decree. It found that the agreement was a "consent decree," i.e., one that was entered upon and pursuant to a written agreement of the parties.⁴⁸⁷ The court then concluded if the decree is one which leaves nothing for the court's adjudication, it is one that cannot be modified without the consent of the parties.⁴⁸⁸

If the *Stuart* decision had been allowed to stand, Oklahoma law would have been placed in a strange dichotomy. All divorce decrees based on a settlement agreement would have been labeled "consent decrees" and impervious to subsequent modification. Only decrees that were produced by actual litigation could be modified. The entire distinction between incorporated and non-incorporated agreements would have been abolished. It seemed quite doubtful that the court meant to throw away fifty years of doctrine without any consideration. Obviously, the *Stuart* case needed to be re-rationalized.

This reevaluation occurred in *Batchelor v. Batchelor*.⁴⁸⁹ In that opinion, the court stated that *Stuart* merely held that the court could construe the agreement to determine whether the payments were to be payments of property division alimony or support alimony.⁴⁹⁰ If construed as property division alimony, it would not be subject to termination or modification.⁴⁹¹ Thus, *Stuart* does not stand for a proposition concerning consent decrees. In *Batchelor*, it was clear that the parties' agreement provided for support alimony. Therefore, the failure to include a provision in the agreement that the support alimony would not terminate upon remarriage meant that the normal statutory termination provisions would apply. The statutory provision applied, and the wife's support alimony terminated when she remarried.

The case that clarifies the law in this area is *Dickason v. Dickason*.⁴⁹² The court noted that when the agreement is incorporated in the decree, the rights of the parties are no longer governed by the contract but by the decree or judgment.⁴⁹³ The agreement is extinguished by force of law.⁴⁹⁴ Justice Opala then opined:

483. *Id.* at 613.

484. *Id.* at 615.

485. *Id.* at 613.

486. *Id.* at 616.

487. *Id.* at 614.

488. *Id.* at 615. Justice Simms concurred in the result for other reasons and four justices dissented. *Id.* at 616.

489. 585 P.2d 1120 (Okla. 1978).

490. *Id.* at 1122-23.

491. *Id.* at 1123.

492. 607 P.2d 674 (Okla. 1980).

493. *Id.* at 677.

494. *Id.*; see also *Acker v. Acker*, 594 P.2d 1216 (Okla. 1979).

An intent to modify applicable law by contract is not effective unless the power is expressly exercised. There is no rule of law that makes a contract-based divorce decree [a] per se free from legal incidents ordinarily attachable to the class of judgment into which it falls or [b] impervious to the law which generally governs the class of obligations comprised within it. To escape the incidence of general law, the agreement or decree must not be silent as to the parties' intent vis a vis the law that applies to them.⁴⁹⁵

If attorneys desire to contract around the applicable substantive law, the following procedure should be used. First, it is essential to use two separate documents: an agreement and a decree. Simply calling the decree a "consent decree" will not suffice to avoid applicable statutory or case law.⁴⁹⁶

Second, the agreement should specifically state that the parties are aware of their rights under the applicable cases and statutes and they choose to waive those rights. If the parties do not specifically state so, then the agreement, as incorporated into the decree, becomes subject to interpretation and construction as to what was the intention of the parties. In *Chiles v. Chiles*,⁴⁹⁷ for example, the parties' divorce decree incorporated an agreement which provided that support alimony was "cancelable *only* upon the wife's death pursuant to agreement of the parties."⁴⁹⁸ The issue raised was whether the wife's remarriage entitled the husband to terminate his support alimony obligation under title 43, section 134(B).⁴⁹⁹ The husband argued that because the decree was silent on termination, the normal statutory rules for termination of alimony applied.⁵⁰⁰ The court of appeals determined that the issue was one of construing the decree to determine the parties' intent.⁵⁰¹ It held that the word "only" meant that the parties agreed that only death would terminate the alimony support.⁵⁰² Here the court did find that the parties intended to waive the statutory right to terminate alimony upon remarriage.⁵⁰³

If a modifying court finds that the language of the agreement is ambiguous, it could find that the agreement does not meet the *Dickason* standard that it not be silent as to the parties' intent *vis-a-vis* the law that applies to them.⁵⁰⁴ Some support for examining the agreement as a whole to determine

495. *Dickason*, 607 P.2d at 677.

496. *Ettinger v. Ettinger*, 637 P.2d 63, 65 (Okla. 1981).

497. 778 P.2d 938 (Okla. Ct. App. 1989).

498. *Id.* at 940 (emphasis in original).

499. *Id.* at 939.

500. *Id.* at 940.

501. *Id.*

502. *Id.*

503. *Id.* at 940. The language of the settlement agreement in *Chiles* was not clear. Today the court of appeals might not be as generous with the agreement. In *Capehart v. Capehart*, No. 72,425 (Okla. Ct. App. Oklahoma City Nov. 13, 1990), the court said that the agreement must expressly proscribe future modification of spousal support in order to contract around the statute. The court also said that to the extent that *Chiles* is inconsistent with the opinion, it is specifically disapproved.

504. *See supra* note 484.

the parties' intent can be found in *Greer v. Greer*.⁵⁰⁵ That agreement, as interpreted by the court, provided that, in the event Congress provided for additional benefits to which the wife may be entitled, she was to receive them pursuant to the decree.⁵⁰⁶ The court concluded that this was a sufficient waiver of the protection from retroactive modification of property division.⁵⁰⁷

Third, the parties must then decide whether the contract is to be incorporated into the decree. If it is incorporated into the decree, it is enforceable as a judgment. If left out of the decree, it is enforceable as a contract. The parties must decide which is the most desirable for them.

VII. Conclusion

Of all the substantive areas surrounding divorce law, support alimony continues to present the greatest controversy. In one sense Oklahoma appears to be at the beginning of a brand new day concerning support alimony. It is now fifteen years since the legislature started down its new path. It is time for the court to recognize that fact and implement the "new" law of support alimony. Future years should indicate that alimony will continue to be one of the most litigated areas of the law.

505. 807 P.2d 791 (Okla. 1991).

506. *Id.* at 745-46.

507. *Id.* at 795.

