Toward a Compensatory Model of Alimony in Alaska

The Alaska Supreme Court has traditionally avoided awarding alimony in determining how to divide marital resources at divorce. This note argues that this predisposition has led the court to develop an analytical framework for reviewing trial court alimony awards that is anchored in faulty statutory construction and that fails to account adequately for the economic and social dislocations that disproportionately impact women upon divorce. This note also describes the consistency with which the supreme court has remanded recent alimony decisions and argues that this trend reflects the court's aversion to awarding alimony and unnecessarily exacerbates the harmful effects of divorce on women. This note concludes by offering an alternative, and more equitable, legal and philosophical model that abandons the current needs-based approach to allocating alimony in favor of an approach that focuses on compensation for lost earning capacity.

I. INTRODUCTION

Cases of marital dissolution—including questions of property division, child support, and alimony—are the most frequently litigated issues before the Alaska Supreme Court. During the last two years, such cases comprised between fifteen and twenty percent of the appeals brought before the court.[1] This note specifically addresses the issue of alimony, which the court traditionally has avoided awarding in resolving divorce cases.

The Alaska Supreme Court's interpretive approach to the award of post-dissolution spousal support is far more narrow than either the controlling statute[2] warrants or the economic realities that face women after divorce seem to require. As a consequence, the resolution of alimony cases often yields inequitable results. Part I of this note first describes the devastating economic

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1. Telephone Interview with Jan Hansen, Clerk of the Appellate Courts of Alaska (Nov. 2, 1994).

2. ALASKA STAT. § 25.24.160(a)(2) (1991).

consequences of divorce for women, particularly for women exiting long-term marriages.[3] It then examines the Alaska Supreme Court's aversion to permanent alimony and concludes that this aversion reveals the court's myopic assumption that simple property division or temporary forms of alimony can adequately address the profound financial impact of divorce on women. Part II explores the court's recurring insistence on remanding awards of alimony to the trial court for further specific findings and argues that this trend imposes undue burdens and costs on the litigants in divorce cases. Finally, part III suggests that a theoretical shift—from focusing on the specific needs of the claimant to an understanding of how the claimant's loss of future earning capacity during marriage defines such needs—will yield more equitable and consistent alimony judgments and mitigate the frustration that has plagued practitioners, litigants and judges alike in this area.

A. Background: The Economic Consequences of Divorce for Women

A large body of research confirms that divorce carries devastating economic consequences for women.[4] Indeed, "households headed by divorced and separated mothers constitute the fastest growing segment of the American poor."[5] In her frequently cited study on divorce, Lenore Weitzman concluded:

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3. The note limits its discussion of alimony to awards for women. This is not to suggest that alimony is a remedy available solely to women, nor that men categorically cannot assert meritorious alimony claims. Indeed, a hallmark of modern divorce law is its gender neutrality. *See* Orr v. Orr, 440 U.S. 268 (1979) (striking down a state statute prohibiting males from receiving alimony because it was based on a gendered stereotype of marital roles). Nonetheless, "as a factual matter, alimony is claimed almost exclusively by wives, who are more likely to be economically dependent." IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 264 (2d ed. 1991). A survey of alimony decisions in Alaska confirms this proposition. Thus, the case of men seeking alimony, while not ruled out, simply seems too rare to warrant separate treatment here.

4. *See, e.g.*, LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987); Heather R. Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79 (1986).

5. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1103 (1989).

> For most women and children, divorce means precipitous downward mobility—both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. . . . On a societal level, divorce increases female and child poverty and creates an ever-widening gap between the economic well-being of divorced men, on the one hand, and their children and former wives on the other.[6]

In Alaska, a recent study by the Alaska Women's Commission found that "[d]ivorced women and their children experienced a 33 percent decline in per capita income resulting in a radical downward shift in their standard of living."[7] By comparison, divorced men in Alaska witnessed a seventeen percent rise in their per capita incomes.[8] Moreover, these consequences are particularly acute in Alaska because divorce is so prevalent: the divorce rate in Alaska is sixty-three percent, compared to the national rate of forty-six percent.[9]

The Commission also noted the more general phenomenon that in many marriages, "the couple's major investments are in the education and career of the primary wage earner, usually the husband. Yet, the division of marital property often excludes career assets. Disregarding this property allows . . . the husband . . . to keep what are often the most valuable assets of the marriage."[10]

B. The Alaska Supreme Court's Treatment of Alimony

1. *The Statutory Scheme.* Over thirty years ago, the Alaska Supreme Court enumerated the criteria that were to guide trial courts in resolving spousal support disputes.[11] These so-called

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6. WEITZMAN, *supra* note 4, at 323.

7. BARBARA BAKER, ALASKA WOMEN'S COMMISSION, FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN i (1987). The Commission's study is based on data collected between 1984 and 1985. Anchorage, where over half of the divorces in Alaska occur each year, was selected as the study site. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Merrill v. Merrill, 368 P.2d 546, 547-48 n.4 (Alaska 1962). These same factors are also considered by trial courts in determining the division of property between the parties. *See* ALASKA STAT. §§ 25.24.160(a)(4)(A)-(I) (1991).

Merrill factors are essentially codified in Alaska Statute section 25.24.160(a)(2).[12] In divorce actions in Alaska, "the trial court is vested with broad discretion to award spousal support 'as may be just and necessary.'"[13] The 1990 amendments added language to section 25.24.160(a)(2) instructing courts that a maintenance award "must fairly allocate the economic effect of divorce." However, the legislative history indicates that the 1990 amendments were not meant to effect any dramatic changes in the adjudication of alimony cases. Rather, the legislature intended to "restate the principal factors found in the case law, not to change them, affect the interpretation given to them, or preclude changes or additions to them by other court rulings."[14]

2. *The Court's Aversion to Permanent Alimony.* No principle is more firmly embedded in the Alaska Supreme Court's family law jurisprudence than that, where the marital assets will permit, trial courts are to provide for the post-dissolution financial needs of the parties through the division of property rather than alimony. This principle, while not reflected in the express language of the statute

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12. ALASKA STAT. § 25.24.160(a)(2) (1991) provides in pertinent part:

> (a) In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide
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> (2) for the recovery by one party from the other of an amount of money for maintenance, for a limited or indefinite period of time, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault; an award of maintenance must fairly allocate the economic effect of divorce by being based on a consideration of the following factors:
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> (A) the length of the marriage and station in life of the parties during the marriage;
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> (B) the age and health of the parties;
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> (C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;
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> (D) the financial condition of the parties, including the availability and cost of health insurance;
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> (E) the conduct of the parties, including whether there has been unreasonable depletion of marital assets;
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> (F) the division of property under (4) of this subsection; and
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> (G) other factors that the court determines to be relevant in each individual case. . . .

13. Hanlon v. Hanlon, 871 P.2d 229, 232 (Alaska 1994) (quoting ALASKA STAT. § 25.24.160(a)(2)).

14. Act effective Sept. 12, 1990, ch. 130, § 1, 1990 Alaska Sess. Laws 1; *see also* Jones v. Jones, 835 P.2d 1173, 1178 n.7 (Alaska 1992).

itself, has been asserted repeatedly by the court and represents the traditional starting point for a review of trial court spousal support awards.[15] Where the court determines that the property available for division can adequately satisfy the reasonable needs of the claimant, it deems alimony payments to be violative of the requirement of section 25.24.160(a)(2) that all awards be "just and necessary."[16] As a corollary to this guiding principle, the court has enunciated the policy that awards of *permanent* alimony are particularly disfavored.[17] This policy is grounded in the rationale that "it is generally undesirable to require one person to support another on a long-term basis in the absence of an existing legal relationship."[18]

Moreover, the Alaska Supreme Court has in the past found support for its approach in the demanding standards embodied in the Uniform Marriage and Divorce Act ("UMDA"), which provide that a claimant will be eligible for alimony only if that spouse: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian may not be required to seek employment outside the home."[19] Professor Homer Clark, a prominent family law scholar, has identified the UMDA as comprising part of the "contemporary body of opinion which holds that alimony has few or no useful functions and therefore ought

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15. *See, e.g.*, Richmond v. Richmond, 779 P.2d 1211, 1215 (Alaska 1989); Miller v. Miller, 739 P.2d 163, 164 (Alaska 1987); Nelson v. Nelson, 736 P.2d 1145, 1147 (Alaska 1987); Schanck v. Schanck, 717 P.2d 1, 5 (Alaska 1986); Malone v. Malone, 587 P.2d 1167, 1168 (Alaska 1978); Messina v. Messina, 583 P.2d 804, 804-05 (Alaska 1978).

16. Hilliker v. Hilliker, 755 P.2d 1111, 1112 (Alaska 1988).

17. *See Hanlon*, 871 P.2d at 233. Alaska is not alone in this respect. Florida, for instance, with the advent of no-fault divorce and the principle of equitable distribution, has likewise seen the "virtual abandonment of permanent alimony." REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 56 (1990) [hereinafter FLORIDA STUDY].

18. *Jones*, 835 P.2d at 1179.

19. UNIF. MARRIAGE AND DIVORCE ACT § 308(a), 9A U.L.A. 347-48 (1973); *see also Schanck*, 717 P.2d at 5 n.10 (citing with approval the Commissioner's Comment to section 308 of the Uniform Marriage and Divorce Act); *Messina*, 583 P.2d at 805 (incorporating into the "just and necessary" inquiry the Commissioner's Comment to section 308 that courts should "provide for the financial needs of the spouses by property disposition rather than by an award of maintenance").

either to be abolished or very strictly limited."[20] Another commentator has remarked that, rather than providing compensation for the female spouse's diminished earning capacity at divorce, "the UMDA creates a duty to find a job."[21]

The deeply rooted preference for property division can claim some support in the principles of equitable distribution of marital property that were a hallmark of the no-fault divorce reform era. Yet "because men usually have a greater earning potential, women are disadvantaged by 'equitable' distribution [because] marital assets are [often] too slight to provide sufficient income."[22] In fact, most divorcing couples have minimal tangible property available for division at divorce,[23] and "few couples have significant debt-free property."[24] Additionally, although a strong argument can be made that the spouses' earning capacities represent the primary financial assets of the marriage,[25] earning capacity is not recognized by the Alaska courts as subject to equitable property division at divorce.[26] Thus the large-scale judicial preference in Alaska for property division rather than longer-term alimony awards imposes disproportionate hardship on formerly dependent wives. As one commentator stated in a more general context, "[b]ecause courts generally do not recognize career assets as marital property, current property division rules, even those that ostensibly require an equal division of marital assets, do not result in anywhere near an equal sharing of the fruits of most marriages."[27]

3. *Rehabilitative and Reorientation Alimony.* In an atmosphere that Professor Clark has described as the "contemporary

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20. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.4, at 643 (2d ed. 1988).

21. Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 564 (1990).

22. FLORIDA STUDY, *supra* note 17, at 80.

23. *See* WEITZMAN, *supra* note 4, at 55; McLindon, *supra* note 4, at 384; *see also* CLARK, *supra* note 20, § 16.1, at 621 ("[I]t is clear that only a small proportion of divorces involve enough property to be of any benefit to the spouses.").

24. Rutheford, *supra* note 21, at 575 (citations omitted).

25. *See* WEITZMAN, *supra* note 4, at xiii; FLORIDA STUDY, *supra* note 17, at 61-62; Rutheford, *supra* note 21, at 575 ("The real asset of most Americans is their earning capacity.").

26. *See* ALASKA STAT. § 25.24.160(a)(4) (1991).

27. Singer, *supra* note 5, at 1115.

hostility to alimony,"[28] courts have sought ways to restrict amounts of spousal support payments and to limit the duration of such awards. Data collected by the Alaska Women's Commission suggest that Alaska is representative of this trend; in its 1986 survey, the Commission found that alimony was granted in only ten percent of the cases studied. Moreover, awards "usually lasted for only one year and provided an average of only $500 a month, despite the fact that most [women] who received [alimony] have no job, no other income or are of an age which makes it difficult to find paid work."[29] Courts most frequently turn to "rehabilitative alimony," which seeks to encourage the alimony claimant, usually the wife and former homemaker, to pursue job-training and education. The presumption is that such training will lead to steady employment and self-sufficiency.[30]

The Alaska Supreme Court held in *Jones v. Jones*[31] that rehabilitative alimony is appropriate where "the recipient spouse intends to apply the alimony toward job training designed to lead to employment."[32] But in keeping with the court's general aversion to spousal support payments, the exception for rehabilitative alimony is narrow in its application, both in terms of its general scope and specific duration.[33] While a trial court may award rehabilitative alimony even in cases where it determines the parties' needs will be adequately met through the preferred division of marital property, "rehabilitative alimony is properly limited to job training or other means directly related to the end of securing for one party a source of earned income."[34] The court has held that an award of rehabilitative alimony "does not create a continuing

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28. CLARK, *supra* note 20, § 16.4, at 650.

29. Baker, *supra* note 7, at ii.

30. *See generally* Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988).

31. 835 P.2d 1173 (Alaska 1992).

32. *Id.* at 1178-79.

33. Again, Alaska is not unique in this regard. Weitzman argues that the shift from more traditional permanent alimony awards to short-term or transitional payments signifies "[t]he most important change in the pattern of alimony awards following the introduction of no-fault divorce." WEITZMAN, *supra* note 4, at 164.

34. Schanck v. Schanck, 717 P.2d 1, 5 (Alaska 1986); *see also* Carlson v. Carlson, 722 P.2d 222, 225 (Alaska 1986); *cf.* Bays v. Bays, 807 P.2d 482, 485 (Alaska 1991) (observing that the preference for meeting parties' needs through property division does not apply to rehabilitative alimony or support of limited duration).

legal obligation to provide for the reasonable needs of a former dependent spouse,"[35] and "should not be awarded to a spouse who refuses to use it for its intended purpose."[36]

Moreover, the court in recent years has placed a heavy burden on the spouse seeking an award of rehabilitative alimony: he or she must submit a "cost estimate of the rehabilitative plan, as well as an approximation of the economic benefit that is expected. It is necessary that the person receiving rehabilitative alimony will improve employability as a result of the plan."[37] The court also applies what appears to be heightened scrutiny in its review of rehabilitative awards. In *Dixon v. Dixon*,[38] for example, the wife, following an eighteen-year marriage and seven years of being employed as a bookkeeper, was pursuing an associate's degree in accounting on a part-time basis.[39] The trial court specifically found that Sheri Dixon was "taking courses to improve her earning capacity and . . . need[ed] spousal maintenance for a period to realize her potential and to allow her to grow professionally, as she helped [her husband] to grow and develop."[40] Sheri Dixon also submitted an educational plan according to which she would take three units per semester towards the fifty-four she needed to earn her accounting degree.[41]

Despite the trial court's findings, and Sheri Dixon's demonstrated intention to apply the alimony toward job training as the case law requires,[42] the supreme court held that she had "not presented a sufficiently detailed course plan and degree goal to justify an award of 'rehabilitative alimony.'"[43] Even more remark-

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35. Musgrove v. Musgrove, 821 P.2d 1366, 1369 (Alaska 1991).

36. Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987).

37. Ulsher v. Ulsher, 867 P.2d 819, 822 n.5 (Alaska 1994).

38. 747 P.2d 1169 (Alaska 1987).

39. *Id.* at 1170, 1173.

40. *Id.* at 1173. The trial court further found that Mr. Dixon earned a net monthly salary of $4,900, while Mrs. Dixon earned $1,400 net per month and testified to having monthly expenses of over $3,600. *Id.* at 1170.

41. *Id.* at 1173.

42. For an example of what the case law requires, see *supra* note 36 and accompanying text.

43. *Dixon*, 747 P.2d at 1173. For a contrasting conclusion, see Ulsher v. Ulsher, 867 P.2d 819, 820-21 & nn. 2-3 (Alaska 1994) (affirming a rehabilitative alimony award for a five-year educational plan that was no more detailed than the one dismissed in *Dixon*) and Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981) (affirming, in the absence of any educational plan, a rehabilitative award of $300 per week for one year, based on the trial court's determination that such an award

able, the court concluded that Sheri's plan "will not prevent her from working full-time and therefore cannot justify the trial court's substantial award of $800 per month for two years and $600 per month for an additional two years."[44] Such analysis is particularly questionable and inequitable in light of the fact that Sheri had primary custodial responsibility for the couple's fifteen-year-old daughter. It also suggests that the court was sympathetic to her ex-husband's arguments that "since Sheri did not testify that she intended to decrease her work time in order to increase her school time, alimony should be limited to . . . the cost of her tuition and books" and that "the support awarded . . . would provide Sheri with a financial windfall."[45]

The court's treatment of rehabilitative alimony, as illustrated by *Dixon*, is problematic for two reasons. First, it reveals the court's improper application of the controlling statute.[46] Second, it relies on the myopic assumption that such awards, which by definition are limited in amount and duration, can adequately address the profound financial impact of divorce on women. While the purposes behind the award are unobjectionable, the way rehabilitative alimony is reviewed by the Alaska Supreme Court reflects the judicial misconception that formerly dependent spouses can be quickly trained and integrated into the work force, and attain appropriate levels of self-sufficiency.[47] The plain fact, however, is that few homemakers, divorced after a substantial period of marriage, will ever be able to secure the kind of employ-

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would enable the wife to "improve her commercial, secretarial and bookkeeping skills").

44. *Dixon*, 747 P.2d at 1173.

45. *Id.* The court conceded, however, that "[a]n alimony award of limited duration designed to aid Sheri in reorienting her lifestyle to her new financial circumstances may be appropriate," *id.* at 1173, and remanded the case for "specific findings regarding the propriety of either a rehabilitative or reorientation alimony award and the proper amount thereof," *id.* at 1174.

46. *See* discussion *infra* part II. *Dixon* is noted, *infra* note 93, as an example of the court's tendency to remand cases for more specific factual findings, even when the trial court's findings were guided precisely by the factors enumerated in section 25.24.160(a)(2) of Alaska Statutes.

47. The Florida Supreme Court Gender Bias Study Commission observed that older divorced women "encounter a legal system that assumes a few years of rehabilitative alimony will permit them to go out into the world and attain a standard of living commensurate with that of their married life," which turns out to be a "cruel joke." FLORIDA STUDY, *supra* note 17, at 48.

ment necessary to recover their lost financial standing.[48] One might infer from Alaska case law that time-limited rehabilitative alimony has been seized upon as much to relieve the obligor husband from continuing, indefinite financial obligations as to encourage formerly dependent spouses to obtain education and job skills.[49] However, as one commentator has noted, "[t]ime limits always have the potential for leaving a large, unmet gap between reasonable needs and income of the recipient."[50] The court's approach to rehabilitative alimony, then, when examined within the broader context of its hostility to more permanent awards, reveals an analytical framework that disadvantages the formerly dependent female spouse, particularly the traditional homemaker in a long-term marriage.[51]

The Alaska Supreme Court has also recognized another narrow exception to its general aversion to alimony for what it terms "reorientation alimony." This type of alimony is "inherently transitional"[52] and is intended "to allow the requesting spouse an opportunity to adjust to the changed financial circumstances accompanying a divorce."[53] Unlike an award of rehabilitative alimony, reorientation alimony must be predicated on a finding that "the property settlement will not adequately meet the parties' reasonable needs."[54] While the court generally states that reorientation alimony may "properly be awarded only for relatively short periods of time,"[55] it in effect imposes a severely restrictive cap on the duration of such an award, remarking that "it is difficult to imagine circumstances under which an award of reorientation alimony extending for longer than one year would be justified."[56]

Rehabilitative and reorientation alimony may be awarded simultaneously. Thus, the court has held that "[a]lthough reorientation and rehabilitative alimony serve separate goals, require

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48. Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 19 (1989).

49. *See* Krauskopf, *supra* note 30, at 574. Along these lines, one might also detect an undercurrent of fear of the so-called "alimony drone," *id.* at 574, that is, the stereotype of an ex-wife "living in indolent luxury on the proceeds of her ex-husband's labor." CLARK, *supra* note 20, § 16.4, at 650.

50. Krauskopf, *supra* note 30, at 581.

51. *See* CLARK, *supra* note 20, § 16.4, at 650.

52. Davila v. Davila, 876 P.2d 1089, 1094 (Alaska 1994).

53. Richmond v. Richmond, 779 P.2d 1211, 1215 n.6 (Alaska 1989).

54. *Id.*

55. *Id.*

56. *Id.* at n.3.

different findings, and are consequently distinct forms of temporary support, they are not mutually exclusive; in some instances, when supported by the record, both may be appropriate."[57] The evidence, of course, must establish that both forms of awards would be just and necessary; while "a trial court need not make findings regarding every [statutory] factor, [the court] has remanded awards of alimony where there is an insufficient analysis of the needs of the alimony recipient or the means of the paying party."[58]

The court's treatment of reorientation alimony, like that of rehabilitative alimony, rests on the dubious assumption that women who can establish the requisite financial need that would entitle them to an alimony award can become self-supporting in relatively short periods of time. Indeed, alimony awards in Alaska usually last, on average, for only one year. Moreover, the median monthly award is estimated at $500, while nearly half of the women receiving alimony lack other sources of income.[59] Thus, one sees a perverse tension between the theoretical underpinnings of these forms of short-term awards and their practical effects on women after divorce. In other words:

> [S]hort duration awards of only one year run counter to an acknowledgement of the actual time required to train and find gainful employment. Most vocational and professional programs could not be completed in the length of time spousal maintenance is provided for. Hardest hit by this contradiction are homemakers who have little work experience outside the home.[60]

In sum, the Alaska Supreme Court's current alimony regime suffers from two important defects. First, the court's views do not account for the reality that most women, particularly homemaker wives in long-term marriages, are stripped of their financial security at divorce. Second, the court's approach rests on the faulty assumption that women have achieved a general level of economic parity with men and can be quickly mainstreamed into the

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57. *Id.* at 1094. For an example, see Money v. Money, 852 P.2d 1158, 1164 (Alaska 1993) ("By awarding [the wife] alimony to aid her in preparing for the job market and to help her organize her portion of the marital estate assets, the superior court effectively awarded [her] both rehabilitative and reorientation alimony.").

58. Gallant v. Gallant, 882 P.2d 1252, 1255 (Alaska 1994) (citing Renfro v. Renfro, 848 P.2d 830, 834 (Alaska 1993), and Jones v. Jones, 835 P.2d 1173, 1179 (Alaska 1992)).

59. Baker, *supra* note 7, at 17-18.

60. *Id.* at 17.

competitive labor market. As a result, Alaska alimony rules, though couched in gender-neutral terms, have in judicial application exacerbated gender-aligned inequities.

II. THE RECENT TREND AND ASSOCIATED PROBLEMS

A. The Frequency of Remanding for Specific Findings

An examination of recent Alaska Supreme Court case law involving alimony awards reveals a distinct trend: the court consistently remands spousal support awards to the trial court for further specific findings as to the amount and duration of such payments. *Jones v. Jones*[61] offers perhaps the most striking example of this trend and reveals much of what is wrong with the court's current approach to reviewing alimony awards. *Jones* involved a thirty-eight year marriage that produced four children. The wife, Virginia, never completed the ninth grade, was never employed during the marriage, and was fifty-seven years old at the time of trial.[62] Her former husband, Billie, had been employed at several oil companies during the marriage. He was earning $145,000 per year at the time of separation and had an annual salary of $115,000 at the time of trial.[63] Expert medical testimony presented at trial established that Virginia was plagued by "chronic lower back pain, chronic leg pain due to a tumor, situational depression, and chronic anxiety," all of which would restrict Virginia's ability to work.[64] The trial judge, Judge John Reese, concluded that due to Virginia's "age and debilitated status, it [was] not reasonable to expect her to become economically employed."[65] He further made the specific factual finding that Virginia's "reasonable needs are somewhat in excess of $2500.00 per month"[66] and, "in light of Billie's lucrative and secure career,"[67] ordered Billie to pay alimony in the amount of $2,500 per month until he retired at the age of sixty-five.[68] Judge Reese explained that the award would "maintain Mrs. Jones in an

61. 835 P.2d 1173 (Alaska 1992).
62. *Id.* at 1174.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1175.
67. *Id.*
68. *Id.*

appropriate station in life although somewhat less than the standard of living to which she was accustomed."[69] In consideration of her remaining needs, he pronounced a property settlement that awarded Virginia seventy percent of the marital assets.[70]

The Alaska Supreme Court did not dispute the medical conclusions regarding Virginia's physical and mental incapacitation. Indeed, the court found that "the record contains substantial evidence in support of the [trial] court's finding that Virginia is not employable."[71] Despite this conclusion, the court held that the record revealed an insufficient inquiry into Virginia's current "circumstances and necessities."[72] Finding itself unable to evaluate whether Judge Reese's award of $2,500 per month satisfied the "just and necessary" statutory standard, the court vacated the alimony award and remanded the spousal support determination for "specific findings concerning [Virginia's] financial needs and expenses."[73]

Another recent case, *Davila v. Davila*,[74] involved a similar scenario. Rita and Robert Davila divorced in 1992 after a marriage of twenty-five years, during which time Rita took care of most of the domestic and child-rearing responsibilities.[75] Robert spent nineteen years in the military and thereafter obtained a position with the Federal Aviation Administration. Rita was employed as a full-time civil servant after 1980.[76] At the time of trial, Robert was forty-six years old and received total monthly earnings of $4,109; Rita was forty-three years old and took home $1,516 in net monthly pay.[77] The trial court awarded Rita reorientation alimony for four years, in payments of $800 per month for the first two years and $700 per month for the remaining two years.[78] The trial court explained that its purpose in fashioning the award was "'to aid [Rita] to adjust to new financial circumstances and a new life style.'"[79]

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69. *Id.*
70. *Id.*
71. *Id.* at 1179.
72. *Id.* (quoting Merrill v. Merrill, 368 P.2d 546, 547 n.4 (Alaska 1962)).
73. *Id.* at 1179.
74. 876 P.2d 1089 (Alaska 1994).
75. *Id.* at 1091.
76. *Id.*
77. *Id.* at 1095.
78. *Id.* at 1093.
79. *Id.* (citation omitted in original) (alteration in original).

The Alaska Supreme Court remanded the alimony determination, holding that the trial court had failed to "specifically address Rita's needs" by "not specify[ing] the nature of the financial circumstances Rita would face or the scope of the adjustment she would be required to make."[80] Apparently hostile to any resolution that would create continuing obligations between the parties, the court found it particularly objectionable that the trial court had failed to justify adequately why it selected a monthly payment scheme that would last four years.[81] The court also believed that the trial court had not specifically addressed "the impact that the payments could be expected to have on [Robert's] own financial circumstances."[82]

The supreme court's handling of *Davila* must be analyzed in the context of the scope and detail of the trial court's findings. In *Davila*, as in *Jones*, the lower court's decision was guided precisely by the factors enumerated in section 25.24.160(a)(2) and was informed by the broader commanding principles explicitly embedded in the statute. The trial court examined such factors as the length of the marriage,[83] the age of the parties,[84] the station in life of the parties during the marriage and their custodial responsibilities for their children,[85] the specific earning capacity of each party,[86] the parties' educational backgrounds,[87] the parties' employment skills and job experiences[88] and the nature of the

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80. *Id.* at 1095.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. In this regard, the supreme court noted that "Rita delayed her career plans during the marriage in the interests of raising her children and subordinated her career to Robert's." *Id.* at 1095.

86. This figure was determined by using Rita's yearly salary and Robert's annual salary and retirement and disability benefits. *Id.*

87. The court noted that during the marriage "Robert received a number of higher educational degrees while Rita received an associate's degree." *Id.* On this point, the court further observed that Rita "could not advance in her current job without higher education," and that at the time of trial "Rita was studying for a bachelor's degree, which she expected to complete in five years at the current rate of taking two classes per semester while working full time," *id.*, which would appear to offer an explanation for the court's selection of the four-year payment duration.

88. The court declared that "Rita left the marriage with vastly inferior job skills and earning power than Robert." *Id.*

marital property division.[89] Thus the trial court seems to have made specific findings concerning both the needs of the claimant and the obligor's ability to pay. Its order was therefore clearly geared toward addressing the "economic effect of divorce" as mandated by statute,[90] and its decision reflected an award that it believed would be just and necessary under the circumstances. Given such pertinent factual findings, combined with stated justifications for the resulting conclusions of law, one would assume that the supreme court could have undertaken informed and meaningful appellate review of the correctness of the award instead of remanding the case for further findings. Instead, the court, possibly motivated by its aversion to alimony awards, remanded the case for even more factual findings.

Jones and *Davila* are by no means aberrations. Although their facts are particularly compelling, they represent the norm as to how the court has come to review alimony awards. Other examples of the court's tendency to place onerous burdens on claimants to provide further factual detail can be seen in cases such as *Gallant v. Gallant*,[91] *Hanlon v. Hanlon*,[92] *Dixon v. Dixon*,[93] *Miller v. Miller*,[94] and *Messina v. Messina*,[95] all of which were remanded for more factual findings.[96]

B. Problems with the Trend

1. *Remand is often unnecessary, impractical and yields inequitable results.* The *Jones* decision illustrates why remand in many of these cases is unwarranted and suggests that there is more

89. The trial court had noted that the parties did "'not have sufficient liquid assets, nor property which could be converted to liquid assets to properly allocate an equitable division of property between [them].'" *Id.* (citations omitted in original).

90. *See* ALASKA STAT. § 25.24.160(a)(2) (1991).

91. 882 P.2d 1252 (Alaska 1994).

92. 871 P.2d 229 (Alaska 1994).

93. 747 P.2d 1169 (Alaska 1987).

94. 739 P.2d 163 (Alaska 1987).

95. 583 P.2d 804 (Alaska 1978).

96. One recent case, Ulsher v. Ulsher, 867 P.2d 819 (Alaska 1994), seems to have departed from this trend by affirming a five-year rehabilitative alimony award to a claimant pursuing a civil engineering degree. However, at least one justice recognized this case as aberrant. Justice Matthews dissented due to what he considered to be an absence of the type of specific findings the court has customarily come to require in such cases. *Id.* at 823-24 (Matthews, J., dissenting).

to the remand trend than the court simply seeking to circumscribe the trial court's vast discretion. The record in *Jones* discloses that the trial court made extensive findings as to the abilities and needs of both parties.[97] Moreover, these findings were firmly grounded in the relevant statutory criteria that are designed to guide a trial judge's discretion in this area.[98] For instance, Judge Reese made explicit reference to the following factors: the long marital duration; the station in life of the parties during the marriage; the age and health of both parties; the parties' earning capacity; the parties' educational backgrounds, employment skills, work experiences, length of absence from the job market, and custodial responsibilities of the parties during the marriage; the financial conditions of the parties; and the division of marital property.[99] The trial court therefore addressed *all* of the relevant factors that must be considered under Alaska law, carefully weighing those factors in order to fashion a "just and necessary" alimony award that would "fairly allocate the economic effect of divorce," as the controlling statute mandates.[100]

Given the breadth and detail of the trial court's findings, the supreme court's conclusion that "the record reveals little of Virginia's current 'circumstances and needs'"[101] is puzzling. Perhaps the court suspiciously viewed the award as too sizeable and too prolonged with the potential of conferring an indefinite windfall on Virginia. However, though the court stopped short of holding that the trial court abused its discretion, the court's remand for more specific findings as to Virginia's financial needs seems to compel the conclusion that the court regarded the award as so favorable to Virginia as to be unjust or unnecessary. The decision therefore reveals that the Alaska Supreme Court considers the satisfaction of financial need the paramount objective of the alimony statute and the dispositive issue in its evaluation of maintenance awards.

As a general proposition, giving such controlling weight to financial need is anchored in dubious statutory construction, especially given the "laundry-list" of factors enumerated in the statute that must aggregate to produce an award that meets the

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97. *See supra* text accompanying notes 62-70.
98. *See* ALASKA STAT. § 25.24.160(a)(2)(A)-(G) (1991).
99. *See* Jones v. Jones, 835 P.2d 1173, 1174-75 (Alaska 1992).
100. ALASKA STAT. § 25.24.160(a)(2) (1991).
101. *Jones*, 835 P.2d at 1179.

overarching statutory "just and necessary" standard.[102] At the same time, the court neither provides functional guidance as to how the "specific financial needs" inquiry should be conducted nor offers any principled justification for its narrow interpretation of what might constitute a just and necessary award.

As to the particular facts in *Jones*, the amount of support awarded by the trial judge was by no means an arbitrary exercise of discretion. Virginia had submitted a financial declaration of total monthly expenses of roughly $4,000, which included such items as telephone, auto, dental, food, household and incidental expenses.[103] The supreme court concluded that Virginia's figure "appear[ed] to overstate her actual needs."[104] The trial judge apparently agreed, and awarded Virginia $1,500 less than she requested. One must assume that the trial judge was in the best position to assess the evidence presented at trial to arrive at an award he considered "just and necessary." In fact, in setting the monthly amount at $2,500 per month, the trial court found that Virginia's "'reasonable needs are somewhat in *excess* of $2,500.00 per month,'"[105] and that such an amount would maintain her in a station in life "'somewhat *less* than the standard of living to which she was accustomed.'"[106] In addition, since the trial court's order terminated the support payments upon Billie's retirement, the maximum duration of his obligation to Virginia would have been eight years. While this time period is concededly far longer than the court generally sanctions, it is nonetheless one that, strictly speaking, cannot be labelled "permanent." In short, the trial court's factual findings and conclusions of law with regard to its

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102. *See* ALASKA STAT. § 25.24.160(a)(2) (1991).

103. *Id.* at 1179 n.8.

104. *Id.* For a different analysis, compare Hilliker v. Hilliker, 755 P.2d 1111 (Alaska 1988). *Hilliker* involved a 32-year marriage in which the husband earned $103,500 per year and the wife earned $18,800 per year. *Id.* at 1112. While the Alaska Supreme Court held that an award of permanent alimony was unwarranted in view of the availability of property that could be divided to provide support, *see id.* at 1113, 1114, it also held that the trial court had properly assessed the wife's needs in allowing her $2,360 per year for gifts, donations, pet care and vacations, in addition to a $1,500 annual amount for clothing and $1,200 for automobile replacement. *Id.* at 1113. The court expressly found that "[e]ach of these items seems reasonably includable in an annual budget and the amount for each is supported by the evidence." *Id.*

105. *Jones*, 835 P.2d at 1179 (citation omitted in original) (emphasis added).

106. *Id.* at 1175 (citation omitted in original) (emphasis added).

decision to award alimony, as well as the award's amount and duration, were amply supported in the record. The trial court can therefore be said to have complied with its duty under Alaska Rule of Civil Procedure 52(a) "'to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable [the appellate court] to determine the grounds on which the trial court reached its decision.'"[107]

The supreme court's treatment of the alimony issue in *Jones* prompted a dissent from Justice Rabinowitz. Stressing the importance of the "compelling facts"[108] that supported the decision below, Justice Rabinowitz argued that the majority had "overlook[ed] relevant findings by the superior court as well as explicit statutory criteria which must be considered by the superior court in making an alimony determination."[109] Specifically, Justice Rabinowitz asserted that the supreme court erred by "focus[ing] exclusively upon Virginia Jones' specific financial needs to the exclusion of all other relevant factors mandated for consideration by [section] 25.24.160(a)(2),"[110] considerations which the trial court had properly weighed and set out in its decision. Perhaps expressing frustration with his colleagues' demonstrable aversion to alimony, and fearing the potentially inequitable results of remanding support decisions under such circumstances, Justice Rabinowitz remarked that *"the legislature did not intend to limit alimony to subsistence levels for recipient spouses."*[111]

It is certainly unobjectionable that the law of alimony should encourage former spouses to finalize their personal and financial entanglements and move on with their respective lives. Yet in its zeal to effectuate such a "clean break" by resisting longer-term alimony commitments, the supreme court grossly undervalues the investments of women like Virginia Jones in such marriages and underestimates the financial realities which they face at divorce. Equally troubling is that *Jones* presents the paradigm factual predicate under which a presumptive entitlement to alimony should arise. Yet, in a footnote to its opinion, the *Jones* court found that

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107. Merrill v. Merrill, 368 P.2d 546, 548 (Alaska 1962) (quoting Irish v. United States, 225 F.2d 3, 8 (9th Cir. 1955) and citing United States v. Horsfall, 270 F.2d 107 (10th Cir. 1959)).

108. *Jones*, 835 P.2d at 1181 (Rabinowitz, J., dissenting).

109. *Id.* at 1180 (Rabinowitz, J., dissenting).

110. *Id.* at 1181 (Rabinowitz, J., dissenting).

111. *Id.* at 1181 n.4 (Rabinowitz, J., dissenting) (emphasis added).

Virginia failed to meet her burden of "reasonably verify[ing] . . . her claimed monthly financial needs."[112] It seems, then, that the record must be replete with sales receipts or canceled checks before the court will uphold what it perceives to be a "sizeable" award, even in cases where the trial court has made specific findings concerning the resources, abilities and needs of the parties and has articulated the basis for its conclusions within the framework of the governing statutory criteria. Perhaps the court might even expect trial judges to include with their findings of fact and conclusions of law a detailed, anticipated monthly budget for each alimony claimant that could then be reviewed on appeal. One suspects that the court has backed itself into a corner with its alimony precedent and has fallen prey to the law of unintended consequences. For instance, the supreme court's "reasonable verification" requirement—innocuous on its face and seemingly satisfied in *Jones*—has become in operation an unreasonable burden on both alimony claimants and the trial judges who first hear their cases.

Finally, if the court continues to hold that the type of evidence and fact-finding in *Jones* is inadequate, one can expect unnecessary delays for judges with burgeoning dockets, less efficient utilization of judicial resources, greater burdens on counsel to prepare the requisite financial declarations, and increased costs for the litigants—all of which carry a disproportionate economic impact on the financially dependent spouse, most often the former wife.

2. *The scheme produces uncertainty and negatively influences settlement.* Two characteristics of divorce cases have conspired to make alimony predictions particularly difficult to make. First, divorce cases are inevitably fact specific. To aid the judge in sorting through the pertinent facts to allocate alimony, the controlling statute lists seven factors, without making any single factor dispositive.[113] Second, the court continues to remand alimony awards for more specific findings regarding the financial needs of the claimant, without offering trial courts guidance in the form of concrete examples or definitional principles about how such determinations should be made. Such uncertainty exerts a negative influence on the settlement discussions that are often critical in such cases, particularly to the detriment of divorcing

112. *Id.* at 1179 n.8.

113. *See* ALASKA STAT. §§ 25.24.160(a)(2)(A)-(G) (1991).

wives. As one commentator has observed, "[t]he absence of clear-cut legal standards . . . affects the negotiation process in ways that disadvantage the economically weaker party, generally the woman, in a divorce."[114] Even experienced family law practitioners in Alaska would be hard-pressed to predict comfortably for clients whether an alimony claim will succeed in the first instance, let alone to divine the amount of anticipated alimony recovery.[115]

III. RECOMMENDATIONS FOR AN IMPROVED MODEL OF ALIMONY[116]

A. A New Theoretical Approach: Examining the Relationship Between "Need" and "Loss"

A growing body of family law literature, critical of the norms traditionally employed to resolve divorce cases, has urged a movement toward grounding alimony awards in the principles of compensation for loss rather than satisfaction of need.[117] The traditional marriage arrangement, and the gendered division of labor it reflects, tends to impair the economic or market prospects of the wife while simultaneously improving those of the husband. The woman who assumes the role of homemaker or primary

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114. Singer, *supra* note 5, at 1119; *see also* WEITZMAN, *supra* note 4, at 234-35; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

115. *See generally* ELLMAN ET AL., *supra* note 3, at 688-692 and sources cited therein.

116. Procedural improvements are currently being considered in Alaska. Recently, Chief Justice Moore of the Alaska Supreme Court established the Family Rules Committee. This body considers changes to the rules of civil and appellate procedure that might effectively address some of the discrete problems that have arisen in the family law context. Telephone Interview with Christine E. Johnson, Court Rules Attorney, Alaska Court System (Mar. 28, 1995). Some of the proposed changes could mitigate the problems of judicial delay and excess costs to litigants that plague the resolution of divorce cases. However, these procedural changes have very limited potential to redress the more fundamental inequities of the present alimony scheme. To affect a change in the court's perceived aversion to alimony awards, a new legal and philosophical framework is required.

117. *See, e.g.*, Katharine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193 (1988); Margaret F. Brining & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); Ellman, *supra* note 48; Rutherford, *supra* note 21; Singer, *supra* note 5.

caretaker of marital children often withdraws from the labor market for extended periods of time. As a result, she incurs financial disadvantages in a variety of forms, including loss of educational opportunities, undeveloped job skills, foregone career advancement, and loss of direct, employment-related benefits such as wages and pension and insurance plans. Such disadvantages are compensated through the husband's income-earning activities during marriage. However, at the dissolution of the marriage the disadvantages incurred impose on the homemaker spouse a vastly reduced earning capacity, severely restricting her ability to support herself at a level approaching the marital standard of living. Put differently, the sacrifices of a homemaker spouse in a long-term marriage, often made in the interests of the marriage as a joint economic partnership, help to free her husband to pursue his economic interests. The fruits of the husband's activities form his monetary contribution to the marital unit, a contribution in which the homemaker spouse fully expects to share. With the marriage breakdown, however, the wife's non-monetary investments leave her to bear a disproportionate share of the resulting losses, while the husband's investment in his market skills and opportunities confers on him a substantially increased earning capacity.

Herein should lie the central focus of the law of alimony. At divorce, disparate economic ramifications befall each party as a result of the decisions they made in conducting their joint marital endeavor. Where the female spouse incurs substantial economic disadvantages because of the corresponding economic advantage she has conferred on her husband, the law has both a theoretical and practical justification for imposing an obligation on the husband to compensate his former spouse for such loss. The husband should be required to make alimony payments not simply because his former wife has some ill-defined sense of need, but because her conduct during the marriage has helped to insulate him from, and expose her to, the adverse economic consequences that generally accompany divorce. In short, "[t]he need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership."[118]

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118. LAW REFORM COMM'N OF CANADA, MAINTENANCE ON DIVORCE 24 (Working Paper 12, 1975), *cited with approval in* Moge v. Moge, 99 D.L.R.4th 456, 486-487 (Can. 1992).

In consistently remanding cases for a more detailed justification of how the alimony award comports with the claimant's specific financial needs, the Alaska Supreme Court seems to have lost sight of the fact that such need is necessarily informed and defined by what has been lost by the claimant during marriage. Moreover, a close examination of the court's opinions in this area suggests that its needs-based standard is intended to limit, or at least has the effect of limiting, alimony recipients to awards that account only for the "bare essentials." The law of alimony should seek instead to impose an equitable sharing of the economic consequences of divorce that accurately reflects the nature of the investments made by each spouse as part of their joint undertaking. This goal is more effectively served by focusing a court's inquiry on the extent of the loss incurred by the alimony claimant during marriage, particularly in terms of reduced earning capacity. Moreover, such a conceptual shift would be consistent with the relevant statutory factors and would more realistically account for the fact that a formerly dependent wife is often in need at divorce precisely because the failure of the marriage imposes disproportionate financial losses on her.

Empirical evidence confirms the effects that choosing to dedicate oneself to domestic responsibilities has on that spouse's future earning potential. One recent study, for example, found that the earning capacity of the stay-at-home wife erodes by 1.5% for each year that she has withdrawn from the labor force.[119] Based on this and similar data, the Florida Supreme Court Gender Bias Study Commission recently concluded:

> [W]omen who forego a career outside the home suffer a *permanent economic loss justifying compensation* in the form of alimony upon dissolution. The Commission thus concludes that alimony cannot be discarded in favor of property distribution. When property is used as the sole method of distributing marital assets, women suffer a disproportionate impact upon their future, compared to men. This occurs because few marital assets are in the form of divisible property and because there is an enormous gap in earning potential between men and women at every stage of their lives, regardless of their education. . . . Thus *alimony should be considered as general compensation for the wife's lost*

119. Mark A. Sessums, *What Are Wives' Contributions Worth Upon Divorce: Towards Fully Incorporating Partnership Into Equitable Distribution*, 41 FLA. L. REV. 987, 1029 n.27 (1989).

opportunities rather than a claim for support based upon need.[120]

These economic dynamics, and their ramifications for divorce litigants, have recently been recognized in *Moge v. Moge*, an important decision of the Canadian Supreme Court.[121] In *Moge*, the parties had been married for more than twenty years, and the husband had been paying support for sixteen years following their separation. During the marriage, the wife, who had a grade seven education level, served as primary caretaker for the couple's three children, maintained the family home and supplemented the family income by working nights as an office cleaner.[122] The trial court granted the husband's application to terminate support, concluding that the wife had been given sufficient time to become financially self-sufficient.[123] The court of appeals reinstated spousal support for an indefinite period[124] and the Supreme Court of Canada affirmed.[125]

The court initially took notice of the phenomenon that the gender-specific division of labor characteristic of traditional marriages leaves recently divorced women burdened with substantial financial hardship and market disability.[126] Yet rather than stopping there and concluding that the wife was entitled to support based on some elastic or subjective concept of her ostensible "need," the court took the next step and identified the source of her post-divorce need: the sacrifices she made in contributing her full-time domestic services for the sake of the joint marital endeavor. The court observed that the critical element in compensatory analysis is not simply that the wife has incurred demonstrable economic loss, but that this very process simultaneously can confer significant economic advantages on the husband.[127] While these twin effects remain effectively concealed as the marriage remains intact, they are fully realized at divorce. In other words, as the wife's earning capacity atrophies with time spent outside the

120. FLORIDA STUDY, *supra* note 17, at 58 (emphasis added).

121. 99 D.L.R.4th 456 (Can. 1992). For an in-depth discussion of this case and the philosophical approach it endorses by the justice who authored the *Moge* opinion, see Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View From Canada*, 31 HOUS. L. REV. 451 (1994).

122. *Moge*, 99 D.L.R.4th at 461.

123. *Id.* at 463.

124. *Id.* at 462.

125. *Id.* at 499.

126. *Id.* at 488.

127. *Id.*

labor force, her husband's capacity grows as he is freed from the domestic responsibilities he otherwise might share with his homemaker spouse. Upon dissolution, however, he will experience little difficulty in adapting to a condition of economic self-sufficiency, while his dependent spouse faces a radically different set of circumstances. Thus, when the marriage dissolves, "[t]he sacrifices [the wife] has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one."[128] It is precisely this interplay that justifies imposing a legal obligation of post-dissolution support on the husband.

Perhaps the central factor in this analysis is the implicit recognition that the non-monetary contributions of the homemaker or primary caretaker spouse should properly be regarded as her economic contribution to the marital unit since they necessarily free her husband to maximize his economic aspirations and worth in the marketplace.[129] While the income-producing spouse's monetary investments and increased earning capacity will be highly valued in the marketplace after divorce (thereby ensuring him a high degree of sustained economic security), the domestic services rendered by his wife will not be so valued. What might be construed as the opportunity cost of foregoing her own educational or career investments leaves her to face disproportionate economic hardship. Under such circumstances, it is both logical and necessary for divorce law to attempt to redress such inequities.

In light of these considerations, the *Moge* court concluded:

> In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, *in many cases a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages.* In such cases, compensa-

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128. *Id.*

129. While the Alaska Supreme Court might, at present, hesitate to embrace this proposition fully, it has indicated some willingness to move in this direction. For instance, in evaluating a trial court rehabilitative alimony award, the court observed that the wife's "role in the marriage was primarily domestic, but this was apparently a role decided on by the parties jointly, and should be recognized as a valuable contribution to the marital enterprise." Bussell v. Bussell, 623 P.2d 1221, 1223 (Alaska 1981).

> tory spousal support would require long-term support or an alternative settlement which provides an equivalent degree of assistance. . . .[130]

Therefore in *Moge* the Canadian Supreme Court affirmatively endorsed a compensatory approach to the payment of alimony. The court interpreted Canada's Divorce Act of 1970 as requiring the "fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender."[131] The court concluded that effectuating such an equitable distribution would necessitate the "development of parameters with which to assess the respective advantages and disadvantages of the spouses as a result of their roles in the marriage, as the starting point in determining the degree of support to be awarded."[132]

Finally, the *Moge* decision is instructive in that it emphasizes the degree to which custodial responsibility of the children of the marriage must enter into any "disadvantages incurred-advantages conferred" calculus. It is generally the case that custody is awarded to the wife, who, as noted above, also assumes disproportionate financial liabilities at divorce. An alimony doctrine premised on the idea that the parties should equitably share the economic consequences of their marital failure would seem to require that this reality be given the law's attention in the fashioning of support awards. One might reasonably argue that such concerns are the proper domain of child support payments. Yet it is plain that the custodial parent incurs financial disabilities that transcend, and add to, the direct costs of guaranteeing the welfare of her children and that severely restrict her own range of economic choices. As the court therefore properly noted:

> The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments.[133]

In such circumstances, the wife's continuing child care responsibilities can only accentuate the need for the law of alimony to

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130. *Moge*, 99 D.L.R.4th at 487-88 (emphasis added).
131. *Id.* at 479.
132. *Id.*
133. *Id.* at 489-90.

compensate the dependent spouse for losses incurred during marriage.

Professor Ira Ellman has been one of the strongest proponents of reconceiving alimony as compensatory spousal support.[134] Ellman has developed a comprehensive theory of alimony, complete with guiding principles and operative rules, which would be invaluable to any efforts by the Alaska Supreme Court to reconceptualize or rearticulate its philosophical and practical approach to alimony.[135] The utility of Ellman's approach lies both in providing a defensible legal theory upon which alimony can be based and in identifying those sets of facts that would yield compensable losses for the purposes of alimony. Reduced to its core, Ellman's theory of alimony is "designed to encourage socially beneficial sharing behavior in marriage by requiring compensation for lost earning capacity arising from that behavior."[136]

Ellman begins his analysis by highlighting the magnitude of the investment risks borne by women in the traditional marriage. In such a relationship, the wife makes substantial "up-front" investments, most often in the form of providing domestic services and bearing and raising children, skills and services that are effectively valueless in the commercial world. Indeed, these investments "give her no prospects for a return in the open market commensurate with her investment."[137] Yet these investments have undeniable present value to and confer immediate, continuing benefit on her husband. The husband, in turn, can invest in his earning capacity

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134. *See generally* Ellman, *supra* note 48. Most recently, Professor Ellman has served as the Reporter for the forthcoming AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Council Draft No. 1 (Nov. 1993). Much of Ellman's theory forms the core of the rules and principles laid out in Chapter 5, entitled "Compensatory Spousal Payments." The ALI principles are, at the time of this writing, only in draft form, and have yet to receive final Council ratification.

135. While some of Ellman's language recalls a contractual-type obligation with the concomitant remedy of expected benefit, Part I of his article describes in detail the failure of the contract analogy in the alimony context, primarily because "grounding alimony on an agreement for the conduct of the marriage . . . [would] conceptualize it as an award of damages to one spouse for the other spouse's breach," a principle inconsistent with the contemporary no-fault divorce regime. Ellman, *supra* note 48, at 16.

136. *Id.* at 12. For a thoughtful discussion of such sharing behavior in the context of property division analysis, see Susan W. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 7-13 (1977).

137. Ellman, *supra* note 48, at 42.

and contribute financial support to the marriage as such earning capacity grows over the years. Moreover, these investments are integral to an economically successful marriage. The traditional wife, then, "makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband's eventual market success."[138] If the marriage breaks down in later years, dissolution occurs precisely when the wife should be realizing her *gains* coincident with the maximization of her husband's earning potential. Thus, in reality it is the marriage *risks* that she realizes "when the same accommodations to marital roles that were rational within the marriage now leave her disproportionately burdened."[139] The current alimony regime, by not recognizing the wife's past contributions as economically valuable partnership resources, imposes on her the full brunt of what, in hindsight, the law proves to have been an improvident long-term investment. But this is not so for the ex-husband, whose enhanced earning capacity continues to demand a high premium in the marketplace after divorce. This result is clearly perverse: the law of alimony should be protecting the dependent spouse from this very scenario, rather than guaranteeing that it will occur.[140]

Such dynamics are not unique to the so-called "traditional" marriage. In a social context where husbands considerably out-earn their working wives,[141] rational economic planning would seem to dictate that the spouse with the lower earning power invest in the marriage rather than in her earning capacity in the market—an economic sacrifice that is designed to serve the integrated interests of the marriage partnership.[142] This means, of course, that the wife will generally assume the traditional role of homemaker/primary caretaker, and with it, both a status of economic dependency and a heightened risk if what was expected to be an

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138. *Id.*

139. *Id.* at 49.

140. Ellman further highlights that non-economic factors such as "the gender differences in the impact of age on marriageability" exacerbate women's post-divorce predicament. *Id.* at 44. He notes that in addition to making "substantial investments early in expectation of a deferred return," the traditional wife increasingly depletes her "marriageability" the longer she is married. *Id.*

141. *See id.* at n.137 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, NO. 133, EARNINGS IN 1981 OF MARRIED COUPLES FAMILIES, BY SELECTED CHARACTERISTICS OF HUSBANDS AND WIVES 29 (1984)).

142. *Id.* at 46.

enduring, sharing enterprise collapses. In light of these realities, Ellman makes the following observations:

> In fact, many if not most marriages in which the wife is employed are still traditional in orientation; she continues to carry a disproportionate share of the domestic responsibilities, burdening her career advancement, and it is her job which yields when there is a conflict between spousal jobs. Where the husband's work is more lucrative than the wife's, this arrangement is economically rational. Nevertheless, the wife's position is then similar to that of the classic homemaker-wife. She has not abandoned a market career, but she has sacrificed some career prospects to invest instead in her marriage. If the marital unit dissolves, she no longer shares in her husband's enhanced income and, absent some contractual or statutory remedy, the husband leaves the marriage with the benefit of her investment in his earning capacity.[143]

Having identified the problem of asymmetrical allocation of investment risk during marriage, and its inevitable corollary of disproportionate financial consequences following divorce, Ellman offers a reconceptualized version of alimony as the solution. Marital behavior, in the sense of how spouses decide to allocate their respective roles and responsibilities, can be said to be economically rational while the parties maintain their commitment to sharing. However, when that commitment dissolves, it imposes disproportionate financial disabilities on the dependent spouse. Plus, since the "legal environment . . . does not reallocate lost earning capacity on divorce,"[144] the present alimony regime effectively penalizes the homemaker-spouse. Against this backdrop, a new function of alimony emerges: "to reallocate the postdivorce financial consequences of marriage in order to prevent distorting incentives."[145] As Ellman states, "[a] system of alimony that compensates the wife who has disproportionate postmarriage losses arising from her marital investment protects marital decisionmaking from the potentially destructive pressures of a market that does not value marital investment as much as it values career enhancement."[146]

The critical feature here is not only the protection from distorting market incentives the theory seeks to afford the disadvantaged spouse, but also the close nexus the theory demands

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143. *Id.* at 46-47.
144. *Id.* at 50.
145. *Id.*
146. *Id.* at 51.

between cause and effect—compensable losses must have their origin in economically rational marital investment. Consequently, Ellman's theory is grounded in a defensible, and compelling, modus operandi: "equalizing losses arising from sharing behavior in the failed marriage, and not simply equalizing postdivorce income without regard for how the inequality came about."[147]

Having defined the purpose of alimony as compensating financial losses that originate in economically rational marital investment during marriage, Ellman offers principles and rules with which to identify and value the appropriate compensable losses. Ellman's approach compares "the claimant's economic situation at the end of the marriage with the situation she would have been in if she had not married," a comparison that "reveals that lost earning capacity is the only continuing financial loss."[148] Therefore, under Ellman's first principle, a showing of lost earning capacity resulting from marital investment is a condition precedent to establishing a presumptive entitlement to an alimony award.[149] Because alimony under this scheme compensates only those financial losses that can be traced to how the spouses decided to allocate their joint marital duties, the law is justified in rendering the spouse who benefitted therefrom liable to the spouse who suffered. Thus, the remedy not only protects the wife's marital investment, but mitigates the distorting financial pressures that would discourage her from making it.[150] As to the precise nature of this remedy, Ellman identifies it as

> an alimony award based upon the value of the alternative investment [the wife] might have made in her earning capacity. We must thus compare the wife's actual earning capacity when the marriage ends with the earning capacity she would have achieved if she had remained single. The difference equals our general measure of the alimony claim against her husband.[151]

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147. *Id.* at 52.

148. *Id.* at 53.

149. *See id.*

150. From this standpoint, Ellman's approach is attractive if one believes that alimony rules should not discourage interdependency. Politically, at the risk of over-generalization, the approach might find support both from liberal forces inclined to welcome the legal recognition of a traditional wife's marital investment, as well as from more conservative forces inclined to encourage and reward the stay-at-home wife. From either perspective, "[i]f we really believe that homemaking and caretaking are valuable contributions, we ought not to discourage them." Rutheford, *supra* note 21, at 580.

151. Ellman, *supra* note 48, at 54 (footnotes omitted).

Ellman's second principle refines the type of marital conduct that will yield a compensable loss. He specifies that "only financially rational sharing behavior can qualify as . . . marital investment [for which recovery will be allowed]. Lost earning capacity is thus not compensable if it arises from financially irrational behavior. . . ."[152] Because Ellman's third principle independently addresses losses incurred from the care of marital children,[153] the limitation embodied in the second principle deals principally with spousal role accommodations that are unrelated to or do not arise from such care. To illustrate the application of the second principle, Ellman offers the example of the "typical" two-career couple who must decide how to best balance the potentially conflicting demands of their careers. Often, the wife surrenders distinct market opportunities so that her husband can further invest in his earning capacity. The assumption is that the marriage will continue as a shared financial enterprise the benefits of which will inure to both parties. For instance, a schoolteacher-wife might give up her position, and with it, prospects of becoming a high-level administrator or principal in her present school system, in order to join her professor-husband who has been offered the presidency of a university in another city.[154] From the perspective of the marital unit as a whole, the wife's unilateral economic sacrifice can be termed financially rational, because "[t]he expected increase in the husband's income is greater than the expected value of the wife's foregone opportunity, so this choice should yield their marriage a net gain."[155] Yet the calculus shifts dramatically at divorce, when

> [the husband] would receive the entire gain from his job change, while [the wife] would incur the entire loss from hers, unless the law makes some adjustment. A law designed to avoid penalizing sharing behavior in marriage, to encourage spouses to think of themselves communally rather than individually, would therefore consider this history in fixing the spouses' postmarriage obligations.[156]

Ellman's second principle, then, unlike the present alimony regime, would recognize this sort of rational, and common, marital investment, and would confer on the spouse who made it a

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152. *Id.* at 58.
153. *See infra* text accompanying notes 171-73.
154. *See* Ellman, *supra* note 48, at 58-59.
155. *Id.*
156. *Id.* at 59.

presumptive entitlement to be compensated through the remedy of alimony.

Ellman next offers two rules to further define and facilitate the application of his second principle. First, Rule 2.1 states that "[a] loss of earning capacity incurred to accommodate a spouse's lifestyle preferences, yielding a reduction in aggregate marital income, is not compensable."[157] This rule, then, would generally preclude claims that arise from "nonfinancial preferences in matters such as geography, lifestyle and climate,"[158] reflecting the theory's core notion to limit claimworthy alimony actions to financial losses incurred for financially rational reasons. Moreover, the rule reflects both a realistic assessment and the modest goals of what Ellman believes his theory can and should address: while "the law cannot evaluate every aspect of marital behavior in fixing the divorcing parties' financial obligations,"[159] rulemakers can "sensibly isolate decisions that a couple rationally expects will enhance their aggregate income, and ensure that in making such a decision neither takes a risk of disproportionate loss if divorce then occurs."[160]

The effects of Rule 2.1 are most vividly demonstrated by cases in which homemakers in childless marriages assert an alimony claim. The spouse who sacrifices the opportunity to invest in her own market potential by assuming the role of homemaker and primary caretaker undoubtedly suffers from a diminished earning capacity, while the marriage as a whole benefits from a net income gain. In contrast, in a childless marriage, the economic analysis governing Ellman's preceding principles reveals that this is "a decision that predictably yields a reduction in aggregate marital income: [t]hat is, to remain a homemaker in a childless marriage is not ordinarily an economically rational decision, but instead reflects a lifestyle preference."[161] Under Rule 2.1, therefore, there would be a rebuttable presumption against compensating the homemaker in a childless marriage for her lost earning capacity. The rule, however, does not create a "blanket exclusion"[162] against such claimants. Rather, it leaves room for recovery in those presumably

157. *Id.* at 60 (capitalization altered).
158. *Id.* at 61.
159. *Id.*
160. *Id.* at 62.
161. *Id.* at 63.
162. *Id.* at 64.

rare cases in which the claimant can establish that her decision to forego market opportunities was in fact financially rational.[163]

Ellman's second rule addresses perhaps the most pivotal issue that would face judges applying the theory in actual divorce adjudication—how to measure a claim that has been presumptively established under the first and second principles. According to Rule 2.2, "[t]he claimant spouse is ordinarily entitled to recover the full value of her lost earning capacity."[164] This full value rule is an inevitable consequence of the stated purpose of the alimony award itself, that is, "to free spousal decisions about the conduct of marriage from distorting market pressures."[165] Since the market assigns no worth to the wife's marital investment, an alimony rule measured by the full value of the earning capacity she would have generated if she had remained in the job market would represent the most equitable way to reallocate both the disproportionate risks the wife faces during marriage and the disproportionate losses she incurs at divorce.[166] Simply put, Rule 2.2 seeks to "put[] [the wife] where she would have been if she had not married, in terms of her earning capacity."[167]

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163. It would seem that such a decision could qualify as financially rational only when its effects confer an economic benefit on the husband, and consequently could be expected to generate some increase in aggregate marital income. Ellman offers two such examples. First, a wife would be entitled to a remedy under Rule 2.1 where "the couple might rationally decide that [she] can make a substantial contribution to her husband's business by assisting him in some unpaid capacity rather than entering the labor market." *Id.* at 63. Ellman is careful to note, however, that if such a wife were to be awarded a share of the business under controlling marital property law, an alimony award would be inappropriate as it would result in "double counting." *Id.* Second, Ellman offers the "classic executive wife" as a potentially claimworthy homemaker under Rule 2.1. Such a spouse traditionally "was thought to enhance her husband's opportunities for significant corporate advancement through social graces and strategic entertaining. In such cases, it may well be an economically rational use of her labor to be a homemaker." *Id.* at 64 (footnotes omitted).

164. *Id.* at 65 (capitalization altered).

165. *Id.*

166. *Id.*

167. *Id.* at 67. It must be noted that Rule 2.2 also contains a "no-gain-no-claim" proviso; that is, where a wife's marital investment ultimately fails to yield an increase in overall marital income, she will be ineligible for an alimony remedy. Thus, sharing behavior will give rise to compensable losses only where it is both rational and successful. See *id.* at 67-71 for a more in-depth discussion of this limitation.

Finally, Ellman sets out his third principle, which operates as an exception to the second principle and the general measure of full compensation set out in Rule 2.2. In addition, the no-gain-no-claim limitation qualifying Rule 2.2 does not apply to claims arising under the third principle which addresses postmarital losses incurred by a primary caretaker claimant. Specifically, it provides: "[t]he homemaker spouse may claim half the value of her lost earning capacity, even though it exceeds the market value of her domestic services, when these services included primary responsibility for the care of children."[168] Ellman offers a simple but convincing example that illustrates why this separate rule is necessary to distinguish such factual situations from others that would seem to be controlled by the second principle. Ellman presents a two-lawyer couple who decide to raise a family after each has practiced law for three years. For the next ten years, the wife assumes the roles of homemaker and primary caretaker, thereby relinquishing "her place in the partnership track."[169] Were such a couple to divorce, Rule 2.1 would seem to award her the full value of the difference between her earning capacity at dissolution and the value of her alternative investment opportunity, that is, her earning capacity had she remained at the firm and potentially made partner. As Ellman notes, "[t]hat sum might be a few hundred thousand dollars annually, perhaps ten or twenty times the market value of [the wife's] services as a cook, nanny, and housekeeper."[170]

One should certainly pause at the prospect of the law imposing such an obligation on the ex-husband. Indeed, Ellman suggests that the husband could make a plausible argument that his ex-wife's accommodations were, under these circumstances, financially irrational, and that therefore Rule 2.1 should preclude recovery.[171] The argument would be that since "[c]hild care services could have been purchased for considerably less than [the wife's] foregone income, . . . [h]er decision to stay at home therefore resulted partly from the spouses' lifestyle preference—a preference for parental care over purchased care despite the dramatic difference in cost."[172]

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168. *Id.* at 71 (capitalization altered).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

But such an argument, were it to justify denying recovery *in toto*, would carry broad societal implications that would prove too much, and Ellman rejects it in the third principle. He reasons:

> The couple's decision to have children is financially irrational in the first place; no matter what arrangement they make for their child care, they would have been financially better off without children. But society relies for its continued existence on couples who make just this financially irrational choice. . . . Because of the policy of favoring the continued production of children and parental care of them . . . we do not want to impose a disproportionate risk of loss on the spouse who cares for the couple's children. We must instead ensure that the costs of having children are shared equally after the marriage ends. . . . Termination of the marriage cannot terminate the responsibility of either party to pay his or her equal share of the child care bill. . . . Because it is a shared cost, however, the husband is liable to the wife for only half of her loss [in earning capacity].[173]

Yet the third principle also recognizes that if, as happens in many modern marriages, the husband shares in parental responsibilities, and as a result he, like his wife, suffers a loss in earning capacity that arises from the care of their children, then "alimony should equalize that loss on divorce by giving the spouse with the larger loss an award for one-half the difference in their respective losses."[174] In addition, the third principle applies only so long as the children can be said to be of an age that would qualify them as in need of parental care. Consequently, "the woman who remains a homemaker even after her children are grown ceases to benefit from the third principle. She can recover only half the earning capacity she would have lost assuming she had gone back to work when the children were grown, whether or not she actually did."[175]

B. Potential Problems with the Theory

The marital duration has traditionally been a central factor that courts consider in fashioning support awards.[176] Indeed, the controlling Alaska statute lists the length of the marriage as one

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173. *Id.* at 71-72 (footnotes omitted).

174. *Id.* at 72.

175. *Id.* at 73.

176. *See* UNIF. MARRIAGE AND DIVORCE ACT § 308(b)(4), 9A U.L.A. 348 (1970); *see also* cases collected in Annotation, *Excessiveness or Adequacy of Amount of Money Awarded as Permanent Alimony Following Divorce*, 28 A.L.R. 4th 786, 813-14 (1984).

determinant of whether a claimant is entitled to alimony.[177] At first blush, Ellman's theory would not seem to be in complete harmony with this traditional element of alimony adjudication, as neither his governing principles nor operative rules explicitly call for the length of marriage to influence the amount of the alimony award. Yet it should be plain that, where a claimant has sacrificed market prospects in order to advance the earning capacity of her husband either by accommodating his more lucrative career opportunities or assuming the role of primary caretaker, there will be a correlation between the wife's loss in earning capacity and length of the marriage: "[the] right to recover the full amount of her lost earning capacity may yield a substantial claim in a long-term marriage in which the impact on earning capacity is great but it will provide a smaller claim the shorter the marriage."[178] As a result, marital duration will necessarily be a built-in component of Ellman's compensatory model, but, consistent with the overall theory, *only* where the claimant can establish a presumptive entitlement to recovery:

> Where the wife's claim is based on a loss in earning capacity arising from her performance of domestic obligations, the amount of her loss will typically increase with the length of the marriage. In a two-career marriage in which the wife has incurred no loss in earning capacity arising from sharing behavior, there will be no claim even though the marriage lasted for a long time. . . . Current law, which simply makes the length of the marriage a factor to consider, offers no explanation for enhancing the claim in one case but not the other.[179]

Ellman's framework, then, has the added benefit of offering a principled justification for why the duration of the marriage should effect the alimony outcome in the appropriate case.

Finally, Ellman's theory is perhaps vulnerable to the charge that the element upon which it most depends—the value of the wife's lost earning capacity—will be the most difficult at which to arrive. The theory calls for computing such value by determining "the difference between the earning capacity the claimant would have achieved if she had invested her time in marketable skills, and her actual earning capacity upon divorce,"[180] which by its very nature involves guesswork and speculation. While one might be

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177. *See* ALASKA STAT. § 25.24.160(a)(2)(A) (1991).
178. Ellman, *supra* note 48, at 76.
179. *Id.* at 75.
180. *Id.* at 78.

tempted, if not forced, to turn to the use of expert testimony to establish with accuracy the economic consequences of the failed marital investment,[181] the costs of gathering and presenting such evidence is likely to be prohibitive for the majority of alimony claimants. One must therefore search for other more reasonable, yet reliable alternatives.

Ellman recommends that, in attempting to compute the hypothetical earning capacity the former wife would have had she not married, courts can "combine statistical data suggesting average outcomes in like cases with evidence particular to the claimant."[182] The Canadian Supreme Court has also embraced the doctrine of judicial notice as an aid in this inquiry, by observing that "the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice."[183] At this juncture, we must perhaps limit our ambitions to outlining the broader contours of a new conceptual approach, and the suggestion that courts might have to become more hospitable to reasonable estimates and probable results. As Ellman himself ultimately concludes, the potential difficulties are not insurmountable:

> Even crude approximations of theoretically defensible criteria are probably better than intuitive estimates of what is "fair" under a system lacking established principles of "fairness" in the first place... In the end, precision is not obtainable. The determination of alimony claims ... will necessarily depend, at least in part, upon the rough justice of trial court discretion. . . . But we are still better off knowing what we should be doing, even if we cannot do it perfectly, than not knowing at all.[184]

IV. CONCLUSION

The law of divorce should not aspire to alleviate all the economic and social dislocations that accompany the breakdown of a marriage. No theory of alimony could hope to provide principles that would have easy application to the great diversity of marital arrangements that presently come before the courts for resolution. These observations, however, cannot obfuscate the current shortcomings of Alaska's current alimony regime, especially the fact

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181. *See, e.g.*, Krauskopf, *supra* note 30, at 589; Moge v. Moge, 99 D.L.R.4th 456, 495 (Can. 1992).

182. Ellman, *supra* note 48, at 79.

183. *Moge*, 99 D.L.R.4th at 497.

184. Ellman, *supra* note 48, at 79-80.

that a strict showing of financial necessity has come to control the review of alimony cases before the Alaska Supreme Court. The court should rethink its analysis of how resources are to be allocated at divorce; conceptualizing alimony as compensation for loss rather than relief of need offers a promising point of departure and would set the framework for more equitable and consistent results. It might also request that the Alaska legislature amend section 25.24.160(a)(2) and explicitly add "reduced earning capacity" as a statutory factor to be considered by trial courts in fashioning just and necessary alimony awards.[185]

Most importantly, alimony must be seen not as a transfer of the husband's wealth to the wife, but as a *reallocation* of their joint wealth that is derived from the choices they made and behavior they exhibited during marriage. Often alimony claimants do not simply *need* support, but are *entitled* to it, since they have *earned* it through investment in the marital unit.[186] Under the model advanced here, the former wife would not be asserting a claim to share beyond dissolution in her ex-husband's enhanced earning capacity.[187] Rather she would be claiming the right to recover, through compensatory payments, the value of her own lost earning capacity sacrificed during marriage.

Rational economic analysis and intuitive equitable considerations compel the conclusion that it is indefensible for "the spouse who benefitted from the other's lost earning capacity both to leave the marriage with all the financial gain the parties had initially expected to share, *and* to leave the wife with her loss."[188] The compensatory model would preclude such perverse results and would also harmonize with the spirit of the new language added to

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185. Indeed, the court has explicitly noted that "'[d]iminution in earning capacity' is not a statutory factor." Ulsher v. Ulsher, 867 P.2d 819, 822 (Alaska 1994).

186. One commentator has observed that because "only the functionally unemployable are entitled to maintenance on a pure need-based standard, accepting support can lower the spouse's self-esteem." Rutheford, *supra* note 21, at 570. Thus, a further advantage of the compensatory conception of alimony lies in its potential to remove the stigma that accompanies payments under the needs-centered model.

187. Such an approach would be akin to awarding the wife traditional contract expectation damages, where the "benefit of her bargain" would be measured by "her expected share in the marital profit if the marriage had continued." Ellman, *supra* note 48, at 66.

188. *Id.* at 70-71 (emphasis added).

Alaska's alimony statute in 1990 that awards should "fairly allocate the economic effects of divorce."[189] Finally "while theoretically defensible principles of alimony cannot be translated into self-executing adjudicative rules, they can give judges more guidance than they now have in following a coherent approach."[190] By clarifying what the law should seek to accomplish in making an alimony award, and why the law should justifiably impose such an obligation on a former spouse, courts should be better positioned to determine and explain whether, when and how such awards should be granted.

Christopher D. Nelson

189. ALASKA STAT. § 25.24.160(a)(2) (1991).
190. Ellman, *supra* note 48, at 53.