REHABILITATIVE ALIMONY: AN OLD WOLF IN NEW CLOTHES*

INTRODUCTION

Rehabilitative alimony is increasingly prominent in matrimonial law. Although Florida has issued by far the most opinions on the subject,[1] many states are developing the concept of temporary alimony, the purpose of which is to "rehabilitate" an economically dependent spouse, virtually always the wife. In theory, rehabilitative alimony should supplement equitable[2] or community[3] distribution of marital property to provide the dependent spouse with the resources to become self-supporting, at which time alimony ends and the spouses make a clean break.[4] Rehabilitative alimony "contemplates sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining and for the further purpose of preventing financial hardship on society or individuals dur-

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1. Lexis reports that a total of 356 state court decisions referring to rehabilitative alimony or rehabilitative spousal support have been reported since 1977; 303 are Florida opinions. This statistic is particularly distressing because it implies that rehabilitative alimony frequently is applied to women of retirement age.

2. In 1980, New York became the first state to adopt equitable distribution of property, which replaced the common law system of dividing property strictly according to title. New York's law begins by mandating that "Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of respective parties." N.Y. Dom. Rel. Law §236B (McKinney Supp. 1980-81). The statute directs the court to consider nine specific factors and "any other factor which the court shall find to be just and proper." Id. at §263B(5)(d). The nine factors are: income and property of each spouse; duration of marriage and health of the parties; custodial parent's need of the marital home; loss of inheritance and pension rights upon divorce; maintenance award; contribution of each party to the home and to the couple's earning potential; liquidity of the marital assets; financial prospects of each party; and for a business, corporation, or profession, the difficulties of valuation and the advantages of leaving the asset free of interference by the other spouse.

3. Under a community property scheme, 50% of the property acquired during the marriage is awarded to each spouse.

4. Among the other states that have awarded rehabilitative alimony are Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, New Hampshire, New York, Oregon, Pennsylvania, Tennessee, Vermont, Washington, and Wisconsin. State Divorce Laws, (Reference File) Fam. L. Rep. (BNA) 5-6 (Aug. 2, 1983). Some states, such as California, label the awards rehabilitative maintenance or rehabilitative spousal support. For a discussion of rehabilitative alimony in New Jersey, see text accompanying notes 57-66 infra.

ing the rehabilitative process."[5]

In practice, however, rehabilitative alimony serves as a device for time-limiting an alimony award. New Hampshire and Delaware have gone so far as to statutorily implement a strong public policy against alimony awards that continue for more than two or three years. New Hampshire law limits alimony to three years, unless the award is renewed.[6] A comparable Delaware statute limits alimony to two years if the marriage lasted less than twenty years.[7] That statute has been interpreted to mean that permanent alimony may not be awarded without an express finding that the wife could never achieve financial self-sufficiency.[8] However, the policies of most states are less clearly articulated, and decisions are left to the broad discretion of trial judges.

Rehabilitative alimony developed along with equitable property distribution and no-fault[9] divorce. It presumes that marital property has been divided according to principles of equitable distribution or community property before a court ever considers whether to award rehabilitative alimony.[10] However, there are indications that rehabilitative alimony often substitutes for a fair distribution of marital property.

A second premise of rehabilitative alimony is that it is awarded on the basis of economic need rather than as punishment for the marital breakup. It purports to be more just than requiring a guilty husband to pay permanent alimony or denying alimony to a guilty wife. Nevertheless, the relevant opinions show that rehabilitative alimony is often manipulated to punish former wives rather than to assuage the consequences of marital dissolution. Former husbands benefit unjustly when rehabilitative alimony is awarded in circumstances that should have resulted in permanent alimony. In practice, rehabilitative alimony reduces the likelihood that alimony will be used to punish former husbands but maintains the practice of punishing former wives.

A third claim of rehabilitative alimony is that it offers each former spouse the opportunity to become independent again by providing the dependent spouse with a charitable supplement to her fair share of marital property. In fact, rehabilitative alimony allows divorcing husbands to make a clean break but discourages wives from making any break at all.

The judicial opinions delineating rehabilitative alimony involve important social and political issues. Attitudes about family values, marriage, divorce,

5. Black's Law Dictionary 1157 (5th ed. 1979), citing Mertz v. Mertz, 287 So. 2d 691, 692 (Fla. Dist. Ct. App. 1973). See also Reback v. Reback, 296 So. 2d 541 (Fla. Dist. Ct. App. 1974).

6. N.H. Rev. Stat. Ann. § 458.19 (1983).

7. Del. Code Ann. tit. 13, § 1512 (a)(3) (1981).

8. Walter S. J. v. M. Lorraine J., 457 A.2d 319 (Del. 1983).

9. Traditionally, in order to obtain a divorce, one spouse had to prove fault (such as adultery or desertion) on the part of the other. Since 1969, when California adopted the first no-fault divorce law, only South Dakota has failed to adopt some form of no-fault provision. Nevertheless the traditional fault concepts continue to figure, however unofficially, in property and alimony awards.

10. See Freed & Foster, Economic Effects of Divorce, 7 Fam. L. Q. 275, 277-78 (1973).

and the status of women are in flux. Yet government policies downplay the reality that such attitudes are far less uniform than they once appeared to be, and society generally seems determined to refuse to compensate or acknowledge the economic value of housework and childrearing. Principles of comparable worth are currently under discussion, but in general, work performed by women remains less valuable simply because it is performed by women. Further, as our economy becomes more polarized and automated, jobs are scarcer, and the resulting competition intensifies age- and gender-based discrimination.[11] Thus, it will become even more difficult for an older woman entering the job market to attain economic self-sufficiency. Despite these considerations, the illusion that women have equal rights and opportunities persists. By incorporating this illusion as reality, rehabilitative alimony as currently applied promotes inequitable distribution of marital property, penalizes divorcing women, and generally violates women's rights.

This Note will describe rehabilitative alimony's purposes, assumptions, and development. It will discuss the factors that rehabilitative alimony purports to consider and the ways in which the factors are manipulated in awarding or denying rehabilitative alimony, in calculating the amount of an award, in modifying an award, and in substituting rehabilitative alimony where permanent alimony or property is due. It is the thesis of the Note that rehabilitative alimony is frequently unjust not because the concept is flawed, but because flexible standards and broad judicial discretion allow the assumptions of rehabilitative alimony to be overlooked and the economic contributions of women to be undervalued or ignored. A further abuse of this judicial discretion is the difficulty women have in obtaining counsel fees. Therefore, this Note proposes that 1) the criteria for determining an award of rehabilitative alimony be reformulated as a series of specific questions, 2) factors usually omitted be considered, and 3) judges or other presiding officials be required to answer the questions fully on the public record in every case. The proposal would allow flexibility, yet curtail abuse by narrowing and identifying the areas in which discretion should occur and by requiring public explanation of each factor. As a guideline for judges, attorneys, and divorcing spouses it demystifies this area of the law by demonstrating that the vague and incomplete mass of factors which presently determines awards of rehabilitative alimony can easily be broken down into a series of simple questions which, if answered completely and publicly, would result in more just awards.

11. In 1977, a full-time female worker earned only 62% as much as the average full-time male worker. Women's Bureau, United States Department of Labor, Women in the Labor Force: Some New Data Series 7 (1979). The situation may be even bleaker now. A report of the Wisconsin advisory committee to the United States Commission on Civil Rights stated that plant closings and relocations have had disproportionate impact on women and minorities, as have federal budget cuts. Minorities, Women Losing, Report Warns, Capital Times (Madison, Wis.), Dec. 20, 1982, (Today Section) at 2. See generally Jeffries & McGahey, Equity, Growth, and Socioeconomic Change: Anti-Discrimination Policy in an Era of Economic Transformation, 13 N.Y.U. Rev. L. & Soc. Change 233 (1985); Stanley, "Equity," "Growth" and Technology: The Historical Example of Women's Work, 13 N.Y.U. Rev. L. & Soc. Change 287 (1985).

I
ALIMONY DEFINED

Originally, alimony substituted for the husband's duty to support his wife.[12] It evolved to serve other functions, such as: supplementing child support, preventing the former wife from becoming a burden to the community, easing the transition to single status, compensating the former wife for prior services, and articulating moral judgments about the relative faults of the spouses.[13] Society withheld alimony to punish an adulterous wife and awarded excessive alimony to punish an adulterous husband.[14]

But for all its stated virtues, alimony made it financially inconvenient for a man to acquire a second family. The advent of no-fault divorce created the perception that punishment, and therefore traditional alimony, had no place in divorce. Alimony should function only to assist a dependent spouse in achieving economic self-sufficiency.[15] It is still referred to as a means of preventing former wives from becoming public charges,[16] and no doubt it still must supplement child support.[17] Easing the transition to single status is rarely mentioned in recent cases, and punishment of wives, far from having been eliminated as a function, has merely been camouflaged—frequently by calling such punishment rehabilitative alimony.

Equitable distribution of marital property purports to fairly compensate the wife for her services. It does not. The quality, flexibility, and comparable worth of her services are valued at meager rates simply because they are services traditionally performed by women. Nor does equitable distribution compensate the opportunity cost to a woman of investing her human capital [18] in

12. H. Clark, Domestic Relations 441 (1968).

13. Id. at 442.

14. Id.

15. One of the by-products of equitable or equal distribution was the concept of rehabilitation alimony or maintenance. The notion was that since family assets were to be distributed upon divorce there was no entitlement to support unless there was actual need and ability to pay, but that interim maintenance might be awarded until a spouse became self-supporting. Under former law, alimony usually was permanent unless terminated by death or remarriage, but changes in marital property law were deemed to call for the substitution of "rehabilitative alimony" in lieu of "permanent alimony" as a *quid pro quo* for the elimination of title as a crucial factor in distributing assets accumulated during the marriage.

Brown, The Uncertain Duration of Rehabilitation Alimony, Fairshare, Aug. 1984, at 5. See Comment, Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma, 12 U.S.F.L. Rev. 493, 495 (1978); Note, Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion, 50 Fordham L. Rev. 415, 425 (1981).

16. Taake v. Taake, 70 Wis. 2d 115, 130, 223 N.W. 2d 449, 453-54 (1975) (Heffernan, J., dissenting). If the court awards rehabilitative support to a woman incapable of self-sufficiency, the dependent spouse may seek public assistance.

17. Inadequate or unenforced child support awards frequently make it necessary for the wife to use money intended for her own support or rehabilitation (alimony or maintenance) for her children's necessities instead.

18. For a discussion of applicable principles of human capital, see King, Divorce Settlements: The Value of Human Capital, Trial, Aug. 1982, at 48.

housework, childcare, and her husband's career. Whether she performs these services full time, or part time in addition to paid work, she could far more advantageously invest the same time and effort in her own education and career development. In addition, an increasingly significant effect of the opportunity cost of homemaking is the loss of job-related benefits and rights. The trend is toward

> the expanded role of an individual's own work and of public agencies in the sharing of certain functions formerly carried out primarily by family members.
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> . . . [L]egal reinforcement of family support systems, though far from disappearing, is altering and diminishing. Each individual is increasingly treated as being dependent for economic security in times of crisis on his own employment (or employment potential), on work-related benefits and on various forms of public assistance.[19]

There is no guarantee that a divorcing wife will receive any "benefits," such as a share of her husband's pension. If she does, she receives far less than what her efforts in the marketplace would have produced.

Despite recent divorce reforms, the function of alimony as a compensation to the wife for faithful service is even less significant today than it was in 1968 when Homer H. Clark, Jr., wrote, "In some cases this function of alimony is of such little importance as to seem trivial. But in others, as where the wife has worked hard in or out of the home for many years, it is properly given great weight."[20] In many respects, rehabilitative alimony embodies the current efforts of society to avoid compensating the economic value of housework, childcare, emotional support, and investment in a husband's earning capacity.[21] Courts have specifically disapproved the equitable division of earning potential.[22] The inequities engendered by this policy extend far beyond the much-discussed value of a professional license[23] to any situation in which the wife has devoted herself to establishing her husband's career—whether by doing housework, childcare, paid work, secretarial chores, entertaining, traveling, moving, or foregoing her career—in exchange for a share of his career

19. M. Glendon, The New Family and the New Property 47-48 (1981).

20. H. Clark, supra note 12, at 442.

21. ". . . the spouses' earning capacity is typically worth much more than the tangible assets of the marriage." Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1192 (1981).

22. Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). See also Bowen v. Bowen, 96 N.J. 36, 473 A.2d 73 (1984).

23. See Mullinex, The Valuation of an Educational Degree at Divorce, 16 Loy. L.A.L. Rev. 227 (1983). See generally Case Developments: Marital Property, 4 Fairshare 15 (1984); Note, Treating Professional Goodwill as Marital Property in Equitable Distribution States, 58 N.Y.U. L. Rev. 554 (1983); Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate, 11 Hofstra L. Rev. 1327 (1983); Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 Kan. L. Rev. 379 (1980).

benefits. That rightful share is nullified upon divorce, though the husband continues to benefit from his career.

Whatever its stated functions, alimony operates as a bargaining chip in divorce negotiations and as a mechanism for adjusting the economic consequences of divorce.[24] Five factors significantly influence the outcome of bargaining: 1) preferences of the divorcing couple; 2) bargaining endowments created by legal rules that suggest the allocation a court will impose if no settlement is reached; 3) the degree of uncertainty if parties must litigate; 4) emotional and financial transaction costs, and the parties' respective abilities to bear them; and 5) strategic behavior.[25] These factors have always favored the husband, but the development of rehabilitative alimony compounds his advantage by drastically diminishing potential risks to him.

Naturally, an award of alimony has important economic consequences. Recently, these awards have disfavored women with escalating severity. "For example, in 1968, only a third of all [California] spousal support awards had a specified duration, but by 1977, two-thirds had a specified time limit . . . . The median duration of these awards in 1977 was twenty-five months."[26] These truncated awards unjustly enrich the husband. When a father leaves his family, he improves his standard of living dramatically.[27] If an alimony award is time-limited, his standard of living will rise again when the award expires.

Further, five conflicting principles govern economic allocation between spouses at divorce: fault, need, rehabilitation, status, and contribution.[28] Emphasizing one factor has the effect of minimizing the other four. Arguably, the four factors deemphasized by rehabilitative alimony are those that may favor women in divorce settlements, whereas the rehabilitation factor favors men by curtailing the amount they will have to pay.

While the shift of emphasis away from fault had the undeniably salutory effect of facilitating the dissolution of hopeless marriages, refocusing that emphasis on rehabilitation is often inappropriate. Some courts, however, appear to consider it universally apt, regardless of the woman's age, the length of her marriage, or her emotional contributions to her husband.[29] For childless women under thirty and married only a few years, economic rehabilitation may

24. Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).

25. Id. at 966.

26. Weitzman, supra note 21, at 1226.

27. D. Chambers, Making Fathers Pay 48 (1979). See also Weitzman, supra note 21, at 1249-53.

28. J. Areen, Family Law 634-35 (1978).

29. See notes 84, 87, 95, and 102, and accompanying text infra; Wieder v. Wieder, 402 So. 2d 66 (Fla. Dist. Ct. App. 1981) (trial court erred in awarding wife rehabilitative alimony where it was not demonstrated that she could achieve self-sufficiency; wife was 60 years old and in poor health); Davies v. Davies, 345 So. 2d 817 (Fla. Dist. Ct. App. 1977) (permanent alimony reduced to a 3 1/2 year rehabilitative award for a 38-year-old unemployed mother of five children). "The pattern of support and property awards tends to impoverish the long-married woman while providing the long-married man with a continuously comfortable standard of living." Weitzman, supra note 21, at 1248.

represent a realistic goal, though it is not an adequate substitute for property. For others it may not be realistic. Rehabilitative alimony is known as an unfortunate consequence of no-fault divorce not because either rehabilitative alimony or no-fault divorce is a per se evil, but because rehabilitative alimony is usually misapplied as a substitute for the truly equitable distribution of all marital property.

II
REHABILITATIVE ALIMONY AND ITS SIGNIFICANCE

According to a recent West Virginia decision, rehabilitative alimony represents an attempt to encourage the dependent spouse to become self-supporting, alleviate financial problems attendant to divorce, and provide a sense of independence and psychological fulfillment.[30] A recent New Jersey case offered a similar assessment: "Such a program affords multiple advantages to the woman . . . a minimum of financial concern . . . a career of her own which will yield valuable emotional and psychological dividends . . . the self-fulfillment and rewards of entry into the employment market—a goal of the modern day women's movement."[31]

However, the realities lurking beneath this benevolent exterior are far from benign. Debilitating abuses occur both in the way marital property is divided and in the merging of property and alimony concepts. Thus, a more accurate assessment of the purpose of rehabilitative alimony might be simply that it releases the supporting spouse from a long-term alimony obligation perceived as judicially imposed servitude.[32]

Even the terminology of rehabilitative alimony hints at its true purposes and effects. For example, the sex-neutral language of many discussions on the subject cannot disguise the fact that the "dependent" spouse in need of "rehabilitation" is nearly always the woman. The term "rehabilitation" connotes weakness, helplessness, even illness,[33] and implies that the wife is less than a whole person and can be restored only with the charity of the law and of her former husband, for which she should be grateful. "Dependent" connotes social sin and laziness. Both terms put the blame and the burden of change on the woman, without reference to what she as a wife has contributed to her husband and to society and without alluding to the societal structures that constrain women and devalue their contributions. Judicial references to a wife's "capacity/incapacity" or "ability/inability" to be self-supporting are likewise condescending and evasive of economic and cultural facts.

Also, rhetorical and emotional language—ranging from vengeful to patronizing, with little objectivity in between[34]—characterizes these opinions.

30. Molnar v. Molnar, 314 S.E.2d 73, 76 (W. Va. 1984).
31. Turner v. Turner, 158 N.J. Super. 313, 318, 385 A.2d 1280, 1282 (1978).
32. Olsen v. Olsen, 98 Idaho 121, 557 P.2d 604, 606 (1976) (Shephard, J., dissenting).
33. As does the battered woman "syndrome."
34. Cf. A. Jones, Women Who Kill 113 (1981).

Euphemisms such as "weather[ing] the storm"[35] substitute for "entering a job market which will trivialize your considerable skills and discriminate against you at every opportunity."

A survey of recent cases that define rehabilitative alimony and describe its purposes further reveals the true objectives of rehabilitative alimony. An often-cited definition appears in the *Turner v. Turner* opinion: "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support."[36] Besides implying that the lazy wife will finally have to produce to earn her keep, this definition overlooks the effects of age and sex discrimination in the marketplace, and assumes that a career can be developed in a short and predictable time. It thereby ignores the fact that subsistence is not equivalent to self-support, which in turn is not equivalent to self-realization. Frequently both partners in a marriage struggle in the belief that it will be to their mutual economic benefit. However, divorce reveals that, while society protects the man's continued entitlement to self-realization, its ambition for women (and sometimes children) extends no further than subsistence.

The *Turner v. Turner* opinion explained the necessity of rehabilitative alimony, paving the way for characteriztions of rehabilitative alimony as an opportunity for women.

> If we are to encourage a woman to seek employment, what better way is there than to direct that alimony will be rehabilitative in nature and will cease on some predetermined date? A permanent award of alimony *in futuro* with the hope that a woman will seek employment has not and will not work . . . . What is needed is a system which will *encourage* a woman to develop skills and seek employment . . . a blueprint for the future which will have "teeth" to compel a recipient of alimony to obtain employment.[37]

According to this opinion, the fact that the economic status of women has improved, coupled with the reality that most divorcing men cannot afford to support two households, requires that the courts shift focus from the husband's ability to pay alimony.[38] The court reasoned that alimony is "an impediment . . . to the woman if it causes her to live a life of physical and mental indolence."[39]

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35. Campbell v. Campbell, 432 So.2d 666, 668 (Fla. Dist. Ct. App. 1983).

36. 158 N.J. Super. at 314, 385 A.2d at 1280 (1978).

37. Id. at 317, 385 A.2d at 1282 (emphasis in original).

38. Id. at 315, 385 A.2d at 1281.

39. Id. This opinion also quotes courts from two other states on the subject of indolence: "Alimony should not, as one court said, permit 'a wife capable of work to sit in idleness.' Guindon v. Guindon, 256 N.W.2d 894, 898 (S.D. 1977). Another stated that 'they [women] are no longer per se entitled to a perpetual state of assured income or, as some would characterize it, assured indolence.' *Grinold v. Grinold*, 32 Conn. Sup. 225, 314 A.2d 32, 33 (Sup. Ct. 1975)." Id. at 316, 385 A.2d at 1281.

Parallel attitudes are found in *Reback v. Reback*,[40] a seminal 1974 opinion from Florida, the state producing the overwhelming majority of opinions on rehabilitative alimony. Florida's often quoted definition of rehabilitative alimony begins by equating rehabilitate with "to restore to a former capacity . . . to put on a proper basis or into a previous good state again."[41] Its conclusion overlooks former assets that may have been lost forever (youth and childlessness, for example) and restricts the goals of rehabilitation to bare employment:

> 'rehabilitative' alimony is appropriate in those situations where it is possible for the person to develop anew or redevelop a capacity for self-support, and should be limited in amount and duration to what is necessary to maintain that person through his training or education, or until he or she obtains employment or otherwise becomes self-supporting.[42]

Another Florida court went further in 1983, holding that permanent alimony was improper if the wife was capable of becoming self-supporting.[43]

In a reprise of the opportunity theme, a New York court[44] in the same year considered the plight of a wife who had contributed to the financing of her husband's dental degree and license. At the time of the divorce, she was living with her parents while earning seventy dollars per week as a part-time teacher. Her husband's dental practice was expected to produce forty-five to sixty-five thousand dollars per year. The court found that because the husband's future earnings were entirely speculative, a four-year rehabilitative maintenance award would be most beneficial to the wife. In dismissing the wife's efforts to obtain a half interest in the dental license, the judge observed:

> It is apparent to this court that an award of rehabilitative maintenance to the plaintiff in the form of a short-term award would provide her with the opportunity to compete more effectively in the job market, to achieve economic self-sufficiency, to mature as an individual and eliminate continued dependence upon her parents and the defendant.[45]

Such overemphasis on benevolence and opportunity deflects attention from the true goals of rehabilitative alimony. One is to prevent men from having to compensate former wives, by means of either property or alimony, for services rendered and opportunities foregone. Another goal is to prevent society from having to support former wives by means of welfare—even if they

40. Reback v. Reback, 296 So. 2d 541 (Fla. Dist. Ct. App. 1974).

41. Id. at 543 (quoting Webster's New International Dictionary (2d ed. 1960)).

42. Id.

43. Campbell v. Campbell, 432 So. 2d 666 (Fla. Dist. Ct. App. 1983).

44. Eisenstadt v. Eisenstadt, N.Y. County, Trial Term, Part 26, discussed in Fox, Divorcee Denied Marital Share of Husband's Dental Practice, N.Y. Law Journal, Oct. 14, 1983, at 1, col. 3.

45. See Fox, supra note 44, at 3, col. 4.

and their children must live in poverty as a result.[46] In short, the objective of rehabilitative alimony is to allow a woman economic rehabilitation or independence not for her welfare, but for the benefit of those who hope to avoid compensating her, supporting her, or allowing her genuine economic advancement.

In contrast, a just alimony award must reflect consideration of fundamental societal controversies, including: the opportunity cost of marriage; work as self-support versus as self-realization; societal unemployment; gender- and age-based employment discrimination; the value of housework, childcare, and emotional support; what constitutes marital property;[47] what constitutes contribution to a marriage and its product; and the tax consequences of alimony versus those of property.[48] Rehabilitative alimony lies at the nexus of a mass of issues both controversial and elemental to the structure of society.

III
How Rehabilitative Alimony Developed

The use of rehabilitation as a guiding light in fixing the amount and duration of alimony gathered momentum with the evolution of no-fault principles of divorce[49] and their corollary, equitable property distribution. As noted above, this necessarily meant the decline of other factors governing economic allocation between spouses at divorce—such as fault, need, status, and contribution.[50]

However, rehabilitative alimony existed as early as 1971 in Florida, even before the proliferation of no-fault divorce and equitable distribution principles.[51] By 1974, this state's rehabilitative alimony scheme also was supplying

46. See Weitzman, supra note 21, at 1252.

47. Equitable and community property distribution schemes purport to compensate a former wife for her efforts in the marriage; what they do not consider is that the end of the marriage may be the end of her job, the cancellation of her seniority, and the end of her stake in the new property.

48. Due to the tax consequences of alimony, a former wife may lose her stake not only in the new property, but also in the traditional property of the marriage. Alimony, which may function as a vehicle for distributing marital property, must be reported as income by the recipient; the payor, however, receives a 'deduction. Simple property distribution has no such immediate tax consequences. It remains to be seen whether recent tax law revisions will alter the amounts former spouses ultimately receive. See note 76 infra.

49. Gillman, Alimony/Spousal Support: From Punishment to Rehabilitation, 7 Community Prop. L. J. 135, 135 (Spring 1980).

50. J. Areen, supra note 28, at 634-35.

51. Rehabilitative alimony was implemented by Florida's 1971 Dissolution of Marriage Act, Ch. 71-241, 1971 Fla. Laws 1319 (codified at Fla. Stat. ch. 61 (1983)). For a history of rehabilitative alimony in Florida, see Comment, Rehabilitative Alimony—A Matter of Discretion or Direction? 12 Fla. St. U.L. Rev. 285 (1984). See generally Kalmutz v. Kalmutz, 299 So. 2d 30, 37 (Fla. Dist. Ct. App. 1974), which referred to Beard v. Beard, 262 So. 2d 269 (Fla. Dist. Ct. App. 1972) in stating that "courts have sought to place an economic responsibility on the woman by causing her to apply whatever ability or talent she may have to earn an adequate income for her own support and maintenance." *Kalmutz* went on to observe that the "equality of the marital partnership suggests equal benefits and burdens." 299 So. 2d at 37.

Beard applied the principle of rehabilitative alimony, without labeling it, terminating ali-

"horror stories" traded by attorneys. At a conference, many attorneys discussed the fact that Florida

> had enacted a so-called no fault divorce, and they called it a wife sluffing [sic] bill because it allowed husbands to trade-in their wives . . . and there would be no payment, no nothing, and this might be someone they had been married to for twenty-five years. And they quoted some Florida judges saying, well now you have equal rights, and women can go out and get jobs and so the marriage is ended, now goodbye. In other words, ignoring completely the different position that the women were in who had been homemakers compared to their ex-husbands.[52]

Since Florida is the leader in developing the rehabilitative alimony concept and therefore has influenced its development, the implications of a recent Florida decision are notable. *Pulitzer v. Pulitzer*[53] awarded the wife rehabilitative alimony, but refused the woman her children.[54] As though rehabilitative alimony were not a strong enough weapon, a more powerful one has been spawned: "[t]here is a backlash to women's struggle for economic equality [and] denying women their children is the ultimate weapon."[55] The implication is that men will bring custody suits to punish their ex-wives for pursuing self-realization. Rehabilitative alimony, as currently applied, contributes to this trend by denying women their marital property and by forcing them into low-paying jobs. Thus, a woman who offends her husband by pursuing autonomy not only risks being denied custody of her children, but also risks forfeiting them because she cannot support them. If her marriage ends, even if she is awarded custody and child support, she may have to submit to her ex-husband's whims in order to collect the child support. Joint custody also offers an

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mony to an alcoholic wife. One year, the court said, should have been enough for her to regain her health and go to work. She was not entitled to the original award of permanent alimony.

> In this era of women's liberation movements and enlightened thinking, we have almost universally come to appreciate the fallacy of treating the feminine members of our society on anything but a basis of complete equality with the opposite sex. Any contrary view would be completely anachronistic. . . . They now occupy a position of equal partners in the family relationship resulting from marriage . . . .

262 So. 2d at 271-72. *Beard* noted that this philosophy was first expressed in 1955:

> Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus, in an era where the opportunities for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has."

Id. at 272, quoting Kahn v. Kahn, 78 So. 2d 367, 368 (Fla. 1955).

52. Fineman, Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce, 1983 Wis. L. Rev. 789, 855 n.189 (1983).

53. 449 So. 2d 370 (Fla. Dist. Ct. App. 1984).

54. See also Fineman, supra note 52, at 835 n.152.

55. Wall Street Journal, July 19, 1982, at 15.

opportunity for men to exert control over both their children and ex-wives.[56]

Case law in New Jersey illustrates the process by which the doctrinal confusion surrounding rehabilitative alimony has flourished. A 1978 opinion, *Turner v. Turner*[57] was New Jersey's first foray into the subject. It called rehabilitative alimony both an opportunity for women and a system with "teeth" to compel alimony recipients to seek employment.[58] Just one year later, *Arnold v. Arnold*[59] specifically disapproved of *Turner* and found that labeling alimony "rehabilitative" did not justify frustrating the established principle that alimony can be modified only on a showing of changed circumstances. It charged that rehabilitative alimony casts judges in the role of seers who can predict when circumstances will change and that it transforms alimony into a technique for encouraging a former wife to seek employment.[60]

The next important New Jersey case was *Lepis v. Lepis*,[61] decided by the New Jersey Supreme Court in 1980. *Lepis* criticized *Arnold* in a footnote and implicitly approved rehabilitative alimony, noting that other states applied similar award provisions. For example, California permitted a court to withhold support to self-supporting ex-spouses, and Indiana prohibited maintenance of anyone not physically or mentally incapable of self-support.[62] By relegating it to a footnote, the *Lepis* court evaded *Arnold*'s observation that rehabilitative alimony effectively requires judges to predict when and how circumstances will change. Justifications for this judicial function include the explanation that courts are considering only reasonably expected future events and that the function is necessary to relieve overburdened courts by limiting the number of modification proceedings.[63] Complications arise, of course, since the predictions are devised by inexact methods and since by definition they do not always materialize. Obtaining a modification of the award to accommodate unrealized predictions proves difficult, particularly for women.

In 1982, *Avirett v. Avirett*[64] observed that rehabilitative alimony appears on its face to be a "male-oriented, sexist approach."[65] The court declined to modify a voluntary property settlement and rehabilitative alimony agreement, noting that it would be inequitable for a court to modify such an agreement on grounds of changed circumstances, since the voluntary agreement was negotiated as a package involving tradeoffs and equitable distribution

56. In this case, having custody of his children would imply little inconvenience or economic hardship to the man.

57. 158 N.J. Super. 313, 385 A.2d 1280 (1978).

58. Id. at 317, 385 A.2d at 1282.

59. 167 N.J. Super. 478, 401 A.2d 261 (1979), disapproved in Petersen v. Petersen, 85 N.J. 638, 428 A.2d 1301 (1981).

60. Id. at 480, 401 A.2d at 263-64.

61. 83 N.J. 139, 416 A.2d 45 (1980).

62. Id. at 155 n.9, 401 A.2d at 53 n.9.

63. Gillman, supra note 49, at 137.

64. 187 N.J. Super. 380, 454 A.2d 917 (1982).

65. Id. at 383, 454 A.2d at 919.

considerations.[66]

Even in Wisconsin, a state more progressive than most in protecting women's interests upon divorce, reform legislation has not produced a successful balancing of the interests of men and women upon divorce. This may be because there are currently at least two distinct and warring perceptions of marriage: as a partnership between equals or as a legal institution which victimizes women,[67] especially upon divorce. The failure of legislators to articulate the distinction has resulted in "unavoidable concessions to the victim imagery within the framework of rule equality, and suggests that the concept of need must have created some ambivalence for reformers who accepted equality as their ideal."[68]

A wife who contributes anything other than a paycheck to her marriage, or who sacrifices opportunities for it, may be led to perceive her marriage as a partnership of equals—until she is divorced and discovers that few assets of the "partnership" belong to her. It is the need of these victims of marriage and divorce that a court uses to justify an award of rehabilitative alimony where it might otherwise award no alimony. However, doctrinal chaos allows the need, in many cases, to be limited by the misperceptions that women have attained economic equality and that all marriages are partnerships of economic equals. Unfortunately, few marriages meet this worthy standard. In Wisconsin, "[t]he rules are not flexible enough to accommodate different classes, different ages, different educational levels or different family circumstances."[69] Yet flexibility in the rules produces other dilemmas,[70] exemplified by the dismal failure of New York's equitable distribution law, formerly hailed as providing equity for women.[71]

IV

FACTORS IN DETERMINING REHABILITATIVE ALIMONY

The factors that most states claim to use in determining whether and to what extent to award rehabilitative alimony approximate those enumerated in the Uniform Marriage and Divorce Act.[72] The act specifies that maintenance may be awarded to either spouse only if that spouse lacks sufficient property to be self-supporting and is either unable to support herself through employment or is the custodian of a child whose "condition or circumstances make it appropriate that the custodian not be required to seek employment outside the

66. Id. at 386, 454 A.2d at 920.

67. Fineman, supra note 52, at 835.

68. Id. at 836.

69. Id. at 842.

70. See text accompanying notes 116-30 infra.

71. See Bouton, Women and Divorce: How the New Law Works Against Them, New York Magazine, Oct. 8, 1984, at 34; Goodman, With New Law, Divorce Fees Soar, N.Y. Times, Jan. 13, 1983, at C1. For a legal analysis of the factors considered in New York's equitable distribution of property and their implications, see Pincus, How Equitable Is New York's Equitable Distribution Law? 14 Colum. Hum. Rts. L. Rev. 433 (1983).

72. Uniform Marriage and Divorce § 308, 9A U.L.A. 160-61 (1973).

home." Courts frequently neglect to consider whether the recipient must, while "rehabilitating" herself, simultaneously pay childcare costs and perform childcare duties herself.[73] In fact, one court articulated its intent to avoid promoting childbearing as a method by which a woman could ensure future financial support if her marriage ended.[74]

If both preliminary conditions are met, the UMDA directs that the court consider, without regard to marital misconduct, all relevant factors including:

1) financial resources of the spouse seeking support;
2) time necessary to acquire appropriate employment;
3) standard of living during the marriage;
4) duration of the marriage;
5) the age and the physical and emotional condition of the spouse seeking maintenance;
6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

As significant as the factors themselves in determining the award is the manner in which courts apply the criteria. A generous award of income-producing property obviates the necessity for rehabilitative alimony. However, rehabilitative alimony is a grossly inadequate though frequently awarded substitute for a fair share of marital property.[75] Characterizing an award as alimony rather than property has several advantages for husbands. First, whereas property may be awarded upon divorce, alimony defers payment to the wife and amounts to an interest-free loan to the husband. Second, unlike property, alimony is deductible to the husband and taxable to the wife.[76] Finally, alimony does not vest when it is awarded, but it terminates upon the death of either party. Therefore, it does not provide the same measure of security as property, nor may it be bequeathed.

UMDA optimistically specifies that any allowance for the custodian of a child be considered a financial resource of the recipient spouse. However, statistics indicate that child support awards rarely cover half the actual costs of raising a child.[77]

The second factor, the time necessary to secure appropriate employment, is similarly subject to abuse. A court's estimation of what constitutes "appro-

73. Davies v. Davies, 345 So. 2d 817 (Fla. Dist. Ct. App. 1977), called an award of fifty dollars per week excessive and, to compel the wife to work, reduced it from permanent to rehabilitative—even though she preferred to stay home to care for her five minor children.

74. McAllister v. McAllister, 345 So. 2d 352, 355 (Fla. Dist. Ct. App. 1977).

75. "This court has frequently stated that the word *alimony* is ambiguous because the word may denote either property distribution or spousal support." Seablom v. Seablom, 348 N.W.2d 920, 924 (N.D. 1984).

76. I.R.C. § 71, 215 (1976). See note 48 supra.

77. Weitzman, supra note 21, at 1222.

priate" employment for a woman may differ significantly from her estimate.[78] The question of what employment is appropriate necessarily involves the issue of whether a court should award resources for college or graduate training [79] and support for the period of time necessary to find an appropriate job. By deciding that employment far beneath a woman's capability is appropriate, a court drastically limits the amount of time necessary to secure that employment and thereby saves her former husband a considerable amount of money. It seems doubtful that much weight is given to the third factor, the standard of living established during the marriage, since divorced women and their children suffer a significant drop in their living standards, while the living standards of divorced men rise dramatically.[80] Possibly courts use the standard of living as an indication of the former husband's ability to pay or, more likely, as an indication of what he has already "donated" to his wife during the marriage. The next factor, duration of the marriage, serves as a partial indicator of the opportunities the wife has foregone[81] by devoting her energy to homemaking rather than to developing marketable skills, but neither contribution nor comparable worth is specifically mentioned in these guidelines.[82] When an award of rehabilitative alimony substitutes for equitable distribution of property, it substitutes not only for the services she has contributed, but also for her contributions of human capital,[83] opportunity cost, and other intangibles. The longer she has made these contributions, the more they are worth, but the weaker her economic position is upon divorce.

Two decisions exemplify the judicial reluctance to consider the complexities subsumed by this factor. *DiPietro v. DiPietro*[84] concerned a fifty-three-year-old wife on welfare. Although she had borne and raised six children, the appellate court found that she had not contributed a great deal of emotional strength to the thirty-three-year marriage. She was awarded alimony of seventy-five dollars per week until her husband retired, when alimony would cease and she would begin receiving a share of his pension. The award was later reversed,[85] due to a mathematical error that would have given her half of her husband's $651.78 monthly pension—twice what the judge intended her to receive. Another decision, *Reed v. Reed*,[86] involved a marriage of thirty-four years, during which the farm wife did gardening, canning, and meat packaging

78. See Morgan v. Morgan, 81 Misc. 2d 616, 620, 366 N.Y.S.2d 977, 981. (Sup. Ct. 1975), modified, 52 A.D.2d 804, 383 N.Y.S.2d 343 (N.Y. App. Div. 1976).

79. See generally text accompanying notes 36-37 supra.

80. Men's post-divorce living standards rose 42%, while those of women dropped 73%. Weitzman, supra note 21, at 1251.

81. Molnar v. Molnar, 314 S.E.2d 73, 77 (W. Va. 1984) (citing Dyer v. Tsapis, 249 S.E.2d 509, 513 (W.Va. 1978).

82. But cf. Wis. Stat. § 767.255 (1981).

83. See generally King, supra note 18.

84. 183 N.J. Super. 69, 78, 443 A.2d 244, 248 (1982), rev'd, 193 N.J. Super. 533, 475 A.2d 82 (1984).

85. 193 N.J. Super. 533, 475 A.2d 82 (1984).

86. 100 Ill. App. 3d 873, 427 N.E.2d 282 (Ill. App. Ct. 1981).

in addition to raising fourteen children. Upon divorce, the husband retained the farm and custody of the minor children and was able to sustain a considerably higher standard of living than his former wife. Tragically, these examples are indicative of the injustice long-married women suffer under alimony and divorce laws.[87]

The age of a homemaker displaced from a long-term marriage is frequently, though not consistently, given weight. However, little recognition is accorded to the fact that the trauma to a woman being divorced at the age of fifty-five is much greater than that to a woman of twenty-five, and the resulting physical and psychological handicaps are frequently discounted. The true impact on such women of age discrimination in employment is rarely, if ever, mentioned.

In considering the sixth factor, courts clearly give more weight to the necessity of the supporting spouse to meet his own needs, which often are deemed to include a second family, than they give to the competing needs of his former wife. Historically, judges in Wisconsin balked at asking a man to pay more than a third of his income in alimony and child support,[88] and a 1978 Los Angeles survey suggests that this is the norm still, despite consistent references of judges and attorneys to an informal limit of one half.[89] Yet a divorced mother with two children requires 75 to 80% of former family income to maintain her standard of living and those of her children.[90] Despite this level of need, the average monthly California court-ordered support award is eighty-six dollars less than the AFDC allotment would be.[91]

Since a divisible income is the sine qua non of a maintenance award, a husband may claim bankruptcy or resort to other ploys to avoid paying alimony.[92] While true alimony is unaffected by bankruptcy, property is not. This may partially account for the willingness of courts and attorneys to use the terms alimony, maintenance, and lump sum property distribution interchangeably, and for the related tendency to either merge or distinguish those concepts depending upon the circumstances of the particular case.[93] The consequences of each concept are clearly articulated, but the definitions of the concepts themselves are not.

Even if he does not defer income or claim bankruptcy, the husband's earning capacity may amount to a guaranteed stream of deferred income. The controversy over whether future income from a professional license may be considered marital property represents the tip of this larger question: whether

87. See Fineman, supra note 52, at 806.

88. Id.

89. Weitzman, supra note 21, at 1234.

90. Id. at 1238 (citing D. Chambers, Making Fathers Pay 48 (1979)).

91. Weitzman, supra note 21, at 1236. The figure is calculated from a hypothetical case based on a typical situation.

92. Cf. Seablom v. Seablom, 348 N.W.2d 920, 924 (N.D. 1984); Eisenstadt v. Eisenstadt, N.Y. County, Trial Term, Part 26, discussed in Fox, supra note 44, at 1, col. 4.

93. See generally Seablom v. Seablom, 348 N.W.2d 920, 922 (N.D. 1984). See also text at notes 75 and 81-83 supra.

in most single-income families, the single career should be considered a two-person career [94] and whether half the husband's paycheck in such a marriage should be issued in the wife's name throughout the marriage.

While divorce was formerly an economic luxury, couples with little earning capacity are now divorcing more often. *DiPietro v. DiPietro*[95] was one such case. There, the court's statement that the wife had contributed little emotional strength to the union[96] seems an inadequate reason to abandon stated principles of property division and maintenance. It simultaneously underscores the fact that courts rarely reward women who have contributed emotional strength. That public assistance may be necessary for such divorced couples to survive does not justify depriving the wife of property so that her husband may escape dependence on public assistance. When there is more income, the object apparently is to allow the man enough money to found a second family, regardless of the circumstances in which his first family must live. Among the myriad factors not listed by UMDA and rarely considered explicitly are age and sex discrimination in employment, and cultural pressures on women to be homemakers and mothers.[97] Also, the one factor expressly eliminated, namely fault, remains an element in determining rehabilitative maintenance. Besides punishing a woman for marital misconduct, a court may effectively punish her for cohabitation or remarriage.[98] Some cases suggest that she may also be punished simply for leaving the marriage.[99]

V

PERMANENT VERSUS REHABILITATIVE ALIMONY, AND MODIFICATION

Courts have most directly addressed controversy in at least two specific aspects of rehabilitative alimony: when to award rehabilitative or permanent alimony or both, and when to modify an award of rehabilitative alimony. New

94. Papanek, Men, Women, and Work: Reflections on the Two-Person Career, 78 Am. J. Soc. 852 (1973).

95. 183 N.J. Super. 69, 78, 443 A.2d 244, 248 (1982), rev'd on other grounds, 193 N.J. Super. 533, 475 A.2d 244, 248 (1984). See text at notes 84-85.

96. Id.

97. We will not ignore the reality recognized in *Grove*, [280 Ore. 341, 351-52, 571 P.2d 477, 485, modified, 280 Or. 769, 572 P.2d 1320 (1977)], that, at least until recent years, young women entering marriage were led to believe—if not expressly by their husbands-to-be, certainly implicitly by the entire culture in which they had come to maturity—that they need not develop any special skills or abilities beyond those necessary to homemaking. . . . The marriage itself may well have prevented the development of those skills and abilities.

Plaster v. Plaster, 55 Or. App. 700, 705, 639 P.2d 1287, 1290 (1982).

98. In a 1975 holding later reversed, the New York Supreme Court awarded a wife sufficient alimony to complete college and medical school, in return for her having supported her husband through law school. But even this landmark opinion qualified the award as being valid only "so long as she does not remarry." Morgan v. Morgan, 81 Misc. 2d 616, 621, 366 N.Y.S.2d 977, 982 (Sup. Ct. 1975), modified, 52 A.D.2d 804, 383 N.Y.S.2d 343 (N.Y. App. Div. 1976).

99. Cf. Pincus, supra note 71, at 454.

Hampshire[100] and Delaware[101] have statutorily limited the length of an alimony award. In other states, this is left to the discretion of the trial court, with predictably disparate results, as illustrated by a 1982 Oregon case[102] involving an alcoholic and emotionally troubled wife of a seventeen-year marriage. On one set of facts, three vastly different awards of alimony were recommended: the trial judge denied alimony outright; the appellate court awarded two years rehabilitative alimony so that the former wife could train for employment; and a dissenting judge would have granted permanent alimony.

Comparison of rehabilitative and permanent alimony frequently arises in the context of an appellate court reversing a trial court decision, as in three Florida appellate decisions that substituted permanent alimony for a trial court's award of rehabilitative alimony. In the first, a full-time mother with no employment possibilities had originally been granted only eighteen months alimony.[103] In the second, a homemaker of twenty-three years was awarded permanent alimony in view of the fact that there was no evidence that she would be rehabilitated within the two years of the original award.[104] In a third case, the court said it would be error to deny permanent alimony to a wife who would not be able to support herself at the high standard of living enjoyed during the marriage.[105] At least one state, Maryland, has acknowledged that gross disparity in the living standards of the former spouses at the end of the rehabilitative period is unconscionable and justifies converting rehabilitative alimony to permanent alimony.[106]

Permanent alimony may in effect be converted to rehabilitative alimony, and the award terminated, by a showing of changed circumstances. Among the cases reversing a permanent award in favor of a rehabilitative award, *Walter v. Walter*[107] is notable for its assertion that permanent alimony should be given only as a last resort and, in any event, "permanent periodic alimony is subject to modification upon a substantial change of circumstances."[108]

The trial court ordinarily decides whether it will retain jurisdiction to modify an award.[109] Some courts assert that they must retain jurisdiction until

100. N.H. Rev. Stat. Ann. § 458:19 (1983), limiting alimony to three years if there are no children.

101. Del. Code Ann. tit. 13, § 1512 (a)(3) (1981) limits alimony to two years if the marriage lasted fewer than twenty years. A 1983 opinion, furthermore, reversed an award of indefinite alimony to the wife of a thirty-year marriage, stating that under Delaware statute it was error to award permanent alimony without an express finding that the wife could never achieve financial self-sufficiency. Walter S. J. v. M. Lorraine J., 457 A.2d 319, 326 (Del. 1983).

102. In re Marriage of Burke and Burke, 60 Or. App. 169, 653 P.2d 247 (1972).

103. Liebler v. Liebler, 413 So. 2d 1246 (Fla. Dist. Ct. App. 1982).

104. Maloy v. Maloy, 431 So. 2d 743 (Fla. Dist. Ct. App. 1983).

105. Neumann v. Neumann, 413 So. 2d 1203 (Fla. Dist. Ct. App. 1982).

106. Md. Ann. Code art. 16 § 1 (c) 1 (1957). See Holston v. Holston, 58 Md. App. 308, 323-24, 473 A.2d 459, 467, cert. denied, 300 Md. 484, 479 A.2d 372 (1984).

107. 10 Fam. L. Rep. (BNA), 1103, 1104 (Fla. Dist. Ct. App. 1983).

108. Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) (citing Chastain v. Chastain, 73 So. 2d 66 (Fla. 1954)).

109. Molnar v. Molnar, 314 S.E.2d 73, 78 (W. Va. 1984).

the supported spouse returns to the job market,[110] while other courts terminate their jurisdiction in order to reduce the number of future modification proceedings and to provide post-divorce economic stability.[111]

The modification of a rehabilitative award is nearly always because of changed circumstances of the wife and rarely because of a former husband's increased ability to pay. Since the husband's ability to pay was a factor in setting the original award, one would expect such modifications, especially if the husband artificially depressed his income during divorce proceedings.

The court in *Lepis v. Lepis*[112] enumerated some instances of changed circumstances: increase in cost of living, illness or disability, dependent spouse's loss of a dwelling, dependent spouse's cohabitation with another, subsequent employment by the dependent spouse, changes in federal income tax law.[113] Curiously, the court then noted that other courts "have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred."[114] Two pages later it rejected the argument that for that very reason rehabilitative alimony should not be condoned, and it went on to suggest that careful preliminary fact finding could eliminate future uncertainty.[115]

Contrary to *Lepis*, and perhaps also to the idea that rehabilitative alimony should accurately predict future circumstances, a 1983 Florida decision reversed and remanded for reduction a lower court award of rehabilitative alimony and child support precisely because it *did* allow for inflation and increased expenses of childrearing.[116]

Remarriage and cohabitation, which are not factors in setting the awards, may become the basis for terminating rehabilitative alimony[117] —implying punishment for a former wife who remarries or cohabits. Despite the rhetoric of opportunity for self-sufficiency, courts still recognize marriage as the primary source of support for women. At least two states have concluded that cohabitation warrants termination upon a showing of changed financial circumstances,[118] a result particularly unfair when the rehabilitative alimony award is actually either a distribution of property or compensation for services rendered—that is, when the rehabilitative alimony award actually represents the wife's fair share of what was gained by the marriage partnership.

110. In re Marriage of Morrison, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978).

111. Gillman, supra note 49, at 137.

112. 83 N.J. 139, 416 A.2d 45 (1980).

113. Id. at 151, 416 A.2d at 51.

114. Id.

115. Id. at 155, n.9, 416 A.2d at 53 n.9.

116. Ramsey v. Ramsey, 431 So. 2d 258 (Fla. Dist. Ct. App. 1983). But see Frye v. Frye, 385 So. 2d 1383 (Fla. Dist. Ct. App. 1980) (upheld trial court's refusal to modify rehabilitative alimony award where husband's evidence of wife's changed need was limited to fact of her remarriage).

117. Maas v. Maas, 438 So. 2d 1068 (Fla. Dist. Ct. App. 1983).

118. Gayet v. Gayet, 92 N.J. 149, 456 A.2d 102 (N.J. 1983); Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (Wis. 1983).

Applications to extend awards of rehabilitative alimony were considered in two further cases involving women studying for degrees. In one, an extension was allowed on appeal due to the goals of rehabilitative alimony and to the fact that the wife's degree would lighten the husband's burden of support.[119] The second case, in which the wife required a longer time to obtain her degree than she had contemplated, rejected the request for extension, calling the case one of mistake rather than changed circumstances and citing a local rule that required modification requests to be filed within one year after judgment.[120]

VI
DISCRETION

As in other areas of family law, courts have broad discretion in determining rehabilitative alimony.[121] The doctrinal chaos surrounding rehabilitative alimony results both from elastic standards and from the freedom with which judges may apply them. The fact that precedents on alimony carry little weight[122] has not changed since 1939.[123] A 1976 study of thirteen hundred cases in a Florida county determined that there was little consistency among trial judges as to which variables in determining alimony and child support were significant, although there was a high degree of individual predictability.[124] Such broad discretion permits prejudice and emotion to overwhelm logic. It encourages the purposeful and widespread application of misperceptions, such as the notion that women have attained economic equality with men, and it facilitates the implementation of traditional mores sugar-coated with progressive rhetoric.[125]

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119. Smith v. Smith, 326 N.W.2d 697 (N.D. 1982).

120. Larson v. Larson, 661 P.2d 626 (Alaska 1983).

121. For an analysis of the interaction of relevant factors and a standard for determining abuse of discretion, see Ruth v. Ruth, 316 Pa. Super. 282, 462 A.2d 1351 (Pa. Super. Ct. 1983) (dissent).

122. H. Clark, supra note 12, at 3.

123. "Judicial discretion is probably nowhere . . . given freer rein, than in the field of domestic relations." Cooey, The Exercise of Judicial Discretion in the Award of Alimony, 6 Law & Contemp. Prob. 213 (1939).

124. White & Stone, A Study of Alimony and Child Support Rulings with Some Recommendations, 10 Fam. L. Q. 75 (1976).

125. See Canakaris v. Canakaris, 382 So. 2d 1197, 1202-04 (Fla. 1980) for a discussion of the justifications and standards of judicial discretion. See generally, A. Jones, supra note 34, at 311.

> The body of law, made by men, for men, and amassed down through history on their behalf, codifies masculine bias and systematically discriminates against women by ignoring the woman's point of view. . . . [W]omen lawyers, judges, and jurors, taught the same rules, usually uphold the same male standard. . . . [Women] are deprived at every step of equal protection under the law; and even those women who receive fair and equal treatment are likely to be thought of as having gotten away with something.
>
> Often male bias shows up at one stage or another of the legal process in the exercise of "discretion." . . . [S]ince discretion usually is exercised *by* men (or by women trained to the male standard), it is usually exercised *for* men, for the male

Because courts rarely award divorcing women counsel fees adequate for complex litigation,[126] the uncertainty and high fees guaranteed by broad discretion operate discriminatorily against women—although it might be said that the concept of rehabilitative alimony decreases the uncertainty, since a short-term award of limited amount is increasingly the norm where alimony is awarded at all. Courts also have extraordinary discretion in determining counsel fees, which will not be altered unless the party appealing affirmatively establishes that the trial court has abused its discretion. Factors in determining the award may include relative income, property owned by each party, characterization of the property as liquid or fixed assets, and the degree to which each party unreasonably increased attorney time necessary.[127] The last three are determined by the same trial court that will fix counsel fees.

A court may decide that a former spouse has sufficient funds to pay her own counsel fees,[128] or that the attorney's fee is unconscionable and that therefore only a portion of it will be awarded.[129] As one trial court stated,

> [w]hen an attorney knows that the lady lady does not have assets, it is [the attorney's] obligation to take [that] into account . . . . Attorneys who take on for indigent or nearly indigent wives the prosecution of a matrimonial action are making a substantial personal sacrifice in many cases. They can never be adequately compensated. . . . [S]uch services . . . are subject to the *philosophically imposed discount.*[130]

Thus, particularly since the potential fees generated by uncertainty in divorce are enormous,[131] the prospect of "philosophically discounted" services discourages attorneys from taking on clients without substantial assets, including

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standard. Judicial discretion, repeatedly exercised to protect the same male interests, becomes a mask for the law's underlying systematic discrimination against women.

Id. (emphasis in original).

126. In Manhattan, the cost of a divorce can easily reach six figures, and $60,00 to $70,000 in other jurisdictions.

> . . . $60,000 to $70,000 is not an unusual amount for a litigated divorce.
>
> . . . [T]he cost of expert witnesses pushes litigated divorce well beyond most people's means. . . . The cost of an appeal . . . [includes] . . . fees for the transcript of the trial—at $3 a page, a three-week trial comes to about $13,000.

Bouton, Women and Divorce: How the New Law Works Against Them, New York Magazine, Oct. 8, 1984, at 34. See also id. at 40. See also Goodman, With New Law, Divorce Fees Soar, N.Y. Times, Jan. 13, 1983, at C1. See generally, Sassower v. Barone, 85 A.D.2d 81, 447 N.Y.S.2d 966 (N.Y. App. Div. 1982) (attorney valued services at $40,000, but court allowed a claim for only $10,000, due to indigence of wife at time of litigation; couple had reconciled, and attorney claimed fees from both).

127. Jondahl v. Jondahl, 344 N.W.2d 63, 73 (N.D. 1984).

128. Id. at 73.

129. See Sassower v. Barone, 85 A.D.2d 81, 87, 447 N.Y.S.2d 966 (N.Y. App. Div. 1982); Reisch & Klar v. Sadofsky, 78 A.D.2d 517, 431 N.Y.S.2d 591.

130. Sassower v. Barone, 85 A.D.2d 81, 87, 447 N.Y.S.2d 966, 969 (N.Y. App. Div. 1982) (emphasis in original). This excerpt from the trial court decision was quoted and rejected by the appellate court in its opinion remanding to the trial court.

131. Goodman, With New Law, Divorce Fees Soar, N. Y. Times, Jan. 13, 1983, at C1.

very rich men's wives, who often do not have ready access to cash.[132] It also encourages attorneys to avoid litigation if they do represent wives. According to one New York attorney, "in general, judges are not generous in this area. . . . Let's say they are good guardians of the husband's money."[133] Besides reducing the chance that a woman will emerge from a divorce with the best settlement possible, this factor, coupled with the uncertainty of property and maintenance awards, operates to trap women in bad marriages.

If neither spouse can afford to pay attorney's fees, legal aid services may compensate. However, there is no established constitutional right of indigents to state assistance for divorce counsel fees.[134] The right of indigents to have access to divorce courts was established in *Boddie v. Connecticut*,[135] but that does not suffice to allow the merely "poor" divorcing woman, whatever her economic status was during the marriage, to litigate adequately her claim to an equitable share of marital worth.

Even contingent fee arrangements are unlikely to be available as a means of financing a divorce. The American Bar Association Code of Professional Responsibility acknowledges that contingent fees "often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim."[136] However, the Code discourages contingent fee arrangements in domestic relations cases by stating that they are rarely justified, due to "the human relationships involved and the unique character of the proceedings."[137] The more recently developed Model Rules of Professional Conduct *forbid* a lawyer to take a case in which the fee would be "contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."[138] The only other situation in which both the Code and the Rules specifically discourage contingent fees is in criminal cases, "largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee."[139] This would often not be the situation in a domestic relations case. None of the arguments seems compelling enough to justify eliminating what may be a spouse's only opportunity to claim her property.

To the extent that it expands the uncertainty surrounding divorce litigation and emphasizes the misperception that women have achieved economic rights equal to those of men, rehabilitative alimony compounds the likelihood that divorce fees will rise and that the issue of counsel fees will operate against women.

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132. Id.
133. Id.
134. In re Smiley, 36 N.Y.2d 433, 437, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 90 (1975).
135. 401 U.S. 371 (1971).
136. Model Code of Professional Responsibility EC 2-20 (1981).
137. Id.
138. Model Rules of Professional Conduct, Rule 1.5(d)(1) (1983).
139. Model Code of Professional Responsibility EC 2-20 (1981).

VII
EFFECTS OF REHABILITATIVE ALIMONY

It would be easier to justify rehabilitative alimony if its reduced amounts[140] led to an increased frequency of awards, but statistics indicate that the overall frequency of awards has not changed.[141] In the sharpest decline of support awards under California's no-fault laws, only 13% of mothers of preschool children were awarded spousal support in 1977, as compared with 20% in 1968.[142] One third of displaced long-term homemakers were awarded no support in 1977.[143]

Although it is difficult to generalize about policy or statutory standards for determining rehabilitative alimony, it is not difficult to recognize their deleterious effects. In a sense, perceptions about women's value as custodial mothers or as homemakers have been supplanted by misconceptions about women's economic status. The responsibility for support has been shifted to divorced women and away from their former husbands[144] without consideration of economic or cultural realities. Further, the distinction between property and support is blurred, so that what is actually property or long overdue compensation for past services may be labeled rehabilitative alimony—which may then be reduced, according to broad judicial discretion. The odds are against a woman having access to the legal resources needed to defend her property.

It is possible to generalize about judicial attitudes in this area. The language and attitudes expressed consistently indicate that rehabilitative alimony is part of the backlash against "women's liberation." Only rarely does an opinion accurately assess the cultural and economic aspects of divorce, and an opinion that attempts to set a progressive, logical precedent may be soon reversed.[145]

VIII
PROPOSAL

While certain aspects of family law may require broad judicial discretion to accommodate individual circumstances, rehabilitative alimony does not. The broad discretion currently permitted severely disadvantages women in several ways: by allowing social myth and prejudice to curtail property and alimony awards to former wives, by inflating attorneys fees with the result that women cannot adequately litigate their claims, and by merging concepts so

140. One court labeled it "diminished" alimony. Molnar v. Molnar, 314 S.E.2d 73, 75 (W. Va. 1984).

141. Weitzman, supra note 21, at 1221.

142. Id. at 1222.

143. Id.

144. Traditionally, marriage obligated a man to support his family for life. See Clark, supra note 12, at 420-22.

145. See Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (Sup. Ct. 1975), modified, 52 A.D.2d 804, 383 N.Y.S.2d 343 (N.Y. App. Div. 1976), discussed at note 98, supra.

that alimony substitutes for property and rehabilitative alimony substitutes for permanent alimony.

Underlying all marital property distributions and alimony awards are fundamental societal evasions or conflicts. The economic worth of housework, childcare, and emotional support is undervalued or ignored, as is the opportunity cost to a wife of investing her life in her husband's earning capacity rather than in her own. Job-related benefits represent an increasingly significant aspect of this opportunity cost. A full- or part-time homemaker accrues none of these benefits during marriage, and only rarely is she awarded any upon divorce. Finally, the value to a husband of deferring full compensation for his wife's services receives no mention in any of the cases surveyed.

At present, divorce courts appear to assign practically no value to these commodities, yet they constitute the bulk of what many wives contribute to a marriage. Rehabilitative alimony cannot be fairly awarded until such conflicts have been confronted, if not with respect to society as a whole, then at least with respect to the individual case. Rehabilitative alimony presupposes equitable or community distribution of all marital property, and property cannot be equitably divided until all contributions to the marriage are accurately credited.

Even if this is done, the perceived need for broad judicial discretion will still lack a logical basis. Nearly all of the "individualized" factors involved are separable and easily defined, and the parameters within which an award of rehabilitative alimony should fall are predictable. The stated purposes of rehabilitative alimony can be achieved only by limiting its use to dependent spouses who will in fact achieve economic self-sufficiency. Whether a spouse will achieve that can be determined by asking the questions listed below. Therefore, the need for broad judicial discretion could be virtually eliminated by requiring the responsible official to answer the questions completely on the record. These answers will indicate whether an award of rehabilitative alimony is appropriate, as well as how much time and money the spouse will need to achieve economic self-sufficiency.

An explanation of how each factor was weighted in the final determination should also be on the public record, along with a justification for an award of rehabilitative alimony to anyone who does not fall within predetermined parameters. *Is rehabilitative alimony appropriate, and if so, how much is necessary to ensure economic rehabilitation of the dependent spouse?*

1. Of what do the marital assets consist?
2. Have *all* of them been fairly divided? What property was awarded as compensation for contributions such as opportunity cost, housework, and childcare, and other economically valuable services the wife has performed? Does the compensation include benefits such as health insurance and pension?
3. How old is the dependent spouse?
4. What is the state of her physical and psychological health?

5. How many children will be in her custody? How old are they?
6. Will she have primary responsibility for their daily care? If so, how much will it cost her to pay someone else to care for them both while she trains and then while she works?
7. Is the child support award adequate to cover these expenses, or must they be included in the rehabilitative alimony award?
8. What are the dependent spouse's marketable skills?
9. What is her potential earning capacity, in light of objective appraisal of a) age and sex discrimination in employment opportunity and compensation b) societal unemployment rates?
10. How much income will she derive from her property, employment, and all other sources?
11. Considering tax implications of the award, how much income will she require for subsistence? for self-sufficiency? for self-realization?
12. In light of the duration and expectations of the marriage, which of the possible standards of support set out in question 11 is appropriate? Why?
13. Does she presently have the resources to achieve that income goal? If not, how much additional time and money will it take her to achieve that goal?
14. When she does achieve the goal, how will her standard of living (and that of her children) compare with that of her former husband? If there is a discrepancy, how is it justified?
15. Under what circumstances may the award be modified?
16. What additional factors, excluding "fault," should be considered in this case?

If rehabilitative alimony is found appropriate, the public record should include a full explanation of the reasons for minimizing any factors suggesting that rehabilitative alimony would be inadequate. For example, any award of rehabilitative rather than permanent alimony to a homemaker over forty, or with children for whom she will care, or without demonstrated potential for competing in the current job market, requires special explanation on the record. So, too, does any deviation from the expectations of a long-term marriage, the twelfth factor. If a woman agreed to forego higher education and career in order to put her husband through medical school and to raise their children, and if she did so in reliance upon the expectation that she and the children would have the standard of living of a doctor's family, then that expectation should not be ignored upon divorce. There is another reason not to overlook her expectation if she made these contributions at her husband's insistence or with his approval. If she has kept her bargain, he should keep his, or else compensate her. It is one situation if he has decided to reduce his income and change his lifestyle, but another if he has simply decided to exchange his family for a new one.

Particularly in factors twelve, fifteen, and sixteen, there is sufficient flexibility to accommodate special situations. However, the necessity for broad discretion is obviated by requiring both a public explanation of each factor and a clear identification of the areas in which discretion has been exercised and the justifications for it.

Once rehabilitative alimony is deemed appropriate, then it must be determined whether the husband has the ability to pay the amount necessary for the wife to achieve economic rehabilitation. States should view suspiciously, as Maryland did, an award that does not result in equivalent standards of living for the former spouses.[146] No one should be allowed to claim a standard of living higher than his former spouse's as a reason for failing to pay adequate rehabilitative alimony.

CONCLUSION

Although rehabilitative alimony is frequently applied in an unjust manner, in theory it need not be unjust if certain assumptions underlying it are squarely critiqued. It assumes that all marital assets have been fairly divided according to the contributions and expectations of each spouse—but at present, most of what wives are expected to contribute and do contribute is undervalued or ignored despite its substantial economic worth. The returns that wives reasonably expect for their contributions are usually deferred and dependent on their spouses, but the expectations of men are not similarly eviscerated. The present system of dividing marital property does not credit what wives contribute, but rehabilitative alimony may compound the problem by substituting it for whatever property a woman would be entitled to. In addition, it may serve to cut short a wife's expected return at a point when her husband has realized his return on their bargain.

Rehabilitative alimony further assumes that the resources allocated to rehabilitation will actually be available for that purpose and will not have to be spent for babysitters because the child support award is inadequate; and that a dependent spouse who acquires skills will actually be able to secure the job and salary which the rehabilitative alimony award contemplates. Where these assumed criteria are not met, a short-term award is properly termed not rehabilitative alimony, but diminished alimony, and it is unrealistic to expect that a former wife will attain self-sufficiency.

In the belief that rehabilitative alimony could be made to function as intended, this article suggests a substitute for the broad discretion currently permitted in this area: a list of questions for spouses, attorneys, and judges to use as guidelines in determining whether rehabilitative alimony is appropriate and if so, how much is necessary. Requiring full answers to these questions on the public record could substantially expose the ways in which rehabilitative alimony is manipulated to the detriment of women and perhaps thereby allow

146. See text accompanying note 106 supra.

the abuses to be corrected so that rehabilitative alimony would serve its stated purpose of allowing a clean and equitable break between former spouses. If abuses in this and other areas of divorce law cannot be corrected, society should, as one court suggested, "re-classify the traditional all American concept of Mom and apple pie and re-label it a most hazardous occupation that all young girls should be dissuaded from."[147]

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147. McAllister v. McAllister, 345 So. 2d 353, 355 (Fla. Dist. Ct. App. 1977).