affirmance or reversal. The requirement of a more complete statement by the trial judge would help achieve this result.

ALIMONY IN INDIANA: TRADITIONAL CONCEPTS v. BENEFIT TO SOCIETY

The family is a permanent institution around which our civilization has formed throughout its development.[1] Society has constantly been on guard to see that the family is protected and that, if it is dissolved, its goals are perpetuated and restoration encouraged. The law of alimony necessarily plays a major role in this endeavor to save, if possible, the community's stake in the family unit even after it has disintegrated.[2] To accomplish this the rights and duties of ex-spouses should be assigned with a clear conception of the impact they will have on the community's interest in the family. Unfortunately, however, great confusion exists in Indiana in the law of permanent alimony. While the courts have declared the alimony policy of the State to be primarily a determination of property rights between the parties,[3] close analysis of the cases reveals that several contradictory theories are being applied under the guise of property division. In an effort to establish a method of alimony payment, the Legislature has attempted to remedy the inadequacies of previous law with a new statute the language of which is so inconsistent that it demands clarification by the courts or, perhaps, amendment.[4]

1. "It is not wholly improbable . . . that the family in some form must be accepted as the initial society, possibly among all the races of mankind." 1 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 10 (1904). See also 1 WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE (5th ed. 1925).

2. "The far ramifications of the law of persons and of property aim to safeguard the institution of the family. . . ." Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROB. 186, 187 (1939).

3. ". . . [T]he institution of a divorce suit . . . conferred upon the court in which the divorce was pending complete jurisdiction of all matters pertaining to the property in controversy." Gray v. Miller, 122 Ind. App. 531, 539, 106 N.E.2d 709, 712 (1952). In the same case the court, in considering the judicial function in the determination of alimony, quoted from Muckenburg v. Holler, 29 Ind. 139, 141 (1867), that " 'all questions of property between the parties, like that in controversy here, are thus in litigation in a suit for divorce, and must there be settled.' " *Ibid.*

4. "The court shall fix the amount of alimony and shall enter a judgment for such sum, and shall specify the method and character of payment, which in his discretion he deems to be just and proper under all the evidence, including any valid separation agreement which may have been introduced into evidence. In determining the character of the payments of the alimony the court may require it to be paid in money, other property, or both, and may order the transfer of property as between the parties, whether real, personal or mixed and whether the title at the time of trial is held by the parties jointly or by one of them individually. In determining the method of payment of the

Upon the dissolution of marriage by absolute divorce, three issues as to property division or money payments may arise for judicial determination: whether or not alimony should be granted; the amount of the award,[5] and the method of payment.[6] Three reasons may be envisaged in answer to these questions. An award may be granted for the support of the wife;[7] it may be awarded to adjust property rights between the parties;[8] or an award may be decreed in recognition of a duty to compensate the injured spouse for the marital offense upon which the divorce is predicated.[9]

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alimony the court may require that it be paid in gross or periodic payments, either equal or unequal, and if to be paid in periodic payments the court may further provide for their discontinuance or reduction upon the death or remarriage of the wife, and, in his discretion, the court may further provide for such security, bond, or other guarantee as shall be satisfactory to the court for the purpose of securing the obligation to make such periodic payments. Said judgment shall be a lien upon the real estate and chattels of the spouse liable therefore to the extent that it is payable immediately but shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly. Such amount as shall be awarded, regardless of the character or method of its payment shall be in complete discharge of all the husband's obligation to the wife. . . ." IND. ANN. STAT. § 3-1218 (Burns Supp. 1953).

5. "The matter of allowing alimony and if allowed to what extent is a matter for the trial court subject to reversal on appeal only where abuse of discretion is shown.

"Only Georgia places the decision on alimony in the hands of the jury." KEEZER, MARRIAGE AND DIVORCE, § 625 (3rd ed. Morland, 1946).

6. "In the ecclesiastical courts, alimony being always in cases of divorce *a mensa et thoro,* was always for maintenance, and was always in periodic installments. But the statutes in many states permit alimony in gross, and in some permit a final division of the property between the spouses as an alternative to periodic alimony." MADDEN, DOMESTIC RELATIONS 323 (1931). See 2 NELSON, DIVORCE AND ANNULMENT § 14.05 (2d ed. Henderson, 1945).

7. This is the traditional view of alimony which was said to signify technically nourishment or sustenance. The word is believed to have been derived from *alimentum* of the civil law which had for its object the provision of food, clothing, habitation, and other necessities for the support of the wife. 1 R.C.L. 864 (1914). It is generally stated that the alimony to which the wife is entitled should correspond to the husband's wealth and position, but the financial circumstances of both the husband and wife are primary determinants today of the amount to be awarded and whether or not an award will be made. 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 1006 (1891); 2 NELSON, *op. cit. supra* note 6, §§ 14.34-14.42; SCHOULER, DIVORCE MANUAL § 258c (Warren's ed., 1944).

8. The treatises are in agreement that the power of the courts to deal with the property of the parties is wholly statutory. Distribution or division of interests in property between the spouses is, strictly speaking, not alimony, although it may be referred to as such in the statutes. Generally, alimony is understood to be an allotment of money. Property division is similar to a money decree only in that it is granted in a divorce proceeding and may incidentally provide for the maintenance of the wife. Thus, division of property is usually considered separately from the traditional alimony payment. KEEZER, *op. cit. supra* note 5, § 575; 2 NELSON, *op. cit. supra* note 6, § 14.03.

9. The fault or misconduct of the wife may be considered in regard to whether she will be awarded alimony, and it may also bear on the amount of the award. KEEZER, *op. cit. supra* note 5, § 630; 2 NELSON, *op. cit. supra* note 6, § 14.31; SCHOULER, *op. cit. supra* note 7, §§ 244 and 251. For a consideration of alimony as a payment of damages, see Lazarus, *What Price Alimony,* 11 LA. L. REV. 401 (1951).

In most American jurisdictions absolute divorce and the allowance of property or alimony are of statutory origin.[10] Therefore, when a court grants a divorce, the judge must look first to these statutes to ascertain the reasons for which awards may be made: support of the wife, adjustment of property rights, or compensation for a wrong. These are the foundations of separate theories of alimony.[11]

When divorce is granted and the court bases an award on the ground that the husband has the continued duty to support his wife, it should consider both the wife's need for support and the husband's ability to pay. Since the allowance is to provide for the day-to-day needs of the wife, the form of payment is generally sums of money to be paid at regular intervals over an indefinite period of time.[12]

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10. The ecclesiastical courts granted only separations from bed and board. Under such separations the relationship of husband and wife continued to exist, and, hence, the obligation of the husband to support his wife also continued. 27 C.J.S. 202 (1941).

The traditional doctrine of alimony was partially a consequence of what the common law established between husband and wife in connection with property and also a result of the marital obligations. Upon marriage the husband became entitled to the ownership of the wife's chattels, the right to collect her earnings, to prosecute choses in action, and the sole use of her lands during coverture. The common law limited divorce did not affect these rights. Therefore the courts, in granting such a separation to the wife, placed upon the husband the duty to maintain her according to his ability. The husband was not permitted to abandon this obligation; therefore, while the law authorized her to live apart from him by reason of his ill conduct, it required him to continue to maintain her. See 2 BISHOP, *op. cit. supra* note 7, § 829; MADDEN, *op. cit. supra* note 6, § 97.

Under statutory authority the concept of alimony has been expanded in American jurisdictions to include an allowance for the wife's support while she is living apart from her husband and also after she is absolutely divorced from him. KEEZER, *op. cit. supra* note 5, § 560.

11. See notes 7, 8, and 9 *supra*.

12. See 27 C.J.S. 965 (1941); 2 NELSON, *op. cit. supra* note 6, § 14.23; SCHOULER, *op. cit. supra* note 7, § 260; 2 VERNIER, AMERICAN FAMILY LAWS § 107 (1932).

There appear to be two theories of the support doctrine in the reported cases. One is based upon the right to support which is created by the marriage. Under this concept continued support is allowed the wife although she may be possessed of income from her own separate property or is able to earn a living in her own right. Thus, it is said in Griffith v. Griffith, 180 S.W. 411, 412 (Mo. App. 1915) that the right to alimony does not depend on ". . . the value of her individual property or the willingness of her kin and friends to come to her aid." Similarly, in Williams v. Williams, 146 Tenn. 38, 44, 236 S.W. 938, 940 (1922) it was asserted that the duty of the husband to provide support is ". . . no less by reason of the fact that she has property of her own or ability to earn support for herself."

The other theory makes allowance only for the sustenance of the wife limiting the award to her actual need. For instance, maintenance is provided for an invalid wife who is physically unable to secure employment for her own support. In such cases it is ruled that the court will not allow the wife to remain idle where she is able to earn a living and her husband is unable to support her. Also, if she has sufficient funds of her own which are approximately equal to the amount she would be entitled to from her husband, then the reason for support fails. Wylly v. Collins, 9 Ga. 223 (1851); Ressor v. Ressor, 82 Ill. 443 (1876); Brown v. Brown, 22 Mich. 241 (1871); Hoffman v. Hoffman, 7 Rob. 474 (N.Y. 1868). See 2 BISHOP, *op. cit. supra* note 7, § 831; 2 NELSON, *op. cit. supra* note 6, § 14.28.

An award may be designed to apportion interests in property between the spouses. Mixing of property rights and interests is often a consequence of marriage, and it is likely that at the time the interests are mingled the spouses do not consider the possibility of divorce. The Legislature confers upon the courts the duty of restoring individual property rights[13] by returning separate property to the rightful owner and dividing joint property acquired during wedlock in such a manner as to do equity to the parties.[14]

Strictly speaking, a division of property between the parties is not alimony, although it may incidentally provide a source of income from which the wife may derive her maintenance.[15] The award serves as a final determination of the property rights between the parties and is based upon the presumption that henceforth they will be mutually independent.[16] The form of payment is either a grant of property or a gross sum of equal value.[17]

Occasionally, the award of alimony is to compensate one spouse for a wrong committed by the other,[18] the supposition being that had there

13. See note 8 *supra*.

14. Concerning the restoration of property and the recovery of dower, see 2 NELSON, *op. cit. supra* note 6, § 14.103; and SCHOULER, *op. cit. supra* note 7, §§ 351 & 352. Numerous considerations are taken into account in determining the division and distribution of property rights. For an analytical article on this subject, see Harbert, *Property Rights as Affected by Divorce, Annulment, and Separate Maintenance* [1949] U. OF ILL. L.F. 605; Daggett, *Division of Property Upon Dissolution of Marriage,* 6 LAW AND CONTEMP. PROB. 225 (1939). Considerations to be taken into account are the wife's contributions to the property acquired, property acquired through joint efforts of the parties, property acquired by virtue of the industry of one of the parties, conveyances procured by fraud, and conveyances in the absence of fraud. See also 2 BISHOP, *op. cit. supra* note 7, § 641; 30 CHI-KENT L. REV. 280 (1952).

15. 2 NELSON, *op. cit. supra* note 6, § 14.03.

16. Runyan v. Runyan, 72 Ind. App. 469, 126 N.E. 35 (1920); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906); Murray v. Murray, 153 Ind. 14, 53 N.E. 946 (1899); Walker v. Walker, 150 Ind. 317, 50 N.E. 68 (1898); Hilbish v. Hattle, 145 Ind. 59, 44 N.E. 20, 33 L.R.A. 783 (1896); Fletcher v. Monroe, 145 Ind. 56, 43 N.E. 1053 (1896); Nicholson v. Nicholson, 113 Ind. 131, 15 N.E. 223 (1888); Behrley v. Behrley, 93 Ind. 255 (1884); Rose v. Rose, 93 Ind. 179 (1884); Muckenburg v. Holler, 29 Ind. 139 (1867); Note, 71 A.L.R. 723, 724 (1931); 27 C.J.S. § 235 (1941).

17. KEEZER, *op. cit. supra* note 5, § 625; 2 NELSON, *op. cit. supra* note 6, § 14.03; SCHOULER, *op. cit. supra* note 7, § 260c.

18. This concept arises from the reasoning that no pecuniary loss should fall on a person because of another's wrong. Therefore, it is said that alimony should be sufficient to leave the wife as well off financially after divorce as she was in marriage. This results from the idea that every injury is, in law, entitled to its pecuniary compensation. So the wife is awarded, in addition to maintenance, a sum sufficient to compensate her for mental and physical suffering and the loss of her husband's society. As a result, the nature and extent of the husband's *delictum* are taken into account in determining the question of alimony. 2 BISHOP, *op. cit. supra* note 7, §§ 1007-1009. Misconduct is a factor to be considered when determining whether to grant or refuse alimony. 2 NELSON, *op. cit. supra* note 6, § 14.40.

been no misconduct, the matrimonial union would have continued.[19] Thus, this theory attempts to fix fault in the defendant.[20] States which authorize compensatory awards adhere to the view that the divorce terminates the duty to support, consequently any further duty owed to the ex-spouse must be predicated upon tort principles.[21] Considerations which govern this theory are the nature of the wrong committed and the injury sustained.[22] Awards under this concept should be limited to instances of actual harm.

It becomes apparent from an analysis of the three reasons for decreeing alimony that each embraces distinct considerations which determine the propriety, size, and form of the award. If the courts decide why the award is being granted, these determinations will be easily made. An examination of the statutes and cases in Indiana will demonstrate the confusion that results from a failure to recognize a definite rationale underlying awards of alimony.

From the wording of the Indiana enactments it appears that the Legislature has not been specifically concerned with the reasons for which alimony may be awarded.[23] The early statutes apparently considered

19. In SCHOULER, *op. cit. supra* note 7, § 244, it is stated that in a few jurisdictions alimony is compensation to the wife for the breach by the husband of his marital obligations.

20. "Whoever causes damage to another by his fault, is bound to indemnify the person injured." Lazarus, *supra* note 9, at 407.

21. In Lazarus, *ibid,* it is pointed out that the "quasi-delictual" theory of alimony, which is utilized in Louisiana, grew out of the Code Napoleon. There it is asserted that "[s]ince upon the dissolution of the marriage, the mutual obligations of fidelity, support and assistance between the spouses is [sic] extinguished, the continued duty of one spouse to support the other can be predicated on a tort basis only." *Id.* at 407. It is noted that alimony is payable only in favor of the innocent spouse. The payment of money by the "guilty" spouse is assimilated to the payment of damages incident upon a breach of contract. The reason for alimony is the damage that one spouse has caused the other in making the divorce necessary through his fault.

22. "Where the delinquency of the husband has been established, and the wife is the injured party, driven by his cruelty from the comforts of domestic enjoyments, she should be liberally awarded." Burr v. Burr, 7 N.Y. 207, 209 (Hill 1843).

"Alimony rests upon the obligation of the husband to support his wife, . . . but under our code, it is something more . . . compensation for a wrong done her." *In re* Spencer, 83 Cal. 460, 464, 23 Pac. 395, 396 (1890).

" 'Since alimony may be awarded by way of compensation to the wife, or given to her for the support to which she is entitled by the marriage and which she has been compelled to forego, the conduct of the husband is a proper subject of inquiry in reaching a determination as to the amount to be allowed, such as his cruelty. The greater the wrongs inflicted upon the wife by the husband, the more liberal should be the award.' " Smith v. Smith, 167 Ga. 98, 108, 145 S.E. 63, 67 (1928), quoting from 19 C.J. 256, n.45, 46 & 47 (1920).

Also in Whaley v. Whaley, 280 Ky. 543, 133 S.W.2d 709 (1939), it was ruled that where a wife was guilty of such conduct in her relations with another man as to forfeit her right to continue as plaintiff's wife, she was entitled to no alimony.

23. "The court shall make such decree for alimony, in all cases contemplated by this act, as the circumstances of the case shall render just and proper; and such decree

alimony as only a means of dividing the family's property. The Legislature prescribed detailed rules to govern property division in different situations.[24] Nevertheless, it was realized that in some instances a property division would be insufficient to provide for the wife, and, in such a situation, the Legislature specified an additional allowance from the separate estate of the husband.[25] This can only be explained as an allowance for the support of the wife. However, later enactments, with one exception, make no specific mention of property division and vest complete discretion concerning the alimony award in the courts.[26] There is

for alimony, heretofore made or hereafter made, shall be valid against the husband, whether asked for in the petition or given by the judge on default." IND. ANN. STAT. § 3-1217 (Burns Repl. 1946).

24. It was provided in Ind. Acts 1807, c. 25, § 3, p. 140, that: "Whenever a divorce shall be decreed, on cause or aggression from the husband, the woman, if no issue of the marriage be living at the time of the divorce, shall be restored to all her lands, tenements and hereditaments, and be allowed out of the man's personal estate, such alimony as the court may think reasonable, having regard to the personal property that came to him by the marriage, and his ability. . . ." Also, Section 4 provides "if the divorce arises from the cause of [or] aggression, of the wife, whether there be living issue or not, of the marriage, the court may order to her the restoration of the whole, or part, or no part, of her lands . . . as shall be thought proper. . . ."

Later the Ind. Acts 1813, c. 28, § 7, p. 79 made the more general provision that ". . . the court pronouncing the decree of divorce shall regulate and order the division of the estate real and personal, in such a way as to them shall seem just and right. . . ."

Detailed rules were incorporated in the Ind. Rev. Stat. 1843, c. 35, §§ 53, 54, 55, and 58, pp. 603-4. There it was declared: "Upon dissolution of the marriage for misconduct of the husband . . . the wife shall be entitled to immediate possession of her real estate in like manner as if the husband were dead.

"In every such case, the court may decree for restoring to the wife the whole, or such part as they think just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage, or for awarding to her the value thereof in money, to be paid by the husband.

"If the real estate of the wife shall have been disposed of by the husband and wife during the coverture, he may . . . be required to account for the same; and the court may require him to pay such amount thereof to her as may be just and reasonable.

"When a divorce shall be decreed on account of the adultery of the wife, the husband shall hold her personal estate forever, and he shall also hold her real estate so long as they both live; and if there shall have been issue of such marriage born alive, he shall hold such real estate during his life as tenant curtesy; but in any case specified in this Section the court, by their decree, may allow to the wife for her subsistence, as much of her said real and personal estate, or of the income thereof, as they shall judge reasonable."

25. "When a divorce shall be decreed for the misconduct of the husband, if the estate and property assigned to the wife by the preceding provisions are an insufficient allowance for the wife and the support of such of the children as shall be committed to her care and custody by the decree of the court, or if there be no such estate and property as above specified, the court may decree to her such part of the personal estate of the husband, and such alimony out of his estate as shall be just and reasonable, taking into view the whole property of the husband wherever it may be, and having regard to the ability of the husband and the character and situation of the parties, and all other circumstances connected with the case." Ind. Rev. Stat. 1843, c. 35, § 56, p. 603.

26. "The court shall make such decree for alimony, in all cases contemplated by this act, as the circumstances of the case shall render just and proper; and such decree for alimony, heretofore made or hereafter made, shall be valid against the husband,

nothing in the words of these statutes that would prevent use of any of the three reasons—support, property settlement, or misconduct.[27]

While the Legislature appears to have been rather unconscious of the precise rationales underlying awards, the courts have been continually faced with the question. In a divorce action all of the property rights of the parties in relation to each other are in litigation and must be settled.[28] An 1852 provision that "a divorce granted for the misconduct of the husband shall entitle the wife to the same rights, so far as her real estate is concerned, that she would have been entitled to by his death"[29] has been interpreted to include only the wife's separate property at the time of the divorce. This construction gives the wife no rights in the husband's real estate.[30] Even without benefit of this statute, it is consistently ruled that the separate property of the wife is not affected by the decree.[31] Thus, these statutes actually have no effect on property settlement.

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whether asked for in the petition or given by the judge on default." IND ANN. STAT. § 1057 (Burns 1894). Earlier statutes were similar. IND. STAT. part II, c. 6, § 19, p. 353 (Gavin and Hord 1862); Ind. Rev. Stat. 1852, part II, c. 4, § 19, p. 237.

The exception noted is a provision that the party obtaining the divorce shall be entitled to the same rights in *his or her real estate* as he or she would have been entitled to by the death of the divorced party. IND. ANN. STAT. §§ 3-1227, 3-1228 (Burns Repl. 1946).

27. A limitation on the type of award may arise by implication from the statutes specifying the method of payment. The traditional method of alimony payment in Indiana has been limited by statute and judicial decision to an award of a gross sum and not periodic payments. Ind. Acts 1873, c. 43, § 22, p. 107; IND. ANN. STAT. § 3-1218 (Burns Repl. 1946), amended by Ind. Acts 1949, c. 120, § 3, p. 318; IND. ANN. STAT. § 1218 (Burns Supp. 1951); Runyan v. Runyan, 72 Ind. App. 469, 126 N.E. 35 (1920); Laufer v. Laufer, 61 Ind. App. 508, 112 N.E. 106 (1916); Boggs v. Boggs, 45 Ind. App. 397, 90 N.E. 1040 (1910); Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904); Ifert v. Ifert, 29 Ind. 473 (1868).

An award of a gross amount is generally indicative of a property division system of award. MADDEN, *op. cit. supra* note 6, §§ 97, 98. Such a fixed sum indicates finality in the award. However, it must be pointed out that in some jurisdictions where gross sums with installment payments are decreed the courts still recognize that the payment is based upon support and will terminate and modify such decrees on remarriage of the wife or other instances of changed circumstances. Ortman v. Ortman, 203 Ala. 167, 82 So. 417 (1919); Francis v. Francis, 192 Mo. App. 710, 179 S.W. 975 (1915); see also Note, 71 A.L.R 723, 738 (1931).

28. Gray v. Miller, 122 Ind. App. 531, 106 N.E.2d 709 (1952); Blagetz v. Blagetz, 109 Ind. App. 662, 37 N.E.2d 318 (1941); Watson v. Watson, 37 Ind. App. 548, 77 N.E. 355 (1906); Murray v. Murray, 153 Ind. 14, 53 N.E. 946 (1899); Hilbish v. Hilbish, 145 Ind. 59, 44 N.E. 20, 33 L.R.A. 783 (1896); Fletcher v. Monroe, 145 Ind. 56, 43 N.E. 1053 (1896); Nicholson v. Nicholson, 113 Ind. 131, 15 N.E. 223 (1888); Behrley v. Behrley, 93 Ind. 255 (1884); Muckenburg v. Holler, 29 Ind. 139 (1867).

29. See note 26 *supra*.

30. "This section gives her no right in his real estate. . . . That section applies to property of which the wife was owner, as her separate property, before and at the time of the divorce, subject only to a restraint upon alienation, without the consent of the husband." Lash v. Lash, 58 Ind. 526, 528 (1877). See Fletcher v. Monroe, 145 Ind. 56, 43 N.E. 1053 (1896).

31. "It is well settled that a decree for alimony is an adjustment of the property

The Legislature has vested the courts with discretion to decree such alimony as the circumstances of the case render proper.[32] Pursuant to this enactment two general rules have been applied: Where the divorce is granted the wife, she will receive a sum that will leave her in as good a position as she would have been (1) had she survived her husband,[33] or (2) had she continued in the marriage relationship.[34] The former proposition would assure her of a one-third interest in her husband's real estate and personal property. When the divorce is granted to the husband, the court may allot to him a portion of the property that he has previously conveyed to his wife, so as to place him partially at least, in the same position as he would have occupied had the marriage continued.[35] However, the fact that the husband obtains the divorce does not always preclude the wife's right to alimony.[36] These precedents considered separately clearly indicate that the courts have organized a jurisprudence of award based upon property settlement.

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rights between the parties; and, in determining the question of alimony, it is proper for the court to take into consideration the wife's separate property. But this is done only for the purpose of determining what would be a fair allowance to the wife out of the husband's property. The wife's separate property is not affected by the decree." Fredricks v. Sault, 19 Ind. App. 604, 608, 49 N.E. 909, 911 (1898); see State *ex rel.* Haines v. Parrish, 1 Ind. App. 441, 27 N.E. 652 (1891).

32. See note 23 *supra.*

33. "It is also a general rule for the guidance of the trial court, though not mandatory, that in awarding alimony to an innocent and injured wife, as part of a divorce decree, the wife should receive such sum as would leave her in as good condition as would have been her condition as a surviving wife upon her husband's death." Glick v. Glick, 86 Ind. App. 593, 595-6, 159 N.E. 33, 34 (1927). See Temme v. Temme, 103 Ind. App. 569, 9 N.E.2d 111 (1937); Dissette v. Dissette, 208 Ind. 567, 196 N.E. 684 (1935); DeRuiter v. DeRuiter, 28 Ind. App. 9, 62 N.E. 100 (1901).

34. Dissette v. Dissette, 208 Ind. 567, 196 N.E. 684 (1935); Boggs v. Boggs, 45 Ind. App. 397, 90 N.E. 1040 (1910); Yost v. Yost, 141 Ind. 584, 41 N.E. 11 (1895).

35. Instances in which the courts reallot to the husband property which was acquired by him outside of the marriage most commonly occur where the husband has conveyed property to the wife as a result of her fraudulent inducement. Such cases reason that it would not be equitable for the wife to continue in possession of such fraudulently acquired property. The most common incident is where the wife induces a conveyance of property from the husband and then makes the marriage so intolerable that the husband is forced to take action for divorce. Mendenhall v. Mendenhall, 116 Ind. App. 545, 64 N.E.2d 806 (1946); Blagetz v. Blagetz, 109 Ind. App. 662, 37 N.E.2d 318 (1941); Keaton v. Keaton, 87 Ind. App. 39, 158 N.E. 251 (1927); Swift v. Swift, 79 Ind. App. 109, 137 N.E. 568 (1922); *but cf.* Walker v. Walker, 150 Ind. 317, 50 N.E. 68 (1898); Stultz v. Stultz, 107 Ind. 400, 8 N.E. 238 (1886).

36. It is reasoned in these cases that the court may decree alimony to the wife where the husband is granted the divorce either under the general discretionary power conferred on them by the divorce statute or by virtue of the general equity powers of the court. Such an award arises from the common law rule which required the husband to make provision for the wife so that she would not be forced into a course of vice. See Baker v. Baker, 108 N.E.2d 70 (Ind. App. 1952); Fites v. Fites, 62 Ind. App. 396, 112 N.E. 39 (1916); Hedrick v. Hedrick, 28 Ind. 291 (1867); Coon v. Coon, 26 Ind. 189 (1866).

However, it became apparent at an early date that these rules advanced by the courts and those prescribed by the Legislature in the first statutory provisions were inadequate to provide for every situation. In one of Indiana's first recorded cases an award was granted "for [the wife's] alimony, and for raising the . . . daughter" although it did not appear that the husband possessed any property.[37] Had the court confined itself to a division of property rights there could have been no award in this case. Later, the courts considered prospective earning power as a property right of the husband in order to have something out of which to make an award.[38] Such grants, measured by virtually the husband's entire estate at the time of divorce, have continued to be justified by reasoning that the capacity to earn is as much a measure of wealth to be considered by the courts as presently possessed property.[39]

Another line of decisions has allowed alimony on a compensatory basis.[40] In these cases the husband's misconduct is of primary significance. The application of this rationale is most apparent where the property holdings of the husband are relatively small and the wife's needs are great,[41] thus requiring the courts to utilize another ground for award. On such occasions the wife has been awarded nearly the entire property interests of her ex-spouse. The courts have declared that in granting alimony they will consider the misconduct of the husband and the wrongs perpetrated by him upon his wife.[42] Even when the marriage lasted for only a short time, it has been held an abuse of discretion for the court to fail to award alimony where the wife was granted a divorce because of cruel and inhuman treatment.[43] In these cases the courts seem to attempt to recompense the wife for the wrong inflicted upon her.

37. Kinney v. Kinney, 1 Blackf. 481, 482 (1818).

38. *E.g.* "It will not do to say that because the husband may have hut little property, or none at all at the time of trial, no decree should be rendered for alimony or for the support of children. In many cases, he who has a strong right arm and vigorous intellect is, in fact, more wealthy than another with less health and mind, in the present possession of property. . . ." Logan v. Logan, 90 Ind. 107, 109 (1883).

39. Cornwall v. Cornwall, 108 Ind. App. 350, 29 N.E.2d 317 (1940); Miller v. Miller, 90 Ind. App. 359, 168 N.E. 881 (1929); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Huffman v. Huffman, 53 Ind. App. 201, 101 N.E. 400 (1913); Stutsman v. Stutsman, 30 Ind. App. 645, 66 N.E. 908 (1903); Gussman v. Gussman, 140 Ind. 433, 39 N.E. 918 (1895); Hedrick v. Hedrick, 128 Ind. 522, 26 N.E. 768 (1891); Glasscock v. Glasscock, 94 Ind. 163 (1884); Logan v. Logan, 90 Ind. 107 (1883).

40. Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944); Miller v. Miller, 90 Ind. App. 348, 168 N.E. 881 (1929); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Rariden v. Rariden, 33 Ind. App. 284, 70 N.E. 398 (1904); Yost v. Yost, 141 Ind. 584, 41 N.E. 11 (1895); Gussman v. Gussman, 140 Ind. 433, 39 N.E. 918 (1895); Ifert v. Ifert, 29 Ind. 473 (1868).

41. Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944); Glick v. Glick, 86 Ind. 593, 159 N.E. 33 (1927); Gussman v. Gussman, 140 Ind. 433, 39 N.E. 918 (1895).

42. See note 40 *supra.*

43. Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927).

The various forms in which a court can order alimony are equally as important as the reasons for which it may be awarded. The early statutes made no specific mention of the method of payment.[44] However, an 1813 Act provided that the decree could not compel either party to divest himself of title to real property.[45] The courts decreed in 1825 that the award could take the form of a gross sum or an annuity.[46] Since then, it has consistently been ruled that alimony must take the form of a money judgment.[47] The 1852 Revision prescribed that the decree should be for a sum in gross and not for annual payments, although the court could allow reasonable time for payment by installments upon the pledge of sufficient security.[48] These provisions and interpretations remained in substantially the same form until 1949.

Under the 1949 Amendment the power of the courts to determine the form and method of payment was expanded.[49] They may now require that payment be made in either money or property and may order the transfer of realty or personalty between the parties whether the title thereto is held jointly or individually. In addition, the statute provides that payment may be decreed in a gross sum or periodic payments, and, if periodic payments are granted, the court may order their discontinuance or reduction on the death or remarriage of the wife. It is not clear from the words of the statute whether the phrase "periodic payments" refers only to installments of a liquidated amount or whether it grants the courts power to require payments that continue until altered by judicial order. The courts themselves have apparently thought that they are still limited to an award in gross.[50]

There is much to be said in favor of Indiana's traditional theory of alimony. It is predicated upon the assumption that a complete separation between the ex-spouses is always desirable, and, by settling all the interests at once, it brings about that result. In this way no vestiges

44. The 1807 Act confined itself to a division of the real and personal estates of the husband and wife. Although provision is made for the payment of alimony, no procedure is specified in determining the method of award. The form of payment was left to the discretion of the court. Ind. Laws 1807, c. 25, §§ 3 & 4.

45. Ind. Acts 1813, c. 28, § 7.

46. Fischli v. Fischli, 1 Blackf. 360 (1825).

47. It has been ruled that a court, when decreeing alimony, has no authority to order the payment of a sum weekly or monthly without a limit as to the time payment is to continue. Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904). The form of payment must be a gross sum, although the sum may be paid out in installments by pledging security. Runyan v. Runyan, 72 Ind. App. 469, 126 N.E. 35 (1920); Laufer v. Laufer, 61 Ind. App. 508, 112 N.E. 106 (1916); Boggs v. Boggs, 45 Ind. App. 397, 90 N.E. 1040 (1910); Ifert v. Ifert, 29 Ind. 473 (1868); Rourke v. Rourke, 8 Ind. 427 (1857).

48. IND. REV. STAT. 1852, c. 4, § 22.

49. See note 4 *supra*.

50. Wallace v. Wallace, 110 N.E.2d 514 (Ind. 1953).

of the broken marriage are left to interfere with the future lives of the parties or to discourage their remarriage. Certainly a man of limited income who is burdened with alimony payments that may continue for years is in a poor position to support a second wife. And a woman may not be anxious to hazard a second marriage if she knows that it will bring an end to her support payments. Moreover, alimony is often the cause of continued ill will between the parties long after their separation.[51]

When a divorce is necessary, the economic as well as social independence of both parties is to be desired.[52] If there is enough property so that an equitable division will assure each party an adequate means of support, then nothing more need be done. Judgments of this type will probably become more prevalent as women's status in society improves.[53]

Inevitably, however, situations arise in which a division of property leaves one party, usually the wife, without adequate means of support. A woman who has devoted all of her time to caring for a home and children has probably had no opportunity to learn any of the skills necessary for earning a living in a competitive society. The longer she has relied upon her husband for support, the less she will be able to provide for herself. Furthermore, if she has children, caring for them properly will leave her little time to support herself.

All the advantages of a complete separation, with the economic independence of each marriage partner are defeated if either one has no adequate means of support. Many American families' expenditures consume nearly all of their income, and, consequently, they have little accumulated property. In a very real sense their only asset is the weekly pay check.[54] To limit the wife of such a family to her share of the family's property is unfair and may ultimately burden the community with responsibility for her support, or deprive the children of the parental care they should receive.

The Indiana courts have tried to solve the problem by treating the husband's future income as property to be divided between the spouses.[55] The solution, besides being unrealistic, has proved inadequate. The fact that courts are making a property settlement has deterred them from

51. See Peele, *Social and Psychological Effects of The Availability and The Granting of Alimony on The Spouses,* 6 LAW & CONTEMP. PROB. 283 (1939).

52. See Kelso, *supra* note 2, at 186.

53. Today a wife is often able to support herself. See 251 ANNALS (May 1947), especially Kyrk, *Who Works and Why,* at 45, 47.

54. See KYRK, THE FAMILY IN THE AMERICAN ECONOMY, c. 10 (1953).

55. See note 38 *supra.*

awarding a wife more than her husband's present assets,[56] and the very nature of a property award prevents any adjustment for future changes in the wife's needs or the husband's ability to pay.[57] Support should be recognized as a valid reason for awarding alimony rather than attempting to provide for it under the color of property settlement; but this alone will not suffice as long as the statutes continue to forbid unlimited periodic payments.

The courts' interpretation of the laws before the 1949 Amendment has been that the judgment must take the form of a gross sum and not periodic allotments.[58] However, if alimony is effectively to provide support, this limitation on the method of payment must be removed. States whose statutes vest their courts with complete discretion concerning the method of payment consistently rule that the best award is a periodic allowance.[59] With this type of decree the courts may supervise and adjust the alimony payments to meet changing situations.[60]

Although it may be necessary to amend the present statute in order to provide for indefinite periodic allotments, it could be interpreted to authorize such payments. As previously discussed, the 1949 Act appears to give the courts discretion in determining the method of payment. It further provides that in determining the method of disbursal the court can require that alimony be paid "in gross *or* in periodic payments."[61] From these provisions it might be concluded that the Legislature intended that in the courts' exercise of discretion they might award either a gross sum judgment or an allotment of periodic payments over an indefinite period of time. Unless these sections are limited by the first phrase of the Act, "the court shall fix the amount of alimony . . . for *such sum*"[62] or the later provision that "such sum . . . shall be in complete discharge of all the husband's obligation to the wife," it might be ruled that discretion was actually vested in the courts to determine the method of award.

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56. "No appellate case . . . appears to have gone to the length of awarding the wife an amount greater than the husband's assets at the time of the decree." FUCHS, MATERIALS FOR COURSE IN DOMESTIC RELATIONS (1950).

57. Although a property award may be paid in installments, the amount of the original award sets the limit of the payments.

58. See note 47 *supra.*

59. Honey v. Honey, 60 Cal. App. 756, 214 Pac. 250 (1923); Shaw v. Shaw, 114 Ill. 586, 3 N.E. 271 (1885); Lewis v. Lewis, 109 Mont. 42, 94 P.2d 211 (1939); Bristol v. Bristol, 65 Mont. 508, 211 Pac. 205 (1922); Parmly v. Parmly, 125 N.J. Eq. 545, 5 A.2d 789 (1939); Doerle v. Doerle, 96 Misc. 72, 159 N.Y. Supp. 637 (1916); SCHOULER, *op. cit. supra* note 7, § 244b; 30 CHI-KENT L. REV. 280 (1952).

60. 27 C.J.S. § 235 (1941); also, see note 59 *supra.*

61. (emphasis added) See note 4 *supra.*

62. (emphasis added)

Further examination of the statute may better substantiate the view that the intention of the Legislature was to allow the courts complete discretion in the method of payment. The portion of the 1949 Statute that provided for the "discontinuance or reduction upon the death or remarriage of the wife"[63] is inconsistent with the principle of a gross sum judgment award. If alimony in a liquidated amount is given, subsequent modification is not justifiable.[64] On the other hand, in other jurisdictions where alimony is awarded in the form of sums payable at regular intervals for the wife's support, the allowance continues only for the joint lives of the parties, or until the wife remarries.[65]

Current statutes place no limitation on the reasons for awarding alimony. The judiciary, however, seems to feel itself largely limited to determining property interests. When the limitations of property division became apparent, the courts granted awards fixed in amount founded on support and misconduct. The gross sum judgment rule is not sufficiently comprehensive to fulfill the needs of litigants. Unless the 1949 Act is interpreted to incorporate the indefinite periodic allowance method, it should be amended to so provide.

Courts have been misguided by the "injured party" and "misconduct" phraseology of the divorce and alimony statutes.[66] The primary aim of these laws is merely to point out the party entitled to

63. See note 4 *supra*.

64. "Inferences of finality, or otherwise, are sometimes derived from the nature of allowances granted in particular cases. If alimony in a lump sum, or 'in gross,' is given, subsequent modification is not usually permitted unless (as the rule is recognized in some jurisdictions), upon a true construction of the particular decree, it appears that the allowance is to be regarded as a provision for support. But the fact that 'alimony' is granted in the form of periodical payments does not justify modification if in fact a mere division of property interests was provided for.

"Accordingly, it is held that an allowance of a gross sum . . . as, or in lieu of alimony . . . is conclusive, notwithstanding the existence of a general modification statute." Note, 71 A.L.R. 723, 730-1 (1931). See Walters v. Walters, 341 Ill. App. 561, 94 N.E.2d 726 (1950); Ortman v. Ortman, 203 Ala. 167, 82 So. 417 (1919); Scott v. Robertson, 212 Ky. 392, 279 S.W. 625 (1926); Guess v. Smith, 100 Miss. 457, 56 So. 166 (1911); Wallace v. Wallace, 74 N.H. 256, 67 Atl. 580 (1907); Olney v. Watts, 48 Ohio St. 499, 3 N.E. 354 (1885).

65. Where alimony is payable in continuous allotments, to satisfy that obligation for support which arises from the marriage, such payments should continue only during the life of the wife or until she marries again. Should the ex-wife remarry she obtains this same obligation for support from the second husband. Therefore it would be illogical to allow her to receive continued support from the first husband at the same time she has support from the second spouse and upon application of the husband such payments will be terminated by the court. Under such circumstances it must be held that she relinquishes support from her first spouse by remarriage. To rule otherwise would be in effect to place a premium on divorce because the wife could increase her income with each marriage. See Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920); 30 A.L.R. 81 (1924).

66. IND. ANN. STAT. §§ 3-1201, 3-1227 and 3-1228 (Burns Repl. 1946).

divorce or alimony and not to specify a compensatory basis of award. The majority of divorces today arise through mutual consent of the parties.[67] It is unrealistic to assume that the defendant in a divorce proceeding is always at fault and to utilize that assumption in determining the amount of an award. Even in cases involving actual harm to the wife, there is no reason to allow her an amount of alimony in excess of the amount she would receive for support.

It is difficult for someone outside the marriage relationship to isolate the cause of marital misconduct and validly place the blame on one of the parties. The acts by one spouse that appear to be the immediate cause of divorce may actually be brought about by less manifest misconduct on the part of the other.[68] Social workers, trained for such problems, are not always able to trace responsibility to one party.[69] Certainly a court is not better qualified to examine a marriage and assign fault for its dissolution. Punishment and compensation should be left to criminal and tort law, which are gradually moving farther into family relationships.[70] Need for support, weighed against the ability to pay, and individual equities in the family property can be ascertained by a court. They directly affect the lives of the spouses after divorce, which is in turn the concern of society as it endeavors to protect the family by domestic relations laws.

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67. ANN. REP. JUD. COUNCIL LEG. DOC., N.Y. (1948). This report showed that during the preceding year some 14,006 divorce actions were entertained in New York, of which in 93.3 per cent of the cases the defendant did not object to the charge made nor the relief sought. In an individual examination of parties only 6 out of 100 failed to see eye to eye on the dissolution of their marriage. Mutual consent to divorce is also indicated by the fact that in by far the majority of cases there is not even a petition for alimony. In FUCHS, *op. cit. supra* note 56, at 133, it is pointed out that in Maryland in the year of 1929, alimony and support for children were asked for in only 453 out of a total of 3,306 eases filed.

68. See Chute, *Divorce and The Family Law,* 18 LAW & CONTEMP. PROB. 49 (1953). Mr. Chute, speaking of divorce, says "[t]he causes are many and complex. No two cases are alike. The grounds alleged in the divorce petition are seldom the real one." *Id.* at 50.

69. For a discussion of the difficulties encountered by social workers in discovering and alleviating the causes of divorce see Mudd, *The Social Worker's Function in Divorce Proceedings,* 18 LAW & CONTEMP. PROB. 66 (1953).

70. See Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952). The Supreme Court of Illinois held that under the Illinois Married Woman's Act of 1874 a wife can maintain an action for personal injuries against her husband. *Accord,* Brown v. Gosser. 262 S.W.2d 480 (Ky. 1953).