North Dakota Law Review

Volume 61 | Number 2 Article 5

1985

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ENTITLEMENTS TO SPOUSAL SUPPORT AFTER DIVORCE

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I. INTRODUCTION

Section 14-05-24 of the North Dakota Century Code authorizes a divorce court to compel one party "to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just."[1] This Article will examine evolving judicial perceptions of the suitability and justice of court-imposed support obligations after divorce.

Before 1976, North Dakota courts understood the statutory directive of section 14-05-24 to permit judicial enforcement of alimony in the common-law sense of a continuation after divorce of

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1. *See* N.D. CENT. CODE § 14-05-24 (1981). Section 14-05-24 of the North Dakota Century Code provides as follows:

> When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.

Id.

The statutory description of post-marital alimony as permanent distinguishes it from temporary or interim alimony authorized by § 14-05-23 of the North Dakota Century Code for the period during which the divorce action is pending or being appealed. Rudel v. Rudel, 279 N.W.2d 651, 657 (N.D. 1979). *See* N.D. CENT. CODE § 14-05-23 (1981). In much contemporary caselaw and literature, however, alimony or maintenace is described as permanent in the sense of being of indefinite duration, to distinguish it from awards for a specific duration. *See, e.g.*, Seablom v. Seablom, 348

the husband's marital duty to support his wife.[2] That concept of alimony grew out of and reflected the common-law status of married women as economically incapacitated and dependent.

In 1976, the North Dakota Supreme Court rejected the common-law concept of alimony as a continuing duty of spousal support.[3] Instead, it recognized a contemporary doctrine of temporary maintenance to rehabilitate a person disadvantaged by divorce.[4]

While continuing to emphasize the functional definition of most post-marital support as rehabilitative,[5] the court since 1976 has also recognized an additional or alternative entitlement to permanent post-marital maintenance in circumstances that limit or preclude rehabilitation.[6] The additional or alternative purpose of permanent maintenance is compensatory: it is sometimes appropriate for spousal support to function as a means of sharing marital assets that cannot be fairly reallocated by a division of property at the time of divorce. Furthermore, because spousal support is modifiable, it may under some circumstances be a necessary mechanism for compensating or sharing future contingent interests. This new understanding of spousal maintenance as a compensatory entitlement is grounded in the contemporary perception of the economic value of spouses' various roles within marriages.

II. THE RUFF-FISCHER GUIDELINES

The North Dakota Supreme Court routinely recites a list of factors that must be considered by trial courts in determining both property distribution and spousal support: the ages of the parties,

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N.W.2d 920, 924 (N.D. 1984) (the purposes of spousal support are rehabilitation or permanent maintenance).

The North Dakota Supreme Court has repeatedly expressed its preference for the term "spousal support" rather than alimony. *See, e.g.*, Coulter v. Coulter, 328 N.W.2d 232, 241 (N.D. 1982); Urlaub v. Urlaub, 325 N.W.2d 234, 238 (N.D. 1982). In Lipp v. Lipp, the court stated that "the term 'alimony' in North Dakota statutes and caselaw is used in a generic sense and means any payment to be made to the other spouse for any purpose, including payment as a part of a property division, spousal support, or child support or a combination of any of them." Lipp v. Lipp, 355 N.W.2d 817, 820 (N.D. 1984). The court prefers the term "spousal support" because it is more descriptive and is less likely to cause confusion between awards of maintenance and property divisions. *Coulter*, 328 N.W.2d at 241.

2. *See, e.g.*, Nugent v. Nugent, 152 N.W.2d 323, 327 (N.D. 1967).

3. Bingert v. Bingert, 247 N.W.2d 464, 468-69 (N.D. 1976).

4. *Id.* at 469.

5. *E.g.*, Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982); Jondahl v. Jondahl, 344 N.W.2d 63, 72 (N.D. 1984); Delorey v. Delorey, 357 N.W.2d 488, 490 (N.D. 1984).

6. *See* Delorey v. Delorey, 357 N.W.2d 488, 490 (N.D. 1984); Lipp v. Lipp, 355 N.W.2d 817, 820 (N.D. 1984); Bullock v. Bullock, 354 N.W.2d 904, 911 (N.D. 1984); Seablom v. Seablom, 348 N.W.2d 920, 924 (N.D. 1984). When monthly payments do not effectuate a purpose such as

their earning ability, their conduct during the marriage, the duration of the marriage, their station in life, their health and physical condition, their necessaries and circumstances, financial and otherwise, the value and income-producing capacity of their property and whether it was accumulated before or after marriage, the efforts and attitudes of the parties towards its accumulation, and other such matters or facts as may be material. These considerations have come to be labeled *Fischer* or *Ruff-Fischer* guidelines.[7]

Spousal support and property distribution determinations are findings of fact and are not set aside on appeal unless they are clearly erroneous.[8] Since an appellate court cannot decide whether such determinations are clearly erroneous unless it understands the trial court's determination of net worth and rationale for fiscal allocations, the North Dakota Supreme Court will remand for further proceedings if it lacks sufficient information to understanding the determinations.[9]

Inclusion of a particular factor as a *Ruff-Fischer* guideline amounts to judicial designation of its permissible relevance. Beyond that, trial courts are left to select and to weigh those factors that they can treat as determinative in particular cases.[10] A trial

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rehabilitation or maintenance, the court suggests that they might constitute a property division. *See* Lipp v. Lipp, 355 N.W.2d at 821-22 (court not required to decide whether payments constituted spousal support or a property division since, even if support, they are not modifiable because there was no material change in circumstances).

7. The guidelines entered North Dakota law in Ruff v. Ruff, where they were quoted with approval from a Nebraska case. Ruff v. Ruff, 78 N.D. 775, 784, 52 N.W.2d 107, 111 (1952) (quoting Holmes v. Holmes, 152 Neb. 556, 41 N.W.2d 919 (1950)). The phrase "and other such matters as may be material" was added in Fischer v. Fischer, 139 N.W.2d 845, 852-54 (N.D. 1966).

8. N.D.R. CIV. P. 52(a). *See, e.g.*, Carr v. Carr, 300 N.W.2d 40, 42 (N.D. 1980); Haugeberg v. Haugeberg, 258 N.W.2d 657, 659 (N.D. 1977). Under Rule 52(a), findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made. Clark v. Clark, 331 N.W.2d 277, 278 (N.D. 1983); Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982). Also, distributions may be set aside if they were induced by an erroneous view of the law. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984); Haberstroh v. Haberstroh, 258 N.W.2d 669 (N.D. 1977). Rule 52(a) also applies to motions to modify divorce decrees. Corbin v. Corbin, 288 N.W.2d 61, 65 (N.D. 1980); Becker v. Becker, 262 N.W.2d 478, 481 (N.D. 1978). *But see* Oviatt v. Oviatt, 355 N.W.2d 825, 828 (N.D. 1984) (VandeWalle, J., concurring specially) (agreeing with Justice Sand that distributions of property are conclusions of law and finding rationale equally applicable to awards of spousal support); Clark v. Clark, 331 N.W.2d 277, 279 (N.D. 1983) (Sand, J., concurring specially) (distributions of property, because they are determined by equitable principles of law, should be reviewed as conclusions of law).

9. *See, e.g.*, Urlaub v. Urlaub, 348 N.W.2d 454, 456 (N.D. 1984) (having been made aware of net worth, court holds that trial court distribution not clearly erroneous); Urlaub v. Urlaub, 325 N.W.2d 234, 237-38 (N.D. 1982) (remand for purpose of determining value of property and rationale for fiscal allocations). Trial courts should normally use the elementary accounting equation of assets minus liabilities in determining the net worth of marital property. Linn v. Linn, 370 N.W.2d 536, 541 n. 3 (N.D. 1985).

10. There are no fixed rules by which the guidelines are to be applied. *See, e.g.*, Martin v. Martin, 307 N.W.2d 541 (N.D. 1981); Midboe v. Midboe, 303 N.W.2d 548 (N.D. 1981). What is equitable depends upon the circumstances in a particular case. Graves v. Graves, 340 N.W.2d 903,

court need not make particular findings as to each guideline,[11] but it must determine the net worth of property before the other guidelines come into play,[12] and it must specify a rationale for the distribution it orders.[13] The guidelines are intended to aid the trial court in exercising its discretion in formulating equitable terms and conditions for post-marital fiscal allocations[14] or in deciding whether the terms and conditions of stipulated agreements between the former spouses are equitable.[15] They neither imply nor depend upon particular reasons why post-marital support may be equitable.[16] They are, however, grounded in an understanding of why it may be equitable to redistribute property after a marriage.

III. EQUITABLE REDISTRIBUTION OF PROPERTY

In North Dakota, judicial power to redistribute property after a marriage is based on recognition of "the husband's and the wife's respective rights to an equitable portion of the property which has been accumulated by the parties through their joint efforts and for their mutual benefit."[17] It is no longer a controversial or minority perception that non-income producing spouses as well as those who work outside their homes perform economically valuable roles and contribute to their marriages as economic partners. All states now reflect the premise of marriage as a shared economic enterprise by providing distribution of property during or after marriage.[18] While it is perhaps ironic that greater awareness of the value of the

906 (N.D. 1983); Tuff v. Tuff, 333 N.W.2d 421, 423 (N.D. 1983).

11. *E.g.*, Graves v. Graves, 340 N.W.2d 903, 906 (N.D. 1983); Nastrom v. Nastrom, 284 N.W.2d 576, 581 (N.D. 1979).

12. *E.g.*, Lentz v. Lentz, 353 N.W.2d 742, 745 (N.D. 1984); Winter v. Winter, 338 N.W.2d 819, 821 (N.D. 1983). Rule 8.3 of the North Dakota Rules of Court requires parties in contested divorces to assign value to property possessed by the parties. N.D.R.O.C. 8.3.

13. *E.g.*, VanRosendale v. VanRosendale, 333 N.W.2d 790, 791 (N.D. 1983); Tuff v. Tuff, 333 N.W.2d 421, 424 (N.D. 1983). Articulation of a rationale is necessary in order "to aid the trial court in reaching a reasonable determination and to aid [the appellate court] in giving meaningful review of the discretionary decision." Haugan v. Haugan, 117 Wis. 2d 200, ____, 343 N.W.2d 796, 804 (1984).

14. *E.g.*, Sanford v. Sanford, 301 N.W.2d 118, 126 (N.D. 1980); Carr v. Carr, 300 N.W.2d 40, 42 (N.D. 1980).

15. *E.g.*, Bismarck Tribune Co. v. Bowman, 293 N.W.2d 133, 136 (N.D. 1980); Rummel v. Rummel, 234 N.W.2d 848, 852 (N.D. 1975).

16. All jurisdictions examine factors similar to those found in the *Ruff-Fischer* guidelines in making post-marital allocations. Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 138-39 (1974). Therefore, such guidelines themselves cannot be thought to define a particular policy. In North Dakota, the *Ruff-Fischer* guidelines have remained the same in cases declaring that alimony is a continuation of marital support and in cases declaring that it is not.

17. Lipp v. Lipp, 355 N.W.2d 817, 820 (N.D. 1984); Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981). The power to distribute property equitably after a divorce means that courts may divide separate or jointly held property regardless of its legal or equitable title. An equitable property division need not be equal. *E.g.*, Lippert v. Lippert, 353 N.W.2d 333, 336 (N.D. 1984); Piper v. Piper, 239 N.W.2d 1 (N.D. 1975).

18. In the eight community property states, "community property" acquired after marriage is

work done by women as homemakers has come at a time when an increasing number of women work in income-producing jobs outside their homes, that awareness reflects recognition that spouses choose among different but equally valuable economic roles within marriage. Spousal decisions about their respective roles within marriage are presumably shared,[19] as are their efforts and the consequences of those efforts.

Acknowledgment of tangible property as the product of shared efforts by non-income-producing and income-producing spouses appeared in North Dakota cases long before the current popularity of the idea of marriage as an economic partnership. That premise is now firmly established as the rationale for equitable property redistribution. Earlier courts undoubtedly felt more comfortable attributing value to those contributions of wives that could be linked directly to income production by their husbands, as when the wife assisted in a business enterprise on a non-salaried basis.[20] Even though it is more difficult to quantify contributions of a spouse who is not playing a wage-associated role, contemporary

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owned jointly during the marriage and is distributed at divorce. The forty-two common law states now have either "deferred community property" or "equitable distribution" at divorce.

In deferred community property states, "marital property" acquired after marriage is distributed at divorce. Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1282 (1981). *See also* UNIF. MARRIAGE AND DIVORCE ACT § 307 (alternative B); Rutten v. Rutten, 347 N.W.2d 47, 48 (Minn. 1984) (award of non-marital property not clearly erroneous); Dammann v. Dammann, 351 N.W.2d 651, 652 (Minn. Ct. App. 1984) (abuse of discretion for trial court to divide non-marital property).

Equitable distribution states such as North Dakota permit courts at divorce to distribute all property, including property acquired before the marriage. *See, e.g.*, Fraase v. Fraase, 315 N.W.2d 271, 273-74 (N.D. 1982). Courts can also distribute property obtained by gift or inheritance during the marriage. *See, e.g.*, Schmidt v. Schmidt, 325 N.W.2d 230, 233 (N.D. 1982); Hoge v. Hoge, 281 N.W.2d 557, 561 (N.D. 1979). *See* UNIF. MARRIAGE AND DIVORCE ACT § 307 (alternative A).

In the nineteenth century, common-law states distributed property at divorce according to legal title. By 1984 all common-law states authorized redistribution. Freed & Foster, *Family Law in the Fifty States: An Overview*, 18 FAM. L. Q. 369, 390-92 (1985) (authors do not label Mississippi as an equitable distribution state but acknowledge that recent judicial decisions permit that characterization).

19. Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 6 (1977). The author discusses the marital decision-making process as follows:

> In marriage most of us seek an alliance with another individual who will believe in us, be loyal to us, help us function in a demanding, often hostile world, and who will help make life satisfying. In exchange we will try to do the same. In many senses these needs and the expectations they create shape the frame of mind with which decisions are made during marriage. The expectation of stability and continuity and the desire for a shared life suggest that married people are unlikely to make decisions on an individually oriented basis; rather the needs of each person tend to be taken into account. Thus married people will often make decisions differently than they would if there were no marriage or marriage-like relationship functioning.

Id.

20. Farm wives play an important role in the farm enterprise. In a 1982-83 study of North Dakota farm families, 90% of the wives reported that they were involved in the farm operation. Sixty percent did bookkeeping; 61% were involved in business decision-making; 54% operated equipment; 42% cared for livestock; 76% prepared meals and/or did laundry for hired men. Seven percent received a salary for their work. Light, Hanson, & Hertsgaard, *The Work of North Dakota Farm*

courts are now willing to attribute value to both spouses for property accumulated through their joint efforts and for their mutual benefit, and to recognize the value to the marital unit of the fact that, for example, the wife devoted "a substantial part of her productive life to the marriage, raising their three children, handling the family's finances, entertaining [her husband's] business clientele, and generally providing the type of support and services that a homemaker usually provides."[21] While that recognition is accepted as the premise for equitable redistribution of property, it has not been seen so clearly relevant to possible post-marital support obligations.[22]

IV. CHARACTERIZATION OF POST-MARITAL FISCAL ALLOCATIONS

Although it applies the *Ruff-Fischer* guidelines to both spousal support and property distribution, the North Dakota Supreme Court has insisted that the two post-marital allocations have different purposes and are distinguishable.[23] It treats the allocations

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and Ranch Women, N.D. FARM RESEARCH MAG. 25-26 (1983). Noting that property sharing principles in common-law states first developed in Kansas and Oklahoma, one commentator observes that rural women took active roles in the family business long before their urban counterparts and suggests that "sharing-based legislation [developed] because of the economic realities of farm life." Comment, *supra* note 18, at 1309.

21. Nastrom v. Nastrom, 284 N.W.2d 576, 581 (N.D. 1979). *See also* Briese v. Briese, 325 N.W.2d 245 (N.D. 1982). In recognizing the wife's contribution to the marriage, the court in *Briese* stated as follows:

> This is a situation where both parties entered into the marriage with relatively little property. Kenneth worked to earn money to provide for his family. He handled the financial and business affairs of the familiy. During the 31 years of her marriage, Florence performed the tasks of a homemaker. She took care of the home and played an active role in raising eight children. It cannot be said that this was an insignificant contribution to the marriage.

Id. at 247. *See also* Comment, *supra* note 18, at 1310. The author states as follows:

> [M]arriages are increasingly viewed as partnerships, with spouses working toward common goals. In a partnership marriage, one spouse must sometimes temporarily put aside his or her individual interests or goals to promote the goals of the other spouse, or of the marital unit. Examples include working to finance the education of the other or staying at home to care for children. This situation creates the expectation and reality that spouses will share assets and income during the marriage. States with sharing principles in property distribution are recognizing these expectations when the marriage is dissolved.

Id.

22. Alimony is disfavored because it continues an often acrimonious fiscal relationship between persons whose other legal bonds have been dissolved. Beyond that, however, it has been thought widely and wrongly available to "alimony drones who neither toil nor spin" and are assured of support for life. Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?,* 14 FAM. L. Q. 141, 142-43 (1980). In fact, only 9.3% of divorces between 1887 and 1906 included alimony provisions. In 1916, 15.4% awarded alimony, and in 1922, 14.6% included alimony provisions. *Id.* at 180 (census data). In a 1975 poll, 14% of divorced wives reported they had been awarded alimony. *Id.* at 143.

23. *See, e.g.,* Lipp v. Lipp, 355 N.W.2d 817, 821 (N.D. 1984) ("To be spousal support a

differently in one way that can make their characterization crucial. The court has construed the last sentence of section 14-05-24 of the North Dakota Century Code[24] as permitting judicial modification of spousal support provisions in divorce decrees if there has been a material change in the financial need of one party or ability to pay of the other,[25] but as not permitting modification of property distributions.[26] The fact that support creates a modifiable fiscal relationship between former spouses which survives the dissolution of their marriages makes it a frequent source of later litigation. Although spousal maintenance and property distribution also differ as to matters of enforceability,[27] taxation,[28] and bankruptcy,[29] characterization problems in reported North Dakota cases deal primarily with questions of modification. Indeed, modifiability emerges as the essential attribute distinguishing maintenance from post-marital property division.[30]

Spousal support is popularly thought of in terms of continuing, periodic payments while property division is associated with a one-step allocation of tangible property.[31] A court can award

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provision in a divorce judgment must effectuate the purposes of spousal support, such as rehabilitation or maintenance"); Sventenko v. Sventenko, 306 N.W.2d 607, 610 (N.D. 1981); Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981).

24. *Williams,* 302 N.W.2d at 758.

25. Cook v. Cook, 364 N.W.2d 74, 76 (N.D. 1985). Generally, the changed circumstances must be substantial, involuntary, and not contemplated at the time of the previous order. Muehler v. Muehler, 333 N.W.2d 432, 434 (N.D. 1983). Even when there has been a material and dramatic increase in the need of a former spouse, however, a court lacks jurisdiction to order payment of alimony if there is no initial award of alimony to modify and no express reservation of jurisdiction in the divorce decree. Becker v. Becker, 262 N.W.2d 478, 482 (N.D. 1978).

26. Although the last sentence of § 14-05-24 of the North Dakota Century Code seems literally to make property distribution as well as maintenance modifiable, the North Dakota Supreme Court does not so interpret it. *See, e.g.,* Wikstrom v. Wikstrom, 359 N.W.2d 821, 823 (N.D. 1984); Becker v. Becker, 262 N.W.2d 478, 481 (N.D. 1978). In *Becker,* the North Dakota Supreme Court refused to reconsider its treatment of property distributions as final, in spite of facts that made application of that doctrine very harsh. *Id.* at 480-81, 484. A property judgment can be "clarified," however, by defining obligations without changing substantive rights. Wastvedt v. Wastvedt, 371 N.W.2d 142, 145 (N.D. 1985). A 1980 judgment awarded the home to the wife and ordered the husband to make payments, including mortgage principle, insurance, interest, and tax payments. *Id.* at 143. When the house was sold, the judgment was "clarified" to order only payment of principle and interest to the wife. *Id.*

27. Seablom v. Seablom, 348 N.W.2d 920, 924-25 (N.D. 1984); Dvorak v. Dvorak, 329 N.W.2d 868, 870 (N.D. 1983). For a detailed discussion of the enforceability of support and property judgments, see Trentadue, *Obtaining an Enforceable Division of the Marital Estate in North Dakota,* 61 N.D.L. REV. ____ (1985).

28. *See* Rosen & Burke, *Putting a Value on a Professional License,* FAM. ADVOC., Summer 1984, at 23.

29. Debts based on post-marital alimony, maintenance, or support obligations to a spouse or former spouse are explicitly excepted from discharge in bankruptcy so long as they are not assigned to someone other than the state as a condition of eligibility for welfare. 11 U.S.C. § 253(a)(5)(1982). Debts owing on a property settlement are dischargeable. *Seablom,* 348 N.W.2d at 925. For a discussion of ways to minimize risks of losing a property settlement in subsequent bankruptcy proceedings, see Trentadue, *supra* note 27, at ____.

30. *See* Delorey v. Delorey, 357 N.W.2d 488, 490 (N.D. 1984) (whether payments are modifiable depends on whether they are actually a property division or spousal support); Lipp v. Lipp, 355 N.W.2d 817, 818 (N.D. 1984) (referee implicitly treated payments as spousal support and therefore modifiable).

31. J. AREEN, FAMILY LAW 664 (1978).

alimony in a lump sum, however, instead of by periodic payments.[32] Conversely, one party may retain most or all of the actual property that is constructively divided, paying a money equivalent to the other party in lieu of transferring the property.[33] The payor spouse can make such money property settlements in a lump sum or in installments.[34] Neither the mode of payment nor whether money or property is transferred, then, can conclusively establish the characterization of a post-marital fiscal transfer. Nor does the label put on a fiscal transfer in stipulations agreed to by the parties or in a divorce decree necessarily settle the question of characterization.[35]

In determining whether a particular provision in a decree is for alimony in the sense of spousal maintenance rather than in the nature of a property settlement, North Dakota cases have not always differentiated between questions of the construction and status of provisions in a stipulation and in a judgment. Considerable confusion can be avoided by not blurring these separate inquiries.

Constructions of particular provisions in stipulations, as well as the validity of any or all parts of a stipulation, are generally governed by rules and principles of contract law.[36] A party seeking to set aside provisions of a divorce decree based upon a stipulation has the additional burden of establishing a basis for rescinding the

32. *E.g.,* Sanford v. Sanford, 301 N.W.2d 118, 128 (N.D. 1980); DeRoche v. DeRoche, 12 N.D. 17, 21-23, 94 N.W. 767, 768-69 (1903). Payment of alimony in a lump sum may be preferred in order to avoid termination by the remarriage of the recipient, the death of either party, or substantial changes in financial circumstances. Once it is understood that alimony can be paid in gross in order to avoid risks of modifiability, the inadequacy of defining alimony by its modifiability is apparent.

33. A spouse may prefer a property division made in periodic payments in order to keep productive property in the payor's control. *See, e.g.,* Rudel v. Rudel, 279 N.W.2d 651, 655-56 (N.D. 1979). *See also* Webber v. Webber, 308 N.W.2d 548, 549-50 (N.D. 1981); Eberhart v. Eberhart, 301 N.W.2d 137, 143 (N.D. 1981).

34. *E.g.,* Pankow v. Pankow, 347 N.W.2d 566, 568 (N.D. 1984) (court awarded a monthly payment of $575 for 25 years as property division); Lawrence v. Lawrence, 217 N.W.2d 792, 794 (N.D. 1974) (court awarded a monthly payment of $500 for 15 years). Periodic cash payments without interest awarded as part of a property distribution must be discounted in determining their present value. Pankow v. Pankow, 347 N.W.2d 566, 568 (N.D. 1984); Lippert v. Lippert, 353 N.W.2d 333, 336 n.1 (N.D. 1984); Tuff v. Tuff 333 N.W.2d 421, 424 (N.D. 1983). Courts should avoid a property division that will damage a party's capacity to earn a livelihood or destroy the value of the property. Pankow v. Pankow, 371 N.W.2d 153, 157 (N.D. 1985).

35. *E.g.,* Seablom v. Seablom, 348 N.W.2d 920, 923-24 (N.D. 1984) (the parties' attorneys agreed to describe $500 monthly payments as alimony and trial court adopted that language in its decree; North Dakota Supreme Court held that provision constituted a property distribution).

North Dakota caselaw sometimes distinguishes "true" or "technical" alimony "in the nature of support," *e.g.,* Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981) and Eberhart v. Eberhart, 301 N.W.2d 137, 139 (N.D. 1981), from "alimony in the nature of a property division," *e.g., In re* Estate of Gustafson, 287 N.W.2d 700, 702 (N.D. 1980); Sinkler v. Sinkler, 49 N.D. 1144, 1152, 194 N.W. 817, 819 (1923). Because of the ambiguities in usage of the term, the North Dakota Supreme Court prefers the term "spousal support." *See supra* note 1.

36. *E.g.,* Rummel v. Rummel, 234 N.W.2d 848, 852 (N.D. 1975); Lawrence v. Lawrence, 217 N.W.2d 792, 796 (N.D. 1974); Bailey v. Bailey, 53 N.D. 887, 895, 207 N.W. 987, 990 (1926).

stipulation as a matter of contract law.[37] A trial court in a divorce proceeding is bound by stipulations allocating property in valid separation agreements that purport to have final and binding effect in the event of divorce.[38] Since post-marital property distributions are not subject to judicial modification,[39] a court can only alter provisions for property division in a final decree if the judgment itself can be vacated for reasons that would justify relief from any judgment under Rule 60 of the North Dakota Rules of Civil Procedure.[40]

If the trial judge accepts and incorporates stipulated provisions for maintenance in the divorce decree, however, those provisions become judicial provisions and are governed by rules and principles applicable to judgments rather than by contract law. It follows that a trial court can modify a provision for spousal support in a judgment even though the provision was initially based on the parties' agreement.[41] Trial courts are advised, however, to be reluctant to modify support provisions that were stipulated by the parties rather than imposed by the court.[42]

The separate question of whether stipulations retain legal

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37. *E.g.*, Dvorak v. Dvorak, 329 N.W.2d 868, 870 (N.D. 1983).

38. Peterson v. Peterson, 313 N.W.2d 743, 745 (N.D. 1981). *Peterson* is squarely in conflict with, and must therefore implicitly overrule, at least two earlier North Dakota decisions. *See* Halla v. Halla, 200 N.W.2d 271 (N.D. 1972); Kack v. Kack, 169 N.W.2d 111 (N.D. 1969). *Peterson* recognized the right of a husband and wife to contract with each other regarding their property. Tiokasin v. Haas, 370 N.W.2d 559, 562 (N.D. 1985). *Peterson* does not imply that divorcing or divorced parents can control their child support obligations by private agreement. *See Tiokasin*, 370 N.W.2d at 562.

39. *See supra* note 26.

40. N.D.R. Civ. P. 60; Dvorak v. Dvorak, 329 N.W.2d 868, 869-72 (N.D. 1983). Rule 60 permits reopening a judgment on grounds of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, misconduct of an adverse party, or any other basis justifying relief from the operation of the judgment. N.D.R. Civ. P. 60. Parties attempting to obtain Rule 60 relief by claims that they were alcoholic or intoxicated at the time of agreeing to stipulations subsequently incorporated into judgments have usually been unsuccessful. *See* Bridgeford v. Bridgeford, 281 N.W.2d 583, 588 (N.D. 1979); Bingert v. Bingert, 247 N.W.2d 464, 466 (N.D. 1976). Nor is it sufficient to allege that one spouse's threats and false statements caused the other spouse to enter into a stipulation. Jostad v. Jostad, 285 N.W.2d 583, 586 (N.D. 1979). *But see* Galloway v. Galloway, 281 N.W.2d 804, 807 (N.D. 1979) (court reopened judgment because alcoholism had left appellant-wife incompetent to contract); Suko v. Suko, 304 N.W.2d 690, 693 (N.D. 1981) (judgment reopened to add provision inadvertently omitted from divorce decree).

41. Cook v. Cook, 364 N.W.2d 74, 76 n.2 (N.D. 1985).

42. Bingert v. Bingert, 247 N.W.2d 464, 467 (N.D. 1976); Bryant v. Bryant, 102 N.W.2d 800, 807 (N.D. 1960). The North Dakota Supreme Court believes that this reluctance protects a party from being misled into accepting a less than equitable distribution of property because a specified monthly payment has been agreed upon. *See* Eberhart v. Eberhart, 301 N.W.2d 137, 143 (N.D. 1981).

In Bauer v. Bauer, Justice Sand expressed concern about modifying contractual agreements for spousal support, observing that during his service on the North Dakota Supreme Court "its powers have been invoked frequently to reduce or eliminate spousal support because of changed circumstances" but that "[d]uring this time I do not recall having had a request to increase the payment because of changed circumstances, such as sickness of the unmarried recipient." Bauer v. Bauer, 356 N.W.2d 897, 900 (N.D. 1984) (Sand, J., concurring specially). He added that "I would not be surprised that in such circumstances the paying party would make strong persuasive arguments that the contract or agreement entered into controlled and the request for increased

status independent of their embodiment in judicial decrees is a simple issue of incorporation with merger or with non-merger.[43] If a stipulation merges into a decree in which its provisions are incorporated, it has no continued existence as a contract. If a stipulation is incorporated but not merged, its alimony provision then takes on a dual existence: as a provision of the judgment, it is subject to judicial modification and enforceable as a judgment; as a provision of a private contract, it is enforceable as a contract and may be modifiable only as a contract.[44]

Once problems of characterization and merger are isolated and resolved, it becomes evident that a deeper uncertainty has pervaded discussion of spousal support. That uncertainty has been caused by insufficient examination of the appropriate functions of such support in contemporary law. The North Dakota Supreme Court has twice held that stipulated periodic payments were intended to be property divisions when the payments would not terminate at the death of the recipient.[45] Beyond that, North Dakota case law suggests that modifiability is the single predictable consequence of characterizing an allocation as spousal support rather than as a property distribution,[46] but until recently it did not explain why a modifiable and so necessarily continuing relationship

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payments should be denied." *Id.*

43. H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 553, 564 (1976). There is a possibility that a stipulation might be approved or referred to in a judgment without being incorporated into the judgment, in which case it has the effect of a private contract only. *Id.* Reported North Dakota cases do not reflect this practice, however.

44. E.g., Johnson v. Johnson, 465 A.2d 436, 440-41 (Md. 1983). If a court modifies an alimony award by reducing it and enforces payment of the reduced amount as a judgment, the difference between the amount paid under the judgment and the amount due under the non-merged stipulation would accrue as a contractual debt. Section 306(e) of the Uniform Marriage and Divorce Act makes non-merger mandatory when a stipulation is incorporated. UNIF. MARRIAGE AND DIVORCE ACT § 306(e) (amended 1971). This is a reversal of the policy of the original 1970 Act, which provided that an agreement whose terms were incorporated into a decree was no longer enforceable as a contract.

For an example of an explicit non-merger provision in a stipulation, see Peterson v. Peterson, 313 N.W.2d 743, 744 (N.D. 1981). The North Dakota Supreme Court apparently relied upon the non-merger clause in treating the property provisions of the parties' agreements as ordinarily binding the trial court. That is not necessarily a consequence of non-merger, however, since the provisions can survive as a binding contract between the parties even if they are changed by the court in formulating judicial provisions.

45. Seablom v. Seablom, 348 N.W.2d 920, 924 (N.D. 1984) (stipulation provided payments would not terminate on remarriage or death of either party, but "obligee's death ends the need for the rehabilitative or permanent maintenance, the purposes of spousal support"); Coulter v. Coulter, 328 N.W.2d 232, 239 (N.D. 1982) (because of promissory note, obligator would be obliged to make payments regardless of whether or not a material change occurred in the circumstances of one of the parties; if payments were alimony in the nature of spousal support, the amount could have been modified).

In Bullock v. Bullock, the court stated that the award of a share of military retirement pay to a wife until either she or her former husband died did not suggest that the payments constituted spousal support rather than property redistribution, however, because payments enforced through the Uniformed Services Former Spouses' Protection Act must terminate at the date of the death of the service member or the former spouse. Bullock v. Bullock, 354 N.W.2d 904, 909 (N.D. 1984).

46. *E.g.*, Delorey v. Delorey, 357 N.W.2d 488, 490 (N.D. 1984) (spousal support is subject to modification upon proof of changed circumstances, while property division is a final determination);

between former spouses might appropriately survive the dissolution of their marriage. In the absence of a clear understanding of the purposes of maintenance, it is not surprising that trial courts have sometimes failed to differentiate clearly between support and post-marital fiscal allocations of property.[47]

V. TRADITIONAL ALIMONY TO CONTINUE MARITAL SUPPORT

Until comparatively recently, there was a well-established concept of post-marital support. Before 1976, North Dakota cases reflected unqualified acceptance of statutory alimony as the common-law concept of continuation after divorce of the husband's duty to support and maintain his wife during marriage.[48] It was this notion of a right to alimony as arising from the single fact of having been married that encouraged misconceptions of large numbers of "alimony drones who neither toil nor spin" and who were assured a lifetime support.[49]

Alimony as a continuation of a husband's duty to support his wife was explicitly endorsed in a 1967 case in which the North Dakota Supreme Court decided as a question of first impression that the remarriage of an alimony recipient creates a prima facie case for judicial termination of alimony.[50] The court reasoned that,

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Sinkler v. Sinkler, 49 N.D. 1144, 1148, 194 N.W. 817, 818 (1923) (whether disputed payments could be modified depended upon whether they were technical alimony, and whether they were technical alimony depended on whether they could be modified).

47. *E.g.*, Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981) (trial court suggested payments to wife would be rehabilitative, but also spoke of the payments as a division of the property); Haugeberg v. Haugeberg, 258 N.W.2d 657, 661 (N.D. 1977) (trial court awarded $300 a month for 26 months, saying "[w]hether you call it alimony or a property division, she is entitled to this amount of money over and above the other property awarded her").

48. *E.g.*, Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976); Sinkler v. Sinkler, 49 N.D. 1144, 194 N.W. 817 (1923); Hagert v. Templeton, 18 N.D. 525, 123 N.W. 283 (1909). *See also* H. CLARK, *supra* note 43, at 219-29.

49. *See* Weitzman & Dixon, *supra* note 22, at 143.

50. Nugent v. Nugent, 152 N.W.2d 323, 327 (N.D. 1967). Furthermore, *Nugent* held that liability for alimony should be terminated retroactive to the date of remarriage. *Id.* at 329. That is an exception to the usual rule that there can be no modification of accrued alimony. Richter v. Richter, 126 N.W.2d 634, 635 (N.D. 1964). *Cf.* Kinsella v. Kinsella, 181 N.W.2d 764, 770 (N.D. 1970) (accrued child support cannot be modified). North Dakota Supreme Court has reaffirmed the *Nugent* rule. Bauer v. Bauer, 356 N.W.2d 897, 898 (N.D. 1984); Nastrom v. Nastrom, 262 N.W.2d 487, 490 (N.D. 1978). The court said in *Nugent* that extraordinary circumstances might rebut the prima facie case for terminating alimony upon the remarriage of the recipient. *Nugent*, 152 N.W.2d at 327. In 1984, it found that such extraordinary circumstances justified continuation of an express agreement to pay post high school education expenses. *Bauer*, 356 N.W.2d at 899-900. *See infra* note 147 and accompanying text. In 1985, it upheld a court-imposed award of rehabilitative spousal support to a remarried recipient. Bullock v. Bullock, 376 N.W.2d 30 (N.D. 1985). *See infra* note 148 and accompanying text.

since an award of alimony was a continuation under court order of the husband's obligation to support the wife, it would be against public policy, illogical, unreasonable, and unseemly "for one man to be supporting the wife of another who himself assumed this obligation for her support."[51] Continuation of alimony after remarriage of a recipient former wife would have the effect, the court remarked three years later, of permitting a woman "the financial benefit of having two husbands at one time."[52]

The deeply ingrained assumption that remarriage terminates alimony may have made that remark seem acceptable in 1970. The image of women, however, had begun to change; the stereotype of wives as passive and helpless recipients of support had in most other respects become an anachronism. Nonetheless, continuation after divorce of a spousal duty to support developed out of the traditional view of marriage as a matter of economic role division, with the husband as economic provider and the wife as economic dependent and as subservient. The common law duty of a husband to support his wife compensated the wife for the fact that at common law "her time, services, and accumulations after marriage became [her husband's] absolutely."[53] In return, the husband was responsible for her maintenance; the law thus secured her a home and "all her reasonable wants, according to his means and station in life."[54]

Alimony was first granted by English ecclesiastical courts at a time when the courts authorized legal separation but not divorce. Since the husband retained control of his estranged wife's property, alimony substituted for her guarantee of maintenance within his household. That marital guarantee continued after married women

51. Nugent v. Nugent, 152 N.W.2d 323, 327-28 (N.D. 1968). Alimony as a variant spousal support device presupposes that single, formerly married women are generally and permanently incapable of self-sufficiency but are likely to find new husbands to take care of them.

52. Kinsella v. Kinsella, 181 N.W.2d 764, 770 (N.D. 1970). The assumption that alimony recipients were female was apparently unshaken by the fact that North Dakota since 1911 has authorized post-marital support for either former spouse. Early North Dakota statutory law deviated from common law in making wives liable for support and maintenance of husbands under certain limited circumstances. N.D. REV. CODE § 4077 (1905) (currently codified at N.D. CENT. CODE § 14-07-03 (Supp. 1985)). *See* Act of Mar. 3, 1911, ch. 184, 1911 N.D. Sess. Laws 284 (codified at N.D. CENT. CODE § 14-05-24 (1981) (alimony permitted for either spouse)). Making alimony available to either spouse reflected reciprocal spousal liabilities during marriage. Thus, the law reinforced rather than altered the concept of alimony as a post-marital continuation of marital support. Requiring wives to support their husbands was considered only in extremely unusual circumstances. *E.g.*, McLean v. McLean, 69 N.D. 665, 668, 290 N.W. 913, 914 (1940); Hagert v. Hagert, 22 N.D. 290, 292-93, 133 N.W. 1035, 1036 (1911). As a result, alimony continued to be conceptualized as a continuation of marital support for wives.

The United States Supreme Court held in 1979 that state law permitting alimony for wives but not for husbands violated the equal protection clause requirement that differential treatment on the basis of gender be substantially related to important governmental objectives. Orr v. Orr, 440 U.S. 268 (1979).

53. *See* Weitzman & Dixon, *supra* note 22, at 146; Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 224-25 (1983-84).

54. Glynn v. Glynn, 8 N.D. 233, 236, 77 N.W. 594, 596 (1898). *Cf.* Weitzman & Dixon, *supra*

were permitted to keep control of their separate property,[55] reflecting the fact that few women entered marriage with enough property to make them self-sufficient and that their marital roles as homemakers prevented them from acquiring assets or developing income-producing capacities. The boundaries of the guarantee were set by ability and need: the level of support, of course, could not exceed the husband's ability to provide it; the minimal need of a wife was put at a level of basic necessities.[56]

It is not clear, historically, why courts continued to enforce the husband's duty to support his wife even after divorce. A plausible explanation is that the courts wanted to keep divorced women from becoming paupers at a time when there were few opportunities for them to work in income-producing jobs outside the home.[57] Certainly need became a guiding principle that could be inferred from patterns of traditional alimony. According to this principle, a person was entitled to be supported by a former spouse at least "at a level sufficient to stay off the welfare rolls."[58] Associations of alimony with notions of private charity for helplessly dependent persons may have come out of this period; there was no suggestion of value from the contributions of non-income producing spouses that might give rise to post-marital entitlements.

The need principle was complicated by the competing principle of fault. It was only the virtuous wife who enjoyed the common-law guarantee of marital support: support was in the nature of a privilege which she might wholly forfeit "by her own fault and folly," irrespective of the quality and duration of her

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note 22, at 146.

55. Mahoney, *supra* note 53, at 225. *See also* N.D. CENT. CODE § 14-07-05 (1981) (North Dakota's Married Women's Property Act permitted married women to retain their own property). Married women's property acts have been adopted by all states. H. CLARK, *supra* note 43, at 222-28.

56. Glynn v. Glynn, 8 N.D. 233, 236, 77 N.W. 594, 596 (1898). *Cf.* N.D. CENT. CODE § 14-07-11 (Supp. 1983) (abandoned spouse not liable for support unless there is an offer to return or abandonment was justified by misconduct).

An affluent husband was not obligated to support his wife to the extent of his greater ability, however. Beyond the provision of basic necessaries, the husband rather than the law determined the appropriate level of support within an ongoing marriage. Many former law students will remember McGuire v. McGuire as the casebook example of an affluent farmer not required to support his 66-year-old ailing wife beyond furnishing her minimal needs. McGuire v. McGuire, 157 Neb. 226, 236, 59 N.W.2d 336, 342 (1953). *See also* Mahoney, *supra* note 53, at 227-28. *See* J. AREEN *supra* note 31, at 636. The author states, "Common sense, of course, dictates that no award should exceed the paying spouse's ability to pay, either at the divorce, or over time. In this sense, the net worth and income-earning ability of the paying spouse creates a ceiling which no award can realistically exceed." *Id.*

57. Note, *New York's Equitable Distribution Law: A Sweeping Reform,* 47 BROOKLYN L. REV. 67, 74 (1980); J. AREEN, *supra* note 31, at 632. To the extent that alimony was justified by the lack of opportunities for women to support themselves, the rationale weakened as women began to have more opportunities. H. CLARK, *supra* note 43, at 422.

Alternatively, the duty may be explained as a matter of simple literalism in applying to divorce the body of law that had been developed for legal separation. *Cf.* Teitelbaum, *Cruelty Divorce Under New York's Reform Act: On Repeating Ancient Error,* 23 BUFFALO L. REV. 1, 24-28 (1973).

58. J. AREEN, *supra* note 31, at 422.

wifely services preceding her folly.[59] In the relatively recent past, divorce was available only if one spouse was found guilty of a matrimonial offense[60] and the other spouse was at least relatively innocent.[61] Courts denied alimony to a wife divorced for her fault but authorized alimony as continued support for a worthy wife divorced because of her husband's fault.[62] During this time property was generally distributed at divorce according to its legal title. Therefore, fault as a crucial consideration sometimes mitigated economic hardship for a wife who had little or no property.[63] Of course the fault doctrine could not protect a wife who was not without fault, however valuable her contributions to the marriage had been, because it did not recognize that entitlements could be created by the contributions of a non-income producing and non-title-holding spouse.

In time courts relaxed the rule that unvirtuous wives forfeited all post-marital fiscal allocations,[64] at least in part because of the strong public interest in keeping even guilty spouses from being public charges.[65] During this same period, states moved away from permitting divorce only when one spouse was guilty of a matrimonial fault. All states now permit divorce upon a showing

59. Glynn v. Glynn, 8 N.D. 233, 236, 77 N.W. 594, 596 (1898) (rejecting argument that wife divorced for fault should have alimony because she had faithfully discharged her duties as a wife for many years and had materially aided her husband in the accumulation of his present property). *See also* Kelso, *The Changing Social Setting of Alimony Law,* 6 LAW AND CONTEMP. PROB. 186, 187-88 (1939). *Cf.* N.D. CENT. CODE § 14-07-11 (Supp. 1985) (abandoned spouse not liable for support).

60. Although scattered prototypes of no-fault grounds for divorce were available in the United States as early as the 1850s, California is generally credited with having adopted the first modern statute in 1970. *See* CAL. CIV. CODE §§ 4500-5138 (West 1986).

61. The harsh doctrine of recrimination was a "mandatory defense" that precluded divorce when both parties were at fault. It was softened in some jurisdictions by the doctrine of comparative rectitude, which permitted divorce when one spouse was less guilty even though not completely innocent. *E.g.,* Dewitt v. Dewitt, 296 N.W.2d 761, 763 (Wis. Ct. App. 1980). North Dakota repealed its recrimination statute in 1963. *See* 1963 N.D. Sess. Laws 205.

62. For a discussion of the common-law rule that no alimony can be awarded to an unvirtuous wife, see Note, *New York's Equitable Distribution Law: A Sweeping Reform,* 47 BROOKLYN L. REV. 67, 74 (1980); Glynn v. Glynn, 8 N.D. 233, 237, 77 N.W. 594, 597 (1898). North Dakota statutory law from 1883 until 1911 reinforced that common-law rule by authorizing maintenance for a wife only when a court granted a divorce for the fault of her husband. N.D. REV. CODE §§ 2761, 2762 (1899); N.D. CIV. CODE § 73 (1883) (identical to § 73 of Field Code, reported for adoption in New York in 1865). *Cf.* Weitzman & Dixon, *supra* note 22, at 146.

63. *See* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protector for the Marital Investor in Human Capital,* 28 U. KAN. L. REV. 379, 395-96 (1980). The author states as follows:

> The homemaker, who had not had the opportunity to earn money or to acquire any property, ordinarily did not wish to be divorced because she needed the economic security of marriage. Her strongest bargaining tool for economic settlement was the threat of preventing divorce by showing fault by the husband.

Id.

64. J. AREEN, *supra* note 31, at 634. *E.g.,* Halla v. Halla, 200 N.W.2d 271 (N.D. 1972); Agrest v. Agrest, 75 N.D. 318, 27 N.W.2d 697 (1947).

65. Glover v. Glover, 64 Misc.2d 374, 314 N.Y.S.2d 873 (N.Y. Fam. Ct. 1970) (court, finding wife's conduct "grievous and loathsome," required husband to pay alimony at welfare level rather than according to his means).

that the marriage is in fact over, without insisting that one spouse be blamed for its failure.[66] In 1971, North Dakota adopted a provision that permits divorce upon a showing of irreconcilable differences.[67] However, the North Dakota Supreme Court, in interpreting that statute, held that fault was still a significant consideration in determining alimony.[68] The continuing importance of fault in determining spousal support may have the unintended effect of evoking old notions of alimony. Like old notions of spousal support during marriage, alimony may continue to be viewed as a reward or privilege rather than as an entitlement.

VI. CHANGES IN PERCEPTIONS AND LEGAL STATUS OF WOMEN

As early as 1939, a legal theorist could argue that the married woman had become the social equal and the legal near-equal of her spouse.[69] At that time, approximately 16% of married women in the United States worked at income-producing jobs outside their

66. Freed & Foster, *Family Law in the Fifty States,* 18 FAM. L. Q. 369, 379 (1985). South Dakota adopted a no-fault ground in 1985. S.D. CODIFIED LAWS ANN. § 25-4-17.2 (Supp. 1985).

67. Act of Mar. 18, 1971, ch. 149, 1971 N.D. Sess. Laws 234 (codified at N.D. CENT. CODE § 14-05-03(8) (1981)).

68. Hultberg v. Hultberg, 259 N.W.2d 41, 44 (N.D. 1977). In *Hultberg,* the North Dakota Supreme Court reversed the trial court's determination that fault was irrelevant to the issue of property distribution. The court rejected Justice Vogel's dissenting argument that the legislature intended to eliminate fault in passing the irreconcilable differences statute. Justice Vogel argued that to continue to consider fault permitted reentry into the courtroom of degredation and mutual character assassination that the new ground was meant to avoid. *See also* Hegge v. Hegge, 236 N.W.2d 910, 916 (N.D. 1975) (reversal of alimony to wife guilty of adultery and desertion); Grant v. Grant, 226 N.W.2d 358, 362-63 (N.D. 1975) (reaffirming *Novlesky* decision that conduct should be considered when making a divorce judgment on grounds of irreconcilable differences); Novlesky v. Novlesky, 206 N.W.2d 865, 868 (N.D. 1973) (adoption of irreconcilable differences ground for divorce did not eliminate fault as consideration for making property division).

69. Kelso, *supra* note 59, at 192. Kelso described the changes in perceptions and legal status of women as follows:

> More anciently she was mainly a consort, kept in her husband's home for purposes of companionship and propagation. Now she has become a social person, quite equal with her husband, thoughtful of civic and public affairs, concerned with matters political, interested in the broader things of life. To an increasing degree today she takes the initiative in family support and family progress.
>
> So completely has she become the coordinate and collaborator with her husband in family support that the law has gradually, by one step after another, recognized her parity. Thus, she may now hold property independently of her husband. She may enter into contractual relations independently of him. She may enter into contracts directly with him. She may sue him and be sued by him in matters not directly touching the marriage contract. Though the words of the marriage ceremony still admonish her to "love, honor and obey" him, she is not obliged to do any one of those things; and the law is powerless to compel her to do so. She may leave him and sue him for absolute divorce upon a multiplicity of grounds touching happiness and personal freedom rather than mere marital faithfulness. She may vote and her secret ballot is none of his legal concern. From her old position as an identity merged in him and not separable from him, she has advanced to a position of independence in most respects fully equal with his.

Id.

homes,[70] but most women expected to stop working when they became wives.[71] By 1940, 27.4% of all American women worked, and 16.7% of married American women worked.[72] Both rates began to rise sharply after World War II. By 1974, 46% of all American women worked, of whom 60% were married.[73] By 1982, 52.1% of the women in the United States, and 51.8% of the married women, worked outside their homes.[74] While significant differences remained in the types and successes of female participation as compared to male participation in the labor force,[75] it was no longer possible to accept the old stereotype of women as economically unproductive persons "destined solely for the home" while only men labored in the marketplace.[76]

Even the constitutional status of women changed. In 1971, the United States Supreme Court decided for the first time that the equal protection clause of the Constitution significantly limits the power of government to differentiate treatment, entitlements, or duties on the basis of gender.[77] The constitutional standard that evolved is that gender-based discriminations must be substantially related to important state objectives.[78] In 1977, the North Dakota Supreme Court held that state constitutional law requires the more stringent justification that gender-based differentials be necessary for compelling state purposes.[79]

Nine years after the North Dakota Supreme Court reasoned that alimony was a continuation of marital support, Nick Bingert argued that his court-ordered obligation to pay alimony was

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70. *Id.* n. 9.

71. G. MASNICK & M. BANE, THE NATION'S FAMILIES: 1960-1990 (1980).

72. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF STATE, BULL. NO. 2096, STATISTICAL ABSTRACT OF THE UNITED STATES 413 (1984).

73. S. ROTHMAN, WOMEN'S PROPER PLACE 229 (1978). In 1967, 57% of all women who worked were married; this was almost twice the percentage in 1940. K. DAVIDSON, R. GINSBERG, & H. KAY, SEX-BASED DISCRIMINATION 426 (1974).

74. STATISITICAL ABSTRACT, *supra* note 72, at 413.

75. *See infra* note 97 and accompanying text.

76. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

77. Reed v. Reed, 404 U.S. 71 (1971). In two early substantive due process cases, the Court invalidated gender-based classifications in state minimum wage laws. *See* Morehead v. Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hospital, 261 U.S. 525 (1923). These cases were later overruled. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). In General Electric Co. v. Gilbert, Justice Stevens described *Reed* as the first intimation by the Court "that the concept of sex discrimination might have some relevance to equal protection analysis." General Electric Co. v. Gilbert, 429 U.S. 125, 161 n.3 (1977) (Stevens, J., dissenting).

78. Heckler v. Mathews, 104 S.Ct. 1387 (1984); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Craig v. Boren, 429 U.S. 190 (1976). This standard for justifying gender-based discrimination is often called an intermediate equal protection test, as it is less demanding than the requirement that racial classifications be necessary for compelling state purposes, but more demanding than the justification of ordinary classifications by their rational relationship to legitimate goals.

79. State *ex rel.* Olson v. Maxwell, 259 N.W.2d 621, 631 (N.D. 1977).

unconstitutional.[80] Although section 14-05-24 is gender-neutral on its face, he reasoned that it was discriminatory because it was a continuation of the marital duty to support and that duty as a matter of North Dakota statute at that time discriminated on the basis of gender. The court acknowledged that Nick Bingert had constructed an "impeccable syllogism."[81] It rejected his conclusion, however, because it rejected his first proposition. Earlier language describing alimony as a continuation of the marital duty to support was mere dicta, the *Bingert* court concluded. Alimony, it declared, is entirely independent of the right to spousal support during marriage. "We believe," the court added, that "the trend in modern domestic-relations law is to treat alimony as a method for rehabilitating the party disadvantaged by the divorce."[82] That observation became the source of later, more positive affirmations that "the function of alimony" is to rehabilitate the party disadvantaged by the divorce[83] and that "is not a continuation of the right of one spouse to be supported by the other during marriage."[84]

The court correctly recognized the need to replace the old notion of marital support in order to preserve the constitutionality of the alimony statute. It may, however, have inadvertently suggested that alimony had only a single purpose that could be described by a single model, a model that would not allow post-marital spousal support if a person did not need rehabilitation or was not capable of being rehabilitated.

VII. POST-MARITAL SUPPORT

A. REHABILITATIVE POST-MARITAL SUPPORT

Certainly the court was correct in its observation that by 1976 it had become popular to describe post-marital support as a means of rehabilitation for a disadvantaged spouse. The perception of

80. Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976). The North Dakota statute defining spousal liability during marriage is § 14-07-03 of the North Dakota Century Code. Section 14-07-03 originally required husbands to support wives by their labor or property but required wives to support husbands only out of their separate property and only when husbands were unable to support themselves. N.D. CENT. CODE § 14-07-03 (1981). Section 14-07-03 was made gender-neutral as of July 1, 1982. It now provides that "the husband and wife have a mutual duty to support each other out of their individual property and labor." *Id.* (Supp. 1985).

81. Bingert v. Bingert, 247 N.W.2d 464, 468 (N.D. 1976).

82. *Id.* at 469.

83. Martin v. Martin, 307 N.W.2d 541, 544 (N.D. 1981); Jochim v. Jochim, 306 N.W.2d 196, 199 (N.D. 1981); Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981).

84. Carr v. Carr, 300 N.W.2d 40, 46 (N.D. 1980).

women as economically productive rather than inherently dependent necessarily implied that they were capable of financial self-sufficiency. It therefore followed that, if they had lost or never gained such autonomy while married, they were entitled to be rehabilitated when the marriage ended.

Rehabilitative maintenance is awarded to encourage and require an economically dependent spouse "to develop marketable skills and obtain employment which will enable her to contribute, in whole or in part, to her support."[85] Rehabilitative support is ordinarily awarded for a limited amount of time because of a reasonable expectation that further training, experience, and circumstances will enable the recipient to obtain appropriate employment during that period.[86]

There are actually two different concepts of rehabilitative maintenance. One, a minimalist doctrine, intends that support for a short period of time be used to attain financial independence at any economic level. The premise of minimalist rehabilitation is that the disadvantage of divorce is the loss to the economically dependent person of the continuing support of the spouse. Implicit in the doctrine is a view of marriage as a career, "the loss of which necessitates, like most other jobs, a period of readjustment and retraining."[87] It is entirely pragmatic in its concern that a dependent spouse not remain a permanent responsibility of the other spouse or of the public. Its purpose is served when the recipient attains sufficient training, retraining, or experience for minimal self-sufficiency. It is perhaps more accurate to describe this kind of support as "transitional;"[88] the dependent spouse who already has enough training or experience will need support only

85. Frye v. Frye, 386 So. 2d 1383, 1389 (Fla. App. 1980). The court stated that "[t]he purpose of rehabilitative alimony is to restore to a spouse who, because of the marriage, was either prevented from becoming or chose not to become self-supporting, those skills which would enable her or him to support herself or himself." *See* Note, *Rehabilitative Spousal Support: In Need of a More Comprehensive Ahproach to Mitigating Dissolution Trauma,* 12 U.S.F.L. REV. 493, 495-96 (1978).

86. McDowell v. McDowell, 670 S.W.2d 518, 522 (Mo. Ct. App. 1984). In *McDowell,* the court found that:

> A limited award of maintenance is not precluded merely because the anticipated event of the wife's employment has not occurred as of the date of the trial or will become a certainty only after the wife has sought out and obtained a position. . . . A limited award of maintenance is an attempt at an appraisal of future events.

Id.

The North Dakota Supreme Court has suggested that "[t]he placement of a specific time when spousal support payments will cease, rather than a time period uncertain in duration, will more readily effectuate the rehabilitative purposes of spousal support." Hedin v. Hedin, 370 N.W.2d 544, 548 (N.D. 1985).

87. Weitzman & Dixon, *supra* note 22, at 149.

88. *Id.*

while looking for a job, although a court may award it for an additional brief period to give her time to "adjust to her new status and circumstances."[89] Transitional support may be appropriate after even a fairly brief marriage, if circumstances of the marriage were economically dislocating.[90]

A more equitable concept of rehabilitative support, however, tries to provide education, training, or experience that will enable the disadvantaged spouse to obtain "suitable" and "appropriate" self-support[91] by improving her employment skills. Suitability is in part determined by the interests and potential skills of the person needing rehabilitation.[92] The standard of living established by the parties during their marriage may also be relevant, as it can be taken as an expression of what needs and levels of consumption they themselves have thought appropriate.[93]

The North Dakota Supreme Court must have had this more generous concept of equitable rehabilitative support in mind when it approved the award of $200 a month for thirteen years to enable Charla Williams to "re-establish herself as a single person" and to "continue her education to her stated vocational and educational goals."[94] The narrower concept could not justify support for such a

89. Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity,* 1978 WIS. L. REV. 947, 951. *See* Jochim v. Jochim, 306 N.W.2d 196, 198, 200 (N.D. 1981) (" 'spousal support' for three years to allow wife 'to move into the job market' "); Turner v. Turner, 158 N.J. Super. 313, 385 A.2d 1280 (1978) (alimony until completion of one full year of employment). Sometimes forced rehabilitation is postponed in order to enable parents with custody of young children to remain at home with them, but this pattern may be changing now that it is considered normal for mothers of young children to work. Weitzman & Dixon, *supra* note 22, at 149, 164-66.

90. *E.g.,* Oviatt v. Oviatt, 355 N.W.2d 825, 828 (N.D. 1984). In *Oviatt,* the Supreme Court upheld the trial court's award of $300 a month for eighteen months. Terry Oviatt had moved with her Air Force husband to North Dakota and then to Oregon during three years of marriage, so it was "not unreasonable to assume, under the circumstances, that [the wife] was having financial difficulty rehabilitating herself once she reached Oregon." *Id. Cf.* Wiltsey v. Wiltsey, 357 N.W.2d 400, 401-02 (Minn. Ct. App. 1984) (trial court did not abuse discretion in awarding $500 a month maintenance based on a "finding that [the wife] had the ability to find employment but needed assistance, because she had been out of the job market for four years").

91. *E.g.,* UNIF. MARRIAGE AND DIVORCE ACT § 308.

92. *See* McDowell v. McDowell, 670 S.W.2d 518, 522 (Mo. App. 1984). In *McDowell,* the wife had a master's degree in education, certification, and six years experience teaching. She had not been working outside the home while caring for children, but that responsibility ended when custody was awarded to the husband. She received marital property valued at $120,000. *Id.* The court found that "[i]n this situation, it was not unreasonable to anticipate an assumption by the wife of her own financial responsibility within a period of two years, aided by maintenance of $1000.00 per month during the period." *See also* Childers v. Childers, 15 Wash. App. 792, 552 P.2d 83, 84, 86 (1976).

93. Note, *supra* note 85, at 502. Minnesota supports the view that the standard of living established by the parties during their marriage is relevant in awarding rehabilitative support. This view is reflected in its statutory requirement that a recipient of maintenance be "unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment. . . ." MINN. STAT. § 518.552(1)(b) (Supp. 1985). "Appropriate" employment is determined by comparing actual income to monthly expenses. Robinson v. Robinson, 355 N.W.2d 737, 741 (Minn. Ct. App. 1984); Erlandson v. Erlandson, 318 N.W.2d 36, 39 (Minn. 1982).

94. Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981).

long time to a recipient who was already working full time as a secretary.[95]

Certainly it was an equitable concept of maintenance for rehabilitation beyond minimal self-sufficiency that the court approved in *Smith v. Smith:*

> Peggy Smith is young and capable and she desires to go to college to learn a profession to help herself become better able to support herself and the four children in her custody. Peggy has chosen an area of training, speech pathology, that she can also use to help her child who has a speech impediment. . . . Peggy's desire to go back to school to acquire the necessary education for financial independence is commendable. Tom, as well as Peggy and the children, will be benefitted as a result of Peggy's rehabilitation because in four years she will be better able to share in the burden of supporting four minor children.[96]

Equitable rehabilitation, beyond minimal self-sufficiency, is intended to mitigate a marital disadvantage that is perceived as having been caused not so much by the fact of divorce as by the impact at divorce of an economic role assumed during marriage. That economic role may not have left one spouse totally incapable of self-support, but has left him or her in a less advantageous position as a wage earner than that person would have been in had there been no marriage. At this time in our culture, the economically disadvantaged party is usually the wife, because she gave up opportunities for education or training, left or never entered the labor force in order to be a full-time homemaker, or because she worked outside the home but in a casual, interrupted, or non-career capacity in deference to a dominant career role for the husband or in order to accommodate her other family responsibilities.[97] Rehabilitative maintenance that recognizes such

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95. *Id.* at 756.

96. Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982). After an eleven year marriage during which the wife had worked while the husband went to college and the wife's father had provided the couple with considerable financial support, the trial court awarded child support of $100 per month per child and alimony of $100 per month for thirty months. *Id.* at 699-700. The husband's gross earnings were from $2,200 to $2,300 a month. *Id.* at 701. The supreme court raised child support to $150 per month and changed the alimony award to $200 per month for four years. *Id.* at 700. *See also* Moran v. Moran, 200 N.W.2d 263 (N.D. 1975) (alimony to enable wife to obtain doctorate so that she could teach at college level).

97. *E.g.,* Hedin v. Hedin, 370 N.W.2d 544, 548 (N.D. 1985), "Mavis was clearly the party disadvantaged by the divorce. Having been a full-time homemaker for most of the [28 year]

opportunity costs is designed to make possible the further education, training, or experience that might place the disadvantaged spouse in the position she could have been in if it were not for the marriage, or at least to mitigate the loss of career opportunities and development during marriage.

Sometimes it is apparent at the time of divorce that the economically dependent spouse cannot be rehabilitated even in the narrow sense of achieving minimal self-sufficiency.[98] Less infrequently, it is obvious at the time of divorce that the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost in the course of the marriage. Most recent reported North Dakota cases upholding awards of spousal support involved middle-aged wives with limited educations who worked primarily, if not exclusively, as homemakers during marriages of more than twenty years duration and who, irrespective of their innate abilities and good faith efforts to rehabilitate themselves, had no realistic prospect of developing significant earning capacities.[99] The North

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marriage, Mavis has not had the opportunity to prepare herself to compete in the employment market, and is now on her own, without the benefit of Jerome's earning ability." *Id.*

Historically, participation of married women in the labor market has often been interrupted, part-time, or marginal. Masnick & Bane, *supra* note 71, at 70-76. Participation of married women, especially those with children, has sharply risen, but working wives and mothers "continue to adjust their work lives to the demands of home and children." *Id.* at 70, 82.

For the last 25 years, women working full-time outside the home have earned, on average, 60% of men's full-time earnings. While this disparity is caused in part by the segregation of women in low-paying jobs, it is also caused by discontinuity of married women's participation in the workforce. Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 659 & n.17 (1981).

98. *E.g.*, Haberstroh v. Haberstroh, 258 N.W.2d 669 (N.D. 1977) (wife incapacitated by serious alcohol and psychiatric problems).

99. *E.g.*, Briese v. Briese, 325 N.W.2d 245 (N.D. 1982) (wife of 31 year marriage had high school education and worked in only occasional and part-time employment outside home); Mees v. Mees, 325 N.W.2d 207 (N.D. 1982) (wife of 34 year marriage with back condition had only high school education and had worked as sales clerk for 10 years); Gooselaw v. Gooselaw, 320 N.W.2d 490 (N.D. 1982) (high school graduate wife of 23 year marriage had work experience only within family-owned business); Nastrom v. Nastrom, 284 N.W.2d 576 (N.D. 1979) (wife of 22 year marriage worked outside home on only a few occasions and had little training in any field). *But see* Hedin v. Hedin, 370 N.W.2d 544, 548 (N.D. 1985) (record did not support conclusion that 50 year old high school graduate was incapable of rehabilitation after being a full-time homemaker during most of 28 year marriage). Maintenance for such "displaced homemakers" has been characterized as "disability insurance for women with earning disabilities." Weitzman & Dixon, *supra* note 22, at 149. Minnesota by statute directs a court determining maintenance to consider "[t]he duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished." MINN. STAT. § 518.552(2)(d) (Supp. 1985).

See Note, *supra* note 85, at 501. The author states that "no case or statutory law distinguishes, in terms of years, between a short-term, middle-term, or long-term marriage." *Id.* In appropriate circumstances, a court may award rehabilitative alimony after a relatively short marriage. *See supra* note 90 and accompanying text. Duration, however, is an important element in quantifying both the need for rehabilitation and the entitlement to share marital assets. For an example of a divorce after marriage of short duration where the North Dakota Supreme Court approved the lower court's attempt to restore the status quo ante, see Mattis v. Mattis, 274 N.W.2d 201, 206 (N.D. 1979). Although a trial court must ordinarily consider all jointly and individually owned property in order to determine the net worth of marital property, after a six year second marriage between the same two parties failed, the Supreme Court permitted the exclusion from consideration of property owned

Dakota Supreme Court has recognized that, while spousal support should be for rehabilitative purposes if rehabilitation is possible,[100] spousal support may serve an additional or alternative purpose of permanent maintenance. While it has recognized that function, however, the court has not always articulated the rationale for such an entitlement.

B. COMPENSATORY POST-MARITAL SUPPORT

Understanding marriage as a shared enterprise within which spouses may play different but equally valuable economic roles makes the sharing of property by equitable redistribution at divorce acceptable.[101] At the termination of many contemporary marriages, however, there is relatively little tangible property to be shared.[102] Often the most significant asset developed during the course of a marriage is the earning capacity of one or both of the spouses.

In many divorce cases, the earning capacity of one spouse is the single significant asset of the marriage, and the disadvantaged spouse can only be compensated by future payments from the other. An interesting problem is posed when one spouse earns a professional degree and, at the time of divorce, has just begun a predictably lucrative career. In such situations it is widely perceived "that concepts of fairness and equity require that the supporting spouse be compensated when the student spouse leaves the marriage with an earning capacity substantially increased through the other spouse's efforts and sacrifices and the supporting spouse leaves the marriage with little property and a lower earning capacity than the student spouse."[103] This is so even though there is usually no justification for rehabilitative support.[104] Most

by the husband at the time of remarriage. Linn v. Linn, 370 N.W.2d 536, 539, 541 n. 3 (N.D. 1985). Contrast the court's discomfort with an attempt to award to a husband property he brought into a marriage and inherited, which amounted to 80% of the parties' net worth, after a 22 year marriage. Sventenko v. Sventenko, 306 N.W.2d 607 (N.D. 1981).

100. Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982) (purpose of spousal support is to rehabilitate when possible).

101. *E.g.*, Comment, *supra* note 18; Mahoney, *supra* note 53. *Cf.* Fischer v. Fischer, 349 N.W.2d 22, 24 (N.D. 1984) (court stated that marriage is a partnership).

102. *E.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SENES P-23, No. 112, CHILD SUPPORT AND ALIMONY (1978). The report states that "[l]ess than one-half of the 12 million women who had ever been divorced as of Spring 1979 received some form of property settlement. *Id.* The median value of property settlements reported by women who received a settlement and were divorced between 1975 and 1979 was $4,650." *Id.*

103. Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796, 805-06 (1984).

104. There is typically no role for minimalist rehabilitation in these cases, as the supporting spouse has been working and supporting the other spouse as well as herself while he finished his education. There is often no justification for the broader concept of equitable rehabilitative alimony,

jurisdictions refuse to characterize a professional degree as property subject to equitable distribution.[105] However, a majority of jurisdictions addressing this problem have accepted one or more rationales for compensating or reimbursing the contributions to the enhanced earning capacity of the student spouse by the spouse with the lower earning capacity.[106] Such cases may be distinguished from those involving marriages of substantial duration that leave the spouses with a substantial disparity in earning capacities. In longer marriages there has been some shared return on the marital investment in the enhanced earning capacity of the economically dominant spouse. That distinction becomes less compelling, however, with the recognition that few marriages produce enough tangible property to permit the parties comparable standards of living after divorce. Thus, the spouse with the significantly larger earning capacity will be in a dramatically different position than the other spouse unless there is some compensatory adjustment.

The attention in contemporary cases to the allocation of retirement and pension benefits, a traditional means of deferring returns on earning capacities, also illustrates the importance of earning capacities. Typically, courts award to one spouse a share of the other's anticipated pension, adjusted to the proportion of

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as the supporting spouse has not interrupted her career but instead has continued with income-producing work as she would have if unmarried.

105. The leading case rejecting characterization of a professional degree as property is *In re* Marriage of Graham, 194 Colo. 429, ____, 574 P.2d 75, 77 (1978). In *Graham,* the court stated as follows:

> [An educational degree] does not have an exchange value or any objective value transferable on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. . . it has none of the atributes of property in the usual sense of that term.

Id. A few courts do treat a degree as a property asset, however, reasoning that "whether or not an advanced degree can physically or metaphysically be defined as 'property' is beside the point." Woodworth v. Woodworth, 126 Mich. App. 258, 263, 337 N.W.2d 332, 335 (1983). Of 23 jurisdictions that have considered the question, 16 have held that an educational degree is not property and 4 have declined to resolve the issue. Weinstein v. Weinstein, 128 Ill. App. 3d 234, 470 N.E.2d 551, 555-56 (1984) (by its holding became the seventeenth court to reject concept of degree as property).

106. Justice Abrahamson explains four permissible approaches to reimbursing or compensating the contributing spouse in Haugan v. Haugan. The first is the cost value appoach, which may reimburse the fair value of homemaker services as well as money contributed to family support and educational costs minus the supporting spouse's living expenses and the student spouse's contributions. Haugan v. Haugan, 117 Wis.2d 200, ____, 343 N.W.2d 796, 802 (1984). *See e.g.,* DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981). The narrowest approach to reimbursement of costs is codified in the Indiana statute that provides "[w]hen the court finds that there is little or no marital property, it may award either spouse a money judgment not limited to the property existing at the time of final separation. However, this award may be made only for the financial contribution of one spouse toward tuition, books, and laboratory fees for the higher education of the other spouse." IND. CODE § 31-1-11.5-11(d) (Supp. 1984). The second method is the opportunity costs approach, which calculates the income the family sacrificed because the student spouse attended school instead of being employed. Haugan v. Haugan, 117 Wis.2d at ____, 343

retirement benefit that accumulated during the marriage.[107] An increasing number of states, including North Dakota,[108] have recognized spousal interests at the time of divorce in unvested as well as vested pension benefits of the other spouse.[109]

Given the importance of future returns on productivity, it is not surprising that the North Dakota Supreme Court often treats disparities between the earning capacities of former spouses as particularly significant.[110] A spouse with an underdeveloped

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N.W.2d at 803. The third approach is the calculation of the present value of the student spouse's enhanced earning capacity. *Id.* This approach, which recognizes the lost expectation of a return on the investment in the student spouse's earning capacity, is often criticized as too speculative because of unforeseen variables that may affect future earnings. The last approach is a labor theory of value, which considers the value of the supporting spouse's contribution at one half of the student spouse's enhanced yearly earning power for as many years as the supporting spouse worked to support the student spouse. *Id.* This approach is analogous to the fixed percentage method for dividing future pension benefits. *See infra* note 107.

107. In Taylor v. Taylor, the Minnesota Supreme Court noted that retirement benefits may be divided at the time of divorce by awarding the present cash value equal to a portion of the present value of the benefits, and that this method is preferred when there are sufficient assets to permit an equalizing award without hardship to either party and when calculation of present benefits is not unduly speculative. Taylor v. Taylor, 329 N.W.2d 795, 798-99 (Minn. 1983). When there are not sufficient assets to equitably require that benefits due in the future be split presently, or when present evaluation is unacceptably speculative, the court must determine a fixed percentage method for dividing future payments when they are paid to the employee. *Id.* at 799 (citing Holbrook v. Holbrook, 103 Wis.2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981)). In Janssen v. Janssen, the Minnesota Supreme Court endorsed a formula for determining the percentages to be shared. Janssen v. Janssen, 331 N.W.2d 752, 756 (Minn. 1983). The formula comprises a fraction, the numerator of which is the number of years of marriage that benefits were accumulated, and the denominator of which is the total number of years that benefits were accumulated prior to being paid. *Id.* (citing *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 663, 397 N.E.2d 511, 519 (1979)). *See also* Kottke v. Kottke, 353 N.W.2d 633 (Minn. Ct. App. 1984).

108. Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984); Lentz v. Lentz, 353 N.W.2d 742 (N.D. 1984); Glass v. Glass, 344 N.W.2d 677 (N.D. 1984). The court recently held that the trial court's conclusion that it could not consider an unvested military pension in property distribution was an erroneous view of the law. Delorey v. Delorey, 357 N.W.2d 488, 490 (N.D. 1984). It has twice upheld awards of percentages reached by the *Janssen* formula. *See* Bullock v. Bullock, 354 N.W.2d 904, 909-10 (N.D. 1984); Lentz v. Lentz, 353 N.W.2d 742, 743 (N.D. 1984). For an explanation of the *Janssen* formula, see *supra* note 107. The court in *Lentz* quoted with apparent approval the Minnesota position that division of the present cash value of retirement benefits is preferred to a future payment of a fixed percentage when there are sufficient assets available to divide the present value without undue hardship and when the present value is not unduly speculative. Lentz v. Lentz, 353 N.W.2d 742, 747 n.2 (N.D. 1984).

109. *But cf.* McCarty v. McCarty, 453 U.S. 210 (1981) (federal statute insulates military retirement benefits from distribution as property in divorce proceedings). Shortly after the *McCarty* case was decided, Congress made the disposition of military retirement benefits at divorce a matter of state law. Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408 (1982)). Section 1408 (d) (2) of title 10 of the United States Code provides that payments may not be made under the Act unless the marriage was for at least 10 years. 10 U.S.C. § 1408 (d) (2) (1982). This has been interpreted to limit direct payments to a former spouse from the pension account of a retired military person but not otherwise to limit a court's power to treat military pensions as divisible property. *In re* Wood, 676 P.2d 338 (Or. Ct. App. 1984). Similarly, section 1408(e)(1) of title 10 limits direct government payments to former spouses to 50% of the disposable retired pay but does not limit court authority to treat all of the benefit as marital property. 10 U.S.C. § 1408(e)(1) (1982); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). The North Dakota Supreme Court recently avoided a contrary interpretation of section 1408(e)(1). *See* Bullock v. Bullock, 354 N.W.2d 904, 908-09 (N.D. 1984).

Minnesota by statute characterizes vested pension benefits as marital property. *See* MINN. STAT. § 518.54(5) (Supp. 1985). Minnesota courts, however, may divide future unvested as well as vested pension benefits in a property division or as an award of maintenance. *See* Taylor v. Taylor, 329 N.W.2d 795, 798 (Minn. 1983); Faus v. Faus, 319 N.W.2d 408, 413 (Minn. 1982).

110. *E.g.*, Weir v. Weir, 374 N.W.2d 858 (N.D. 1985); Mees v. Mees, 325 N.W.2d 207 (N.D.

earning capacity who leaves a marriage of substantial duration[111] has a stake in the career development and potential of the primary income-producer, because the career capacities of both spouses and the standards of living that those capacities make possible are a part of the aggregate tangible and intangible assets and liabilities for which both spouses share responsibility. That conclusion is simply another dimension of the recognition that marriage is a joint enterprise to which both spouses contribute in a variety of ways and for which both accept and share fiscal consequences.[112]

Sometimes disparities between earning capacities can be mitigated by awards of income-producing property.[113] Sometimes the spouse with an underdeveloped earning capacity can be rehabilitated.[114] When neither of those means of mitigating

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1982) (husband had net pay of $1,350.00 per month and wife had net pay of $525.00 a month). In a puzzling case in which the recipient of spousal support had been rehabilitated and had achieved an earning capacity comparable to her former husband's, the court suggested that the payments might be a property division. Lipp v. Lipp, 355 N.W.2d 817, 820 (N.D. 1984).

111. In shorter marriages, it is less likely that spouses with a subordinate economic role will be permanently disadvantaged. Furthermore, one spouse's interest in the other's income capacity is proportionate to the length of the marriage, as is reflected in allocations of pensions. *See supra* note 99.

112. For an analysis of one spouse's contribution to the future productivity of the other spouse as an economic investment in human capital, see Krauskopf, *supra* note 63, at 381-93.

113. *E.g.,* Tuff v. Tuff, 333 N.W.2d 421, 424 (N.D. 1983) (concern that all income-producing assets went to husband, and that wife cannot convert installment payments to income-producing property). Ordinarily property redistribution is the preferred means of equitable division because it avoids continuing enforcement problems. Equitable compensation by means of property distribution does have one major disadvantage, however, which is the risk of bankruptcy. *See* Trentadue, *supra* note 27, at ____.

114. In two recent cases, the Minnesota Supreme Court held that when, after a long marriage, a wife's earning capacity after rehabilitation would be less than 20% of her husband's, maintenance should be rehabilitative rather than permanent. McClelland v. McClelland, 359 N.W.2d 7, 9-10 (Minn. 1984); Abuzzahab v Abuzzahab, 359 N.W.2d 13, 14 (Minn. 1984) (en banc). In *McClelland,* the husband had a gross annual income of $230,000. The wife's college chemistry education was outmoded but after two to four years of computer training following her twenty year marriage, she planned to seek employment in business or as a stock analyst. *McClelland,* 359 N.W.2d at 9-10. In *Abuzzahab,* the husband was a board-certified psychiatrist engaged in the practice of psychiatry and pharmacology whose annual income was $215,473. *Abuzzahab,* 359 N.W.2d at 18. The wife, a former nurse who had not worked outside the home during the twenty-two year marriage, was enrolled in a real estate sales course and intended to obtain a real estate license. *Id.* at 14. The trial court found that her maximum earning capacity would be $18,000 to $22,000 per year. *Id.* There were strong dissents to both decisions, arguing that the trial court awards of permanent maintenance should be upheld. *McClelland,* 359 N.W.2d at 11 (Wahl, J., dissenting in part, concurring in part); *Abuzzahab,* 359 N.W.2d at 14 (Wahl, J., dissenting).

The Minnesota legislature responded to the controvery occassioned by *McClelland* and *Abuzzahad* by amending the Minnesota maintenance statute as follows:

> 518.552 MAINTENANCE.
>
> Subdivision 1. In a proceeding for dissolution of marriage or legal separation, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and which has since acquired jurisdiction, the court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:
>
> (a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

significant disparities in spousal earning capacities is possible, however, compensatory post-marital support, instead of or in addition to rehabilitative maintenance, is appropriate.[115]

With a new awareness of the value of indirect and intangible contributions by homemakers comes a sharper understanding that both spouses, as contributors, invest their time and efforts in the development of the earning capacity of their marital unit as well as in the tangible marital property accumulated. That understanding supports the notion implicit in many opinions that when a marriage of substantial duration fails, its earning capacity as a marital unit should be shared in the sense of permitting both spouses to function as single persons with comparable standards of living. If separate standards cannot be maintained at the level achieved by the marital

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(b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate 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 home.

Subd. 2. The maintenance order shall be in amounts and for periods of time, either temporary or permanent, as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;

(c) the standard of living established during the marriage;

(d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;

(e) the loss of earnings, seniority, retirement benefits, and other employment opportunities foregone by the spouse seeking spousal maintenance;

(f) the age, and physical and emotional condition of the spouse seeking maintenance;

(g) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

Subd. 3. Nothing in this section shall be construed to favor a temporary award of maintenance over a permanent award, where the factors under subdivision 2 justify a permanent award.

Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.

MINN. STAT. § 518.552 (Supp. 1985).

115. *E.g.*, Kulakowski v. Kulakowski, ___ N.J. Super. ___, 468 A.2d 733, 734 (N.J. Super. Ch. Div. 1982). The court stated as follows:

> [C]learly, when a woman has been a homemaker for many years and is compelled to obtain employment in the marketplace, she is often unable to earn sufficient income to enable her to maintain the same style of living to which she became accustomed during coverture when she had access to the income of her husband. No matter how many courses she takes or how much experience she acquires, her earnings often will

unit,[116] it follows that the reduction should be shared rather than avoided by the spouse whose earning capacity was developed and enhanced during the course of the marriage.[117] A significant disparity in the earning capacities of former spouses who made comparable contributions to their marriage must be compensated if the spouse with the smaller capacity is to benefit equitably from their shared efforts.[118]

The *Bullock* case provides an example of spousal support for an

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be insufficient to enable her to do so. Following a divorce after a lengthy marriage she simply does not possess the skills, business contacts and confidence needed to earn a salary comparable to that of her husband, who had the opportunity and time during coverture to develop these talents. Under these circumstances it would be unfair and unjust to compel her at the conclusion of a rehabilitative period to live solely from her earnings, while the husband enjoys the full fruits of the talents he acquired, in substantial part, during the marriage. For these reasons both rehabilitative and permanent alimony may, where appropriate, be awarded.

. . . Clearly, it would be grossly unfair and inequitable to compel her to live a reduced lifestyle commensurate with her anticipated limited earnings, while her husband is permitted to enjoy a substantially enhanced style of living due, in part, to increased income resulting from the skills, business contacts and confidence he acquired during their marriage while she was caring for his home and children.

Id. at ____, 468 A.2d at 734.

116. *E.g.*, Sventenko v. Sventenko, 306 N.W.2d 607, 612 (N.D. 1981). Unless substantial resources are available, separate living standards cannot duplicate the single standard available before divorce. One study concluded that usually purchasing power after divorce is less than half what it was before divorce. White & Stone, *A Study of Alimony and Child Support: Rulings with Some Recommendations,* 10 FAM. L. Q. 75 (1976). *See also* Erickson, *supra* note 89, at 947. The author states that "[b]ecause the old adage two can live more cheaply than one contains an element of truth, even the most equitable system of law would usually leave both parties at a lower standard of living than that they enjoyed during the marriage." *Id.*

117. *In re* Grove, 280 Or. 341, ____, 571 P.2d 477, 485 (1977). In *Grove,* the court stated as follows:

> We will not ignore the fact that, at least until recent years, young women entering marriage were led to believe — if not expressly by their husbands-to-be, certainly implicity 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 and child care, because their husbands, if they married, would provide their financial support and security. We cannot hold that women who relied on that assurance, regardless of whether they sacrificed any specific career plans of their own when they married, must as a matter of principle be limited to the standard of living they can provide for themselves if "employed at a job commensurate with [their] skills and abilities." The marriage itself may well have prevented the development of those skills and abilities.

Id. at ____, 571 P.2d at 485.

118. J. AREEN, *supra* note 31, at 631 (1975) (study of 5,000 American families found wives and children twelve times as likely to be on welfare if separated or divorced, while husbands experience an average increase in spendable income after divorce); Weitzman & Dixon, *supra* note 22, at 173-78 (extensive California data shows striking discrepancies in disposable income available to men and women after long marriages in which husband builds career and income-producing capacity while wife is homemaker; on average, husbands are left with two-thirds to three-quarters of total income available after divorce); Brief for Appellant at 12, Nastrom v. Nastrom, 262 N.W.2d 487 (N.D. 1978). Appellant-wife argued as follows:

> [H]usband can still do his thing and earn the money that he did before. Wife, however, has no experience in her profession, if she ever even trained for one, and, after 20 years or more of marriage, she will be of the age where there are few jobs into which she can step and begin to make a comparable income. . . .

economically disadvantaged spouse who might not be equitably rehabilitated to make up for the opportunities and development she lost in the course of the marriage. The trial court awarded Patricia Bullock $1,200 per month after seventeen years of marriage and frequent relocations occasioned by the military assignments of her husband.[119] The North Dakota Supreme Court found substantial evidence that Patricia Bullock had significantly contributed to her husband's career and enhanced earning capacity.[120] The trial judge had noted that Patricia Bullock would have to return to school to obtain active teaching certification, that the job market for teachers was presently limited, and that she could now be an established teacher if she had not been a military spouse.[121] The supreme court concluded that "[t]he court could very reasonably have concluded that rehabilitation beyond Patricia's present earning capacity was not likely in the near future. In the meantime, the disparity in the earning capacities of the parties justifies the award of alimony."[122]

A similar rationale underlies the case in which the North Dakota Supreme Court noted that Sharon Nastrom, although still young enough to train for an occupation or profession, would never be able to develop an earning capacity comparable to that of her former husband.[123] The court held that the inevitable difference in the earning capacities of the spouses justified post-marital support for her in the amount of $1,000 per month. The support, together with "careful budgeting" and the real property and cash that she received as her share of the property redistribution, would allow her to maintain the standard of living developed within the marital unit.[124]

Looking back to *Nastrom* and *Bullock*, the court explained the

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Id. See also McAllister v. McAllister, 345 So. 2d 352, 355 (Fla. App. 1977) (failure to compensate disparity would require "society to reclassify 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.").

119. Bullock v. Bullock, 354 N.W.2d 904, 906 (N.D. 1984). Support was awarded to continue until the death of the recipient but subject to continued jurisdiction and possible alteration "based upon the financial position of the parties." *Id.* For further discussion of the *Bullock* decision see *infra* notes 148, 150, and 152.

120. *Bullock*, 354 N.W.2d at 910. The court stated: "The record indicates that Patricia was primarily responsible for providing care for the children and managing the household through frequent change-of-station moves and separations unique to life in the military. She also provided economic support by working outside the home at various times during the marriage." *Id.*

121. Id. at 911.

122. *Id.*

123. Nastrom v. Nastrom, 284 N.W.2d 576, 581 (N.D. 1979).

124. *Id.* at 582. Ned Nastrom would be able to maintain the standard of living developed within the marital unit, as he received by property division all the business assets that provided the basis for his income and considerable fringe benefits. *See id.* at 583.

The supreme court also approved post-divorce support of $600 per month to Delores Gooselaw so that she might "continue her present style of living." Gooselaw v. Gooselaw, 320 N.W.2d 490, 493 (N.D. 1982). The court observed that "[i]n light of Delores' age, limited education, work

reason for post-marital support entitlements in a case in which it approved spousal support to be paid to Rebecca Weir in the amount of $1,300 per month for 1985, $1,600 per month for 1986 through 1989, and $1,500 per month for the remainder of a period of twenty years or until she remarried.[125] Rebecca Weir, who had not been employed in a non-interrupted or career capacity during her marriage, was currently working for a master's degree in addiction counseling.[126] The North Dakota Supreme Court noted that her degree might "enable her to achieve some measure of self-support" but that it was unlikely that she could

> be rehabilitated to the extent that she will attain an earning capacity comparable to that of her husband. Nor do there exist substantial marital assets that are presently divisible which might otherwise provide comparable resources to the parties.
>
> After a marriage of substantial duration — twenty-three years — Rebecca is now on her own without the benefit of Patrick's proven earning ability, and without sufficient property and a comparable earning ability sufficient to maintain the standard of living she enjoyed during the marriage. We have recognized that in many cases, when the property is divided between the parties, it is not sufficient to maintain each of the parties at the same standard of living after the dissolution of the marriage as each enjoyed during the marriage. *Svetenko v. Svetenko,* 306 N.W.2d 607, 612 (N.D. 1981). The awarding of spousal support in this case is an attempt to provide an equitable *sharing of the overall reduction in the parties' separate standards of living*, and properly recognizes Rebecca's role in contributing to Patrick's earning capacity which was developed and enhanced during the course of the marriage. . . .

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experience mainly within the family-owned business, and the job market generally. . . it is not unreasonable that the court may have concluded. . . that rehabilitation beyond her present earning capacity is not likely." *Id.* In similar circumstances, the court approved spousal support as well as an approximately equal property division for Florence Briese. Briese v. Briese, 325 N.W.2d 245, 249 (N.D. 1982).

125. Weir v. Weir, 374 N.W.2d 858 (N.D. 1985). Rebecca Weir was also awarded a property interest in her husband's law firm, office building, and pension, to be determined by ½ of the 17½ years the parties lived together as husband and wife while he worked for his law firm, divided by the total number of years benefits were accumulated prior to being paid, with total payments reduced by ½ of the parties' outstanding indebtedness. *Id.* at 861. If payments of the property interests commenced while spousal support was still payable, the amount of spousal support was to be reduced on a pro rata basis by the amount of those payments. *Id.* at 862.

126. *Id.* at 859.

> In our view, the fact that Rebecca is capable of rehabilitation should not in itself deprive her of reasonable spousal support in light of the fact that she is likely to have a much lower income producing capacity than Patrick, which earning capacity she aided Patrick in obtaining through her contribution as the homemaker.[127]

The purpose of post-marital support to effect an equitable sharing of the income-productive capacity achieved by a marital unit or of the reduced standards of living occassioned by divorce is, like the purpose of equitable property redistribution, compensatory in the retrospective sense that a court looks to and divides assets and liabilities at the point of divorce. Both spousal support and property distribution are also forward-looking in the sense that courts are concerned with the relative capacities of the former spouses to function economically and to enjoy comparable returns on their investments in the marital partnership. This rationale requires post-marital fiscal allocations that serve the dual function of recognizing the contributions of the permanently disadvantaged recipient and at the same time recompensing that person for loss of investment in the earning capacity of the marital unit. This loss of investment is the intangible asset of the marriage to which both parties have contributed but which only one party can retain when there is no realistic prospect that the disadvantaged spouse can be rehabilitated by attaining a comparable economic capacity.

Despite their functional similarities, however, post-marital support as a compensatory entitlement should not be confused with awards of property. The North Dakota Supreme Court has twice expressly refused to recognize a divisible property interest in earning capacity or potential future earnings.[128] The court has explained that earning capacity is simply too tenuous to be treated as a property right:

> It would be unjust to order the distribution of what is, at best, an expectancy, where that order would not be subject to modification should the expectancy fail to materialize. When the nature of the interest is such that the court must maintain its jurisdiction, distribution of

127. *Id.* at 864 (emphasis in original).

128. *See* Jondahl v. Jondahl, 344 N.W.2d 63, 70 (N.D. 1984); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978).

> the interest must take the form of alimony or support. . . .[129]

The court has also emphasized that earning capacity is a proper consideration in determining spousal support.[130] Given the fact that the refusal of courts to treat earning capacity as an asset subject to property distribution is based on the uncertainty of receiving the expected returns, it becomes clear why defining spousal support in terms of its modifiability is useful. Maintenance, unlike property redistribution, is forward-looking with respect to the means by which it seeks to reduce disparities in the resources available to former spouses. Because it looks to expected returns from the earning capacity developed by the spouse who took the primary economic role within the marriage, and because such future income cannot be certain, it is important to permit reduction of spousal support if the return on the investment that both spouses made in the earning capacity of one spouse turns out to be less than was projected at the time of divorce. The fact that modification of spousal support is a desirable incident of post-marital support for compensatory purposes, however, does not mean that other doctrines ancillary to the old notion of alimony as a continuation of marital support should not be reexamined.

VIII. FACTORS AFFECTING POST-MARITAL SUPPORT

A. FAULT

States are divided as to whether fault remains relevant to post-marital fiscal allocations incident to no-fault divorce.[131] The North Dakota Supreme Court construes the statute permitting divorce upon a showing of irreconcilable differences as not eliminating consideration of fault in determining property distribution[132] and as not changing the fact that, "[e]ven though section 14-05-24 [of the North Dakota Century Code] does not mention fault or misconduct of the parties as being significant, case law or common law of this State does consider fault or misconduct as significant and

129. Jondahl v. Jondahl, 344 N.W.2d 63, 70 (N.D.1984) (quoting Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978)). The court has repeated that goodwill of a business, as distinguisned from earning capacity, is a property interest. Gooselaw v. Gooselaw, 320 N.W.2d 490, 492 (N.D. 1982); Fraase v. Fraase, 315 N.W.2d 271, 275 (N.D. 1982).

130. Jondahl v. Jondahl, 344 N.W.2d 63, 71 (N.D. 1984); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978).

131. Freed & Foster, *supra* note 66, at 394-969.

132. Hultberg v. Hultberg, 259 N.W.2d 41, 44 (N.D. 1977).

important on the question of alimony."[133] The court has rejected arguments that such a construction reintroduces to the courtroom the bitter competitiveness and mutually destructive charges that the legislature intended to eliminate by providing a no-fault ground for divorce.[134]

Continued consideration of fault in post-marital support determinations exaggerates the fiscal consequences of a necessarily subjective evaluation of comparative responsibility for failed marriages.[135] Consequences of considering fault in contemporary North Dakota cases range from reversal of an award of rehabilitative support to an adulterous wife[136] to acceptance of a trial court's inability to determine who was at fault when an alcoholic husband had sexually molested two of his children and kicked his allegedly paranoid and hypochondriac wife.[137] An award of less than ten percent of property was upheld for a depressive neurotic wife who did not contribute to property or income accumulation during the last three years of a nineteen-year marriage.[138] In the same volume of reported opinions, the court reversed as clearly erroneous because insufficient an award of almost twenty percent of total property to an alcoholic father who abused his family over the years and whose ability to stay sober was "by no means a certainty."[139]

In a recent case, the court suggested that fault may be a more important consideration when the recipient of spousal support rather than the payor is the party at fault.[140] While it is not clear in

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133. Hegge v. Hegge, 236 N.W.2d 910 (N.D. 1975).

134. Hultberg v. Hultberg, 259 N.W.2d 41, 46-47 (N.D. 1977) (Vogel, J., concurring in part and dissenting in part). For other arguments against retention of fault, see Nastrom v. Nastrom, 262 N.W.2d 487, 494 (N.D. 1978) (Vogel, J., concurring in part and dissenting in part); Hegge v. Hegge, 236 N.W.2d 910, 919-20 (N.D. 1975) (Vogel, J., dissenting); Novlesky v. Novlesky, 206 N.W.2d 865, 870-71 (N.D. 1973) (Teigen, J., concurring specially).

135. For striking differences in judicial responses to fault, compare the majority opinion with the dissent in Hegge v. Hegge, 236 N.W.2d 910 (N.D. 1975).

136. Hegge v. Hegge, 236 N.W.2d 910, 918-19 (N.D. 1975).

137. Rust v. Rust, 321 N.W.2d 504, 506-07 (N.D. 1982). The trial court explained as follows:

> It is impossible for this Court to determine the percentage of fault attributable to one or the other or which party's conduct precipitated the fault of the other. The fault of the Defendant in molesting the children is too old to be seriously considered in that it happened many years ago. . . . Defendant's excessive use of alcoholic beverages during the marriage can be considered as a disease. This Court in its discretion believes that in the interest of justice it should not be under the facts in this case used as a factor to cause unequal distribution of the marital assets. Similarly the conduct of Defendant in kicking the Plaintiff or expressing desires that she were dead are attributable to his drinking. . . .

Id. at 506.

138. Haberstroh v. Haberstroh, 258 N.W.2d 669, 673 (N.D. 1977).

139. Haugeberg v. Haugeberg, 258 N.W.2d 657 (N.D. 1977).

140. Mees v. Mees, 325 N.W.2d 207, 208 (N.D. 1982).

principle why the fault of an economically dependent spouse should be more significant than the fault of an economically dominant spouse, some analysts do find that pattern in divorce allocations.[141] The pattern reminds one of the old notion that only virtuous wives, during and after marriage, were entitled to be supported by their husbands. Treating fault as having fiscal consequences may in the past have mitigated the hardship of divorce for some alimony recipients,[142] but since there is no logical relationship between marital fault and entitlements to post-marital support, any such mitigation was random and coincidental.

Since both equitable property redistribution and post-marital support as a compensatory entitlement are mechanisms for sharing tangible and intangible assets of the marriage, at most, fault should be considered only to the extent that it can be shown to have significantly affected economic contributions within the marriage.[143] Since compensatory maintenance is wholly independent of the old concept of alimony as a continuation of marital support for the virtuous wife, it might be more prudent to wholly remove the consideration of fault that was historically intertwined with that old concept.

Fault is completely irrelevant to entitlements to rehabilitative maintenance. Certainly fault cannot be relevant to the minimalist concept of rehabilitative support based upon need, as it cannot affect the determinative fact of whether or not a former spouse needs education or training in order to be financially self-sufficient. Fault has no effect upon the standard of living established during marriage or the opportunities foregone because of an economic role within marriage; thus, fault should not be considered for determining an appropriate level of post-marital rehabilitation beyond minimal self-support. Irrespective of whether fault should be treated as relevant to the sharing of assets and advantages

141. *E.g.*, Haugeberg v. Haugeberg, 258 N.W.2d 657, 668 (N.D. 1977) (Vogel, J., dissenting). Case law suggests that if the husband is at fault, he will get half or more of the property; if wife is at fault, she will get little or nothing; if both are at fault, the division will be approximately equal or the wife may get somewhat less than half. *Cf.* Piper v. Piper, 239 N.W.2d 1, 4 (N.D. 1976). In *Piper*, the wife urged that precedents established that, where the husband is at fault and the wife relatively blameless, the wife must be awarded at least half the parties' net worth; the court agreed that this might often be the result when the husband was at fault but rejected the suggestion that it was a rule. *Id.*

142. *See supra* notes 59-65 and accompanying text.

143. *E.g.*, Anstutz v. Anstutz, 112 Wis.2d 10, ____, 331 N.W.2d 844, 846 (Wis. Ct. App. 1983) (court in dividing marital property may consider whether one party depleted marital assets by squandering, neglect, or intentional destruction); Blickstein v. Blickstein, 99 A.D.2d 287, ____, 472 N.Y.S.2d 110, 114 (N.Y. App. Div. 1984) (the wasteful dissipation of family assets by either spouse is a factor which must be considered in fixing an award of maintenance, but economic fault is distinguishable from marital fault).

achieved during a marriage, it is illogical to treat it as if it could either reduce or somehow eliminate the disadvantage imposed upon one party by the fact of divorce or by the impact of an economic role within a marriage. Once rehabilitative support is understood as a means of mitigating a disadvantage rather than as an entitlement premised upon positive contributions within a marriage, the irrelevance of fault should be evident.[144]

B. DURATION

Although it is so ingrained that it may seem self-evident, the continued assumption of most courts that the remarriage of a recipient presumptively terminates spousal support must also be reexamined. It is in fact remarkable that the termination of maintenance by remarriage, a consequence linked so closely to the concept of alimony as a continuation of marital support, should survive rejection of that concept.

The minimalist concept of rehabilitative support is based upon a need to remedy the incapacity of a formerly dependent spouse for any kind of self-support. To that extent, remarriage is not presumptively controlling because that incapacity is not presumptively removed by remarriage. It could be argued that remarriage removes the need for self-sufficiency because it brings with it a new spousal duty to support. Our contemporary understanding of marriage, however, is that it permits rather than imposes the choice of one spouse to assume a dependent economic role.[145] If a recipient of rehabilitative support does not make a good faith effort to become economically rehabilitated, that fact should

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The rule that a court should consider fault only to the extent it affected economic contributions within the marriage would be analogous to the general rule that fault is only relevant to custody determinations to the extent that it affects the parent-child relationship.

144. The details of the conduct in Hegge v. Hegge made it an impolitic case in which to persuade the court to declare fault irrelevant. Hegge v. Hegge, 236 N.W.2d 910 (N.D. 1975). It is important to remember, however, that the *Hegge* court's consideration of fault as relevant to alimony was in a decision that predated its endorsement of the concept of rehabilitative maintenance. For a discussion of rehabilitative maintenance, see *supra* notes 85-100 and accompanying text.

145. *See, e.g.*, Richter v. Richter, 344 So.2d 889 (Fla. Dist. Ct. App. 1977). In *Richter*, a concurring opinion stated as follows:

> Very possibly the remarriage might accomplish the rehabilitation in that the former wife has established herself in the occupation of housewife and receives her income and support from that source. On the other hand, a remarriage may not demonstrate the absolute rehabilitation of the wife. The days when women married for support have passed and the roles of the partners to a marriage are not stereotyped but vary from family to family. Thus for this court to determine that rehabilitation occurs or doesn't occur upon remarriage is not grounded on reason.

Id. at 890 (Dauksch, J., concurring specially). In a per curiam decision, the *Richter* court reversed an

occasion suspension or termination of the support either before or after remarriage. However, abandonment of rehabilitative goals cannot be inferred from the circumstance of remarriage alone.

Equitable rehabilitative support seeks to repair or mitigate career opportunities and development lost during the failed marriage. Remarriage cannot be said to repair or mitigate those losses. In *Bauer v. Bauer*,[146] the North Dakota Supreme Court recognized that equitable rehabilitative support can continue beyond the recipient's remarriage. In that case, the court affirmed Gary Bauer's obligation to pay his former wife's school expenses for a program of higher education for a maximum of seven school years.[147] In 1985, the appellate court approved rehabilitative spousal support beyond remarriage of the recipient for the first time in a case in which the award had been judicially-imposed rather than pursuant to the parties' stipulation.[148] If a recipient of equitable rehabilitative support achieves rehabilitation or stops trying to obtain education or training to improve her employment skills and earning capacity, that changed circumstance justifies termination of maintenance.[149] As with minimalist support,

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award of lump sum rehabilitative alimony to be paid in installments regardless of the remarriage of the recipient. *See* Frye v. Frye, 385 So.2d 1383, 1389 (Fla. Dist. Ct. App. 1980). In *Frye,* the court observed that "since rehabilitative alimony is paid for a specific purpose not necessarily related to the recipient spouse's remarriage, it would seem to follow that it should not necessarily be terminated upon remarriage." *Id.* at 1389. *See* Weitzman & Dixon, *supra* note 22, at 149. The authors state that "while some judges still consider the 'location of a new husband' as the major goal of the transitional period, the focus is increasingly on acquiring new skills or updating old ones so that the divorcee can become self sufficient." *Id. But see* Landes, *Economics of Alimony,* 7 J. Legal Stud. 35 (1978) (remarriage is an important alternative "employment" for divorced women).

146. 356 N.W.2d 897 (N.D. 1984).

147. Bauer v. Bauer, 356 N.W.2d 897, 899 (N.D. 1984). The court recognized that equitable rehabilitative support can continue beyond remarriage; however, it reaffirmed the *Nugent* rule that remarriage establishes a prima facie case of changed circumstances terminating support and reversed the trial court's denial of the former husband's request to terminate his stipulated agreement to pay $50 per month spousal support payments "for life." *Id.* at 898-99. For a discussion of the *Nugent* rule, see *supra* note 50.

148. Bullock v. Bullock, 376 N.W.2d 30 (N.D. 1985). In earlier litigation, the trial court awarded and the supreme court upheld an award to Patricia Bullock of permanent, compensatory spousal support in the amount of $1,200 per month. *See supra* notes 119-121 and accompanying text. After she remarried, her former husband moved to terminate spousal support. 376 N.W.2d at 31. The trial court concluded that rehabilitative support of $800 per month for 18 months was appropriate to cover her expenses while she became recertified to teach. *Id.* The supreme court affirmed the award. *Id.* at 32.

149. Faircloth v. Faircloth, 449 So.2d 412, 412-13 (Fla. Dist. Ct. App. 1984). In *Faircloth,* the court stated as follows:

> While *Frye* states that rehabilitative alimony does not automatically terminate upon remarriage, it does not prohibit a trial judge from finding that remarriage or other changed circumstances of the recipient spouse has eliminated or altered the need for further rehabilitative alimony. . . . The recipient spouse has remarried and obtained employment through the family business of her new spouse. She is no longer in the training position she had at the time of the final judgment, and she is making no attempt to improve her job skills aside from the job at the family business. Appellant has made no showing of her continuing need for rehabilitative alimony. Therefore, we find that the trial court properly terminated the award of rehabilitative alimony.

however, achievement or cessation of rehabilitative efforts cannot be presumed by the fact of remarriage.

It is not appropriate that compensatory support automatically terminate at the remarriage of the recipient. Since compensatory support is premised on contributions to the marital unit in general and in particular to the enhanced earning capacity of the economically dominant spouse, it should at least continue until those contributions are compensated.[150] North Dakota has determined that a compensatory entitlement to be supported by future income must be characterized as support in order to be modifiable. It should not, however, bring the old rule that alimony terminates at remarriage to the concept of spousal maintenance as an entitlement based on shared contributions. Since compensatory support recognizes an entitlement of former spouses to proportionately share standards of living made possible by marital capacities attained during their marriage or reductions in standards of living caused by divorce, remarriage of the recipient may cause changed circumstances that justify modification or termination of spousal support. Changed circumstances should not, however, be presumed from the fact of remarriage.[151]

If a court is reluctant to award permanent spousal support, an

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Id.

In holding that no material change in circumstances justified modification when the recipient's income increased to more than the payor's because she improved her earning capacity by acquiring a master's degree and securing a higher level of professional employment, the court rejected the possibility that the alimony initially awarded was rehabilitative support. Lipp v. Lipp, 355 N.W.2d 817, 819 (N.D. 1984). The court seemed to doubt, however, that the payments were really spousal support rather than part of property division. *Id.* at 819-20.

150. J. AREEN, *supra* note 31, at 636. The author states as follows:

> Alimony, according to the contribution principle, should end only when the earned share has been paid off. This could be in one lump sum at the end of the marriage if the other spouse has sufficient assets. If not, the time payments on this "debt" (which are what we normally call alimony) should not end because of remarriage or even death, but only when the full "debt" is paid off.

Id. Accord Krauskopf, *supra* note 63, at 401. Note, however, that the North Dakota Supreme Court concludes that an allocation not terminating at the death of the recipient is an award of property. *See supra* note 45.

For examples of compensatory spousal support not terminating at the recipient's remarriage see Greer v. Greer, 32 Colo. App. 196, ____, 510 P.2d 905, 907 (1973) (alimony for specific number of years in consideration of wife's contribution); Moss v. Moss, 80 Mich. App. 693, ____, 264 N.W.2d 97, 98 (1978) ($15,000 alimony in gross, even though wife's current earnings are greater than husband's, fairly represents wife's contribution to acquisition of husband's degree); Wheeler v. Wheeler, 193 Neb. 615, ____, 228 N.W.2d 594, 596 (1975) (payments for 89 months increased by appellate court to $200 per month because wife contributed substantially to education of husband and he was just entering period of peak earning potential); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979) (the only means of satisfying wife's vested interest in husband's medical profession is by $100,000 alimony); Diment v. Diment, 531 P.2d 1071, 1072 (Okla. Ct. App. 1974) (alimony of $300 installments to continue until full amount of $39,600 is paid).

151. The North Dakota Supreme Court has rejected the argument that extraordinary

equitably proportional sharing of income-productive capacity achieved during a marriage can be usefully analogized to proportional sharing of pension benefits[152] or to judicial responses to claims against earning capacities enhanced by professional degrees.[153] Comparable proportionality was achieved in *Weir v. Weir* by awarding compensatory spousal support for twenty years, following a twenty-three year marriage.[154] Courts can sometimes avoid the difficulty of qualifying durational entitlements to compensatory maintenance by enforcing stipulated agreements to continue payments during the lifetime of the recipient.[155] Moreover, now that property allocations such as pensions often are not immediately payable,[156] judicial reluctance to impose permanent support obligations might be avoided by a provision that spousal support be reduced at the time such property

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circumstances justify continuation of spousal support after a recipient's remarriage because the new husband cannot support her at the standard of living established during the earlier marriage. Bauer v. Bauer, 356 N.W.2d 897, 899 (N.D. 1984); Nugent v. Nugent, 152 N.W.2d 323, 329 (N.D. 1977). That makes it clear that there is no indefinite entitlement to an established standard of living. *But see* Bullock v. Bullock, 354 N.W.2d 904, 911 (N.D. 1984) (upholding award of support until recipient's death because the "[trial] court could very reasonably have concluded that rehabilitation beyond Patricia's present earning capacity was not likely in the near future") and Weir v. Weir, 374 N.W.2d 858 (N.D. 1985) (upholding spousal support for twenty years as an attempt to an equitable sharing in the overall reduction of the parties' separate standards of living). The North Dakota Supreme Court approved in principle possible continuation of rehabilitative support beyond remarriage of the recipient when it affirmed the trial court finding in Bauer v. Bauer that "disparity of education between the parties upon leaving the marriage and the documented contemplation of the parties that this disparity be made up to [the wife]" justified continuation of the obligation to pay college expenses of the remarried recipient. 356 N.W.2d 897, 898-99 (N.D. 1984). The appellate court did not agree that there were extraordinary circumstances justifying continuation of the stipulated agreement to pay $50 per month as and for alimony for life. *Id.* at 899. That conclusion, however, would not preclude arguing in an appropriate case that compensatory support should not terminate at remarriage because the underdeveloped earning capacity of the recipient could not be or was not yet rehabilitated and she had not been proportionately compensated for her contributions to the enhanced earning capacity of her former spouse.

152. *See supra* notes 107 and 108. *See also* Faus v. Faus, 319 N.W.2d 408, 413 (Minn. 1982) (spouse awarded as maintenance half of value of retirement benefit units earned during duration of marriage; payments not to terminate if recipient remarried).

153. *See supra* note 106.

154. Weir v. Weir, 374 NW.2d 858 (N.D. 1985). *See supra* notes 125-127 and accompanying text.

155. *E.g.*, Burr v. Burr, 353 N.W.2d 644, 646 (Minn. Ct. App. 1984) (obligation to pay spousal maintenance does not terminate upon recipient's remarriage when stipulation incorporated into decree provides that payments shall terminate when recipient reaches age 62 or in the event payor retires at age 62); Rintelman v. Rintelman, 118 Wis.2d 587, ____, 348 N.W.2d 498, 503 (1984) (former husband estopped from seeking termination of maintenance because he stipulated that payment would continue during recipients' lifetime); Raymond v. Raymond, 447 A.2d 70, 72 (Me. 1982) (parties' express agreement that alimony continue past recipient's remarriage is an extraordinary circumstance justifying continuance). *See also* Cook v. Cook, 364 N.W.2d 74, 77 n.3 (N.D. 1985). The party seeking reduction of spousal support did not argue that the recipient's remarriage created a prima facie case requiring termination in the absence of extraordinary circumstances. *Id.* The court noted that the incorporated stipulation showed the parties' intent was that remarriage not affect the payments. *Id.*

156. *See supra* notes 107-109.

distributions are made.[157]

IX. CONCLUSION

Focusing on rehabilitative and compensatory support is a means of emphasizing that there are in fact different policies that may make it just to award post-marital allowances. If those policies are taken seriously, rules that developed ancillary to the old concept of alimony as a continuation of marital support must be reconsidered. Continued reexamination of the shape of support obligations will encourage coherence and facilitate predictability in judicial determinations of suitable terms and conditions for just awards.

157. *E.g.*, Bullock v. Bullock, 354 N.W.2d 904, 906 (N.D. 1984) ("alimony shall cease when [recipient] starts to receive her share of [her former husband's] retirement provided that her share of the retirement is at least as great as the alimony payment"); Weir v. Weir, 374 N.W.2d 858 (N.D. 1985).