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Monrad G. Paulsen

SUPPORT RIGHTS AND DUTIES BETWEEN HUSBAND AND WIFE

MONRAD G. PAULSEN*

According to the common law a husband was entitled to his wife's earnings and most of her personal property in addition to the pleasure of her company and services in the home. These advantages have been considered the *quid pro quo* for the man's duty of support. Today, because of legislation, most of a husband's legal control over the income and means of his wife is gone. If a husband's duty to support is to be grounded in a reciprocal benefit to him, that benefit is derived almost wholly from the wife's obligation to be a wife and to live with her husband. To a male, the chief economic advantages of marriage are the voluntary contributions by the wife whether of earnings, estate or services.

The wife's duty of cohabitation is not the only reason given for the rules about support. One commentator has suggested that the duty of support flows from a wife's common-law position as a near-chattel;[1] another has said that the duty is founded upon feudal principles.[2] I offer another point of view. The law, especially as it is set forth in the appellate cases, frequently gives us the picture of an ideal. The stated rules often give a kind of reality to cherished myth. "Ought to be" can become the basis for court action when our lives "come a cropper" because of the world, the flesh and the devil. I suggest that this aspect of the law's role accounts, in part, for the stated doctrine in the support cases.

When John and Alice are married, John becomes the head of the home and Alice the heart. John supplies the means for house and table while Alice takes both (and John) into her charge. In the best of worlds Alice does not leave after breakfast for a job which may bring more money into the household than her husband's earnings. It is best if she is the protected homemaker and he the protecting provider. Alice is entitled to share John's fortune according to the commitment phrased in the Anglican Prayer Book "for better, for worse, for richer or poorer, in sickness and in health." Should John and Alice separate, his continuing duty to maintain her depends upon where the fault lies. If he deserts her or drives her away,

* Professor of Law, University of Minnesota.

1. Crozier, *Marital Support,* 15 B.U.L. REV. 28 (1935). Brown, *The Duty of the Husband to Support the Wife,* 18 VA. L. REV. 823 (1932), is a frequently consulted treatment of marital support problems. Gordon, *Nonsupport in Connecticut,* 22 CONN. B. J. 203 (1949), and Lencher, *Desertion, Maintenance and Non-Support in the Law of Pennsylvania,* 5 U. PITT. L. REV. 145 (1939), are useful local contributions.

2. Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services,* 29 VA. L. REV. 857 (1943).

he continues to pay; if she runs off or gives him cause to leave John's obligation is no more. So goes my guess at a version of the ideal which we embrace and which the legal institutions mirror.

The Doctrine

It is startling that the great ninteenth century movement toward the legal equality of the marriage partners has left the duty of the husband to support his wife so little changed. Today a married woman's power to make a contract, run a business, convey a lot or sue a defendant is only slightly different from that of her husband. Yet she has (save in a few instances) no duty to contribute funds to her husband for the support of their common home. A husband has often argued but always without success that the Married Woman's Property Acts have operated to relieve him of the primary duty to support his wife and family.[3] The result is all the more startling when we consider not merely a married woman's modern legal position but also her increasingly important economic role. Millions of women work and contribute voluntarily to the marital enterprise. It is a fair guess that in most youthful marriages both parties are employed for a time. In fact, among married students, the wife commonly provides the means while the husband finishes his education. Opportunities for money making are almost as plentiful and as attractive for women as they are for men.[4]

The legal emancipation of women and the economic realities have not changed the fundamental: a husband has the primary duty of supporting his wife. The duty of support remains upon the husband even if the wife herself is possessed of great means.[5] In *Churchward v. Churchward*[6] the Supreme Court of Errors of Connecticut forced a husband to repay his wife the sums spent for the support of herself and their daughters although she had an income of $100,000 a year from a business transferred to her by her husband. Repayment could have been avoided only upon a showing

3. "The statutes which have endowed married women with the power to have separate property, and to hold it as if they were unmarried, have not dissolved the marriage, or abolished the peculiar incidents of the marital relation. The duty of providing maintenance and support for the family still devolves on the husband . . ." Wilson v. Herbert, 41 N.J.L. 454, 459-60 (Sup. Ct. 1879).

4. Let me point out to the militant feminists that the sentence contains the word "almost." I agree that we still live in a man's world.

5. *E.g.*, McFerren v. Goldsmith-Stern Co. 137 Md. 573, 113 Atl. 107 (1921). An early Vermont case to the contrary has not been followed. Hunt v. Hayes, 64 Vt. 89, 23 Atl. 920 (1892). The cases are collected in Annot., 18 A.L.R. 1131 (1922). As to earnings the following 1955 statement from Pennsylvania is typical: "Moreover the fact that the wife . . . is receiving benefits from the school district at the annual rate of $2,700 does not deprive her of the right to look to her husband for support. A wife is entitled to support from her husband even though she has earning capacity." Davidoff v. Davidoff, 178 Pa. Super. 549, 552, 115 A.2d 892, 894 (1955).

6. 132 Conn. 72, 42 A.2d 659 (1945).

that the husband's transfer had been made for the purpose of providing the wife with reasonable support. Recently in Maryland a man was convicted for the crime of willfully neglecting to provide for the support of his wife although she was possessed of $10,000 in cash.[7] A husband is liable in spite of the fact that someone else is providing for his wife.[8]

If a husband takes a wife's money to pay household bills or, indeed, to provide for her support he has a duty to repay it.[9] Of course, a woman may voluntarily spend her own money to support herself or the household and should she do so she may not get back what she has spent.[10]

The stern demands upon the male are made clear by considering *Bahlman v. Bahlman*,[11] a case by no means unusual. Mr. Charles Bahlman had been ordered by a decree of separate maintenance to pay his wife, Nina, $75.00 per month out of a net income of $216.00 per month. His mother required financial aid to the amount of $40.00 to $50.00 per month as well. Mr. Bahlman's petition for modification of the decree was denied:

> That the wife works, instead of remaining idle, or that her parents furnish her shelter, does not relieve the husband under the facts of this case. The primary obligation is on him.[12]

Our legal institutions give reality to the image of the respective roles of the marriage partners not only by casting the husband in the breadwinner's part but also by giving the wife only the smallest economic bit. Save in a few states by statute a husband has no claim upon his wife for support. The statutes which do speak of a wife's duty to assist her husband financially are of three types: (1) those that provide that husband and wife contract toward each other—obligations of mutual respect, fidelity and support; (2) those which provide that the wife shall support her husband if he is unable because of infirmity to do so; and, (3) those which require a wife to

7. Ewell v. State, 114 A.2d 66 (Md. 1955).

8. *E.g., Ex parte* Hyatt, 254 Ala. 359, 48 So. 2d 329 (1950), in which the court held that a husband's primary liability to support was not changed by the fact that the wife's parents furnished her shelter and support. See also Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924), which permitted a father to recover from his daughter's husband for support given during a period in which the daughter lived at home secretly married to the defendant.

In Floyd v. Miller, 190 Va. 303, 57 S.E.2d 114 (1950), a husband was not permitted to recover from the estate of an insane wife sums spent on her medical and hospital care even though she had recovered the amount involved from a tortfeasor. The result in this case has been changed by statute. VA. CODE ANN. § 55-36 (Cum. Supp. 1954).

9. Young v. Valentine, 177 N.Y. 347, 69 N.E. 643 (1904); Taylor v. Taylor, 54 Ore. 560, 103 Pac. 524 (1909).

10. Manufacturers Trust Co. v. Gray, 278 N.Y. 380, 16 N.E.2d 373 (1938); the cases are collected in Annot., 101 A.L.R. 442 (1936).

11. 218 Ala. 519, 119 So. 210 (1928).

12. *Id.* at 520, 119 So. at 211.

support a husband who is likely to become a public charge. Apparently statutes of the first type set forth a moral duty only, but statutes in the second and third categories have been sometimes invoked as a basis for an award to the husband.[13] In spite of the brave words of the North Dakota Supreme Court as it imposed financial responsibility for an ailing husband upon a wealthy wife, ". . . no good reason exists in these days of equality of husband and wife to grant the wife a remedy and withhold the same from the other party to the marriage relation,"[14] the creation of a duty in the wife only when disaster strikes the husband falls a good deal short of treating the sexes equally.

A number of states have enacted so-called family expense statutes.[15] These statutes, varying somewhat in their formula, in general place liability on the wife[16] or her estate[17] in respect to third persons for items which are used for maintaining the family unit. As between husband and wife, however, the statutes have not operated to shift the liability for support nor to apportion the burden between the spouses.[18]

The law enforces the ideal by insisting that the obligation of maintenance must exist if the marriage relationship exists in spite of the parties' attempt to cut off or shift the obligation by private contract between themselves.[19] An antenuptial agreement barring a woman's support rights after marriage is void as against public policy even if both parties understood that the marriage was solely for the purpose of legitimatizing a child.[20]

13. Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836 (1897); Hagert v. Hagert, 22 N.D. 290, 133 N.W. 1035 (1911). See also, McLean v. McLean, 69 N.D. 665, 290 N.W. 913 (1940). Section 3 of the Uniform Civil Liability for Support Act of 1954 provides that a wife has the duty to support her husband "when in need." 9 U.L.A. 51 (Cum. Supp. 1955). The statutes are collected in 3 VERNIER, AMERICAN FAMILY LAW § 161 (1935).

14. Hagert v. Hagert, 22 N.D. 290, 302, 133 N.W. 1035, 1040 (1911).

15. *E.g.*, CAL. CIV. CODE § 171 (Deering 1949); ILL. REV. STAT. c. 68, § 15 (1953); IOWA CODE § 597.14 (1954); MINN. STAT. ANN. § 519.05 (1947).

16. Hayden v. Rogers, 22 Ill. App. 557 (1887).

17. Dreamer v. Oberlander, 122 Neb. 335, 240 N.W. 435 (1932), 18 VA. L. REV. 680.

18. In Taylor v. Taylor, 54 Ore. 560, 103 Pac. 524 (1909), a wife asked recovery from her husband for rent received from a building which she owned. The defendant sought to show that he had spent the money for the family's benefit. The Supreme Court of Oregon held that the family expense statute did not shift the burden of support between husband and wife. The effort of the act was confined to giving creditors a right to sue either husband or wife for family expenses. The court explained the matter: "Assume A and B were partners, and A purchases from C goods for which as between the partners A is under obligation to furnish, and A settles with C out of individual funds in his hands belonging to B. Could it legally be held that, because it happened to be an instance where C could hold the partnership for the goods purchased, A would not have to account to B? Certainly not. So it is here." 54 Ore. at 583, 103 Pac. at 532. See, however, Truax v. Ellett, 234 Iowa 1217, 15 N.W.2d 36 (1944).

19. Note, *Contractual Liquidations of the Husband's Duty to Support His Wife*, 40 COLUM. L. REV. 677 (1940).

20. French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935).

> The moment the marriage relation comes into existence certain rights and duties necessarily incident to that relation spring into being. One of these duties is the obligation imposed by law upon the husband to support his wife.[21]

Not only may the wife obtain a support order after an attempt to cut off maintenance rights by contract but also a husband may be guilty of a non-support crime in spite of assurance that his marriage to give the bride's child a name would not carry with it an obligation to support the wife.[22]

A wife's promise to provide support for the family is unenforceable.[23] So also is an agreement by a wife to pay her husband a certain sum each month, in part because the husband, having the duty of support, would always be able to call upon his wife to help him to the extent of the promised payments.[24] It is only if the husband contracts with third persons, for example, the brothers of his wife, that he can transfer his burden to someone else.[25]

A husband's promise of maintenance does not constitute consideration for a wife's promise to devise property to him. *In re Ryan's Estate*[26] tells of a marriage between a woman who was blind and in need of care and the man who married her in reliance upon a contract that she would leave her property to him in return for his assistance and support. The husband had promised only what the law requires: to provide support "that society be thus protected . . . from the burden of supporting those of its members who are not ordinarily expected to be wage earners."[27] Nor can a wife recover for services rendered to a helpless husband under a verbal promise that he would leave her the homestead. Performance of wifely services is expected as a part of normal married life.[28]

Because the duty of support is placed upon a husband by the legal relationship—the status of marriage rather than by a contract promise, infancy[29] or insanity[30] does not relieve him of the obligation. Furthermore, the duty remains though the husband is indigent[31] or languishing in jail.[32]

Unless the wife has forfeited her right by misconduct a husband must continue to respond while the marriage exists all during his

21. *Id.* at 546, 195 N.E. at 716.
22. State v. Ransell, 41 Conn. 433 (1874).
23. Corcoran v. Corcoran, 119 Ind. 138, 21 N.E. 468 (1889).
24. Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940).
25. Kovler v. Vagenheim, 130 N.E.2d 557 (Mass. 1955).
26. 134 Wis. 431, 114 N.W. 820 (1908).
27. *Id.* at 434, 114 N.W. at 821.
28. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).
29. *E.g.*, State v. McPherson, 72 Wash. 371, 130 Pac. 481 (1913).
30. Fisher v. Drew, 247 Mass. 178, 182, 141 N.E. 875, 877 (1924) (dictum).
31. *E.g.*, Inhabitants of Brookfield v. Allen, 88 Mass. (6 Allen) 585 (1863).
32. Ahern v. Easterby, 42 Conn. 546 (1875); Moran v. Montz, 175 Mo. App. 360, 162 S.W. 323 (1914).

life or hers whichever is shorter. There is no statute of limitations on the right to claim support.[33] If a wife attempts to force payment through an equity proceeding the defense of laches is available but husbands have had great difficulty in establishing that they have been prejudiced by not being called upon for support over a period of time.[34] Only the divorce courts qualify the undertaking "till death us do part."[35]

It is commonly said that a wife is entitled to a level of maintenance which is appropriate to her husband's wealth, income and station in life.

> Where parties are man and wife, it is obvious that they normally are expected to live together. That does not mean that she is to sleep in the garage, eat with the cook, and wear cast-offs. It commonly contemplates not only sharing the same residence, but eating at the same table, enjoying the ministrations of the same servants—if they have servants—and wearing such apparel as befits the husband's station.[36]

The couple are to share the ups and downs of economic life. The New York Court of Appeals has put it:

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33. *E.g.*, Reach v. Reach, 249 Ala. 102, 29 So. 2d 676 (1947) (20 years); Thomas v. Thomas, 211 Ala. 504, 100 So. 766 (1924) (support given after ten years); Rovner v. Rovner, 177 Pa. Super. 122, 111 A.2d 160 (1955) (support order given after 13 years).

34. "[T]here is nothing in the finding to indicate that the delay prejudiced the defendant. We cannot say as a matter of law that the court was compelled on the facts to conclude that the plaintiff had lost her rights against the defendant by laches." Kurzatkowski v. Kurzatkowski, 116 A.2d 906, 908 (Conn. 1955) (plaintiff made no claim on her husband for twenty-five years).

In Gold v. Gold, 191 Md. 533, 62 A.2d 540 (1948), a twenty-five year delay was a factor which contributed to the plaintiff's inability to prove who bore the fault for separation. Time destroys witnesses if not liability.

35. After divorce the duty to support may be replaced by the duty to pay alimony. In some states, by statute, payments in the nature of alimony may be ordered after an annulment. *E.g.*, CONN. GEN. STAT. § 7341 (1949); IOWA CODE § 598.24 (1954); N.H. REV. STAT. ANN. § 458:19 (1955).

In every state in which insanity is a ground for divorce, appropriate special protection is provided for the wife's support. See the opinion in Klinker v. Klinker, 283 P.2d 83 (Cal. App. 1955).

A husband is liable to support a spouse joined to him by a voidable marriage until the marriage has been annulled. State v. McPherson, 72 Wash. 371, 130 Pac. 481 (1913).

The duty of a husband to support ends at his death. Thereafter, a wife must support herself by her own efforts or by means of the property to which she is entitled under the laws of decedent's estate. In some states a wife is entitled to a widow's support allowance out of the husband's estate. *E.g.*, ORE. REV. STAT. § 116.015 (1953). The right to such an allowance is made to turn on a husband's duty to support his widow. See *In re* Coon's Estate, 107 Cal. App. 2d 361, 237 P.2d 291 (1952); *In re* Aamoth, 197 ORE. 267, 253 P.2d 269 (1953).

Giving as a reason that the support duty ends at the husband's death, the New Jersey Superior Court has held that he cannot be ordered, in a support proceeding, to pay premiums on insurance policies on his life which were given to his wife. Modell v. Modell, 23 N.J. Super. 60, 92 A.2d 505 (App. Div. 1952).

It should be noted that a husband is liable for his wife's funeral expenses. MADDEN, DOMESTIC RELATIONS § 61 (1931).

36. Du Pont v. Du Pont, 103 A.2d 234, 238 (Del. 1954).

> Marriage is frequently referred to as a contract entered into by the parties, but it is more than a contract; it is a relationship established according to law, with certain duties and responsibilities arising out of it which the law itself imposes. The marriage establishes a status which it is the policy of the State to maintain. Out of this relationship, and not by reason of any terms of the marriage contract, the duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life. This works both ways. When he is prosperous, they prosper; when financial misfortune befalls him, the wife and the family are also obliged to receive less.[37]

A contract between unseparated spouses calling for the payment of a fixed sum to the wife each year is invalid because it interferes with a desired flexibility in family economic affairs.[38] A wife has been given a level of support appropriate to her husband's means immediately upon the marriage even though prior to the marriage she earned only $180.00 monthly and he was a man of considerable wealth.[39]

As long as the couple live together the husband may set the scale of living[40] although failure to provide a reasonable level of support may be valid reason for a wife to leave her husband.[41] A husband may fix the place of the home in which he has the duty to support his wife.[42] She is entitled to support in another place only if the

37. Garlock v. Garlock, 279 N.Y. 337, 340, 18 N.E.2d 521, 522 (1939).

38. Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939). The agreement in Garlock was made when the parties were getting on well. But see Adams v. Adams, 17 N.J. Misc. 234, 8 A.2d 214 (Ch. 1939), in which a contract calling for $100.00 weekly to the wife was enforced. The parties were in some marital trouble. The wife agreed to take the husband back if he would make a weekly cash payment. This case seems to have upheld a reunion agreement rather than a separation agreement. See also, Terkelsen v. Peterson, 216 Mass. 531, 104 N.E. 351 (1914).

39. Hempel v. Hempel, 225 Minn. 287, 30 N.W.2d 594 (1948) (the wife, a divorcee, was awarded $750.00 monthly). *Cf.* Coe v. Coe, 313 Mass. 232, 46 N.E.2d 1017 (1943). There the court, in setting the wife's support award at only $35.00 per week although the husband was wealthy, pointed to the following facts: (a) the wife had been a salesgirl before marriage; (b) she had not helped him to create his wealth; (c) she had not shared in it during marriage because of his frugal habits.

40. "[A] wide latitude of discretion must be allowed him as to how much of his income it is advisable to spend and how much should be retained for the purpose of establishing a competence for the future. Furthermore, he is entitled to a large extent to dictate the manner in which such money shall be spent." Pattberg v. Pattberg, 94 N.J. Eq. 715, 717, 120 Atl. 790, 791 (Ch. 1923).

41. "A court of equity as a rule will not undertake to settle disputes as to the exact amount a husband should pay his wife for the support of herself and the maintenance of the home, but when, as in this case, there is a great discrepancy between the husband's very large income and the very small and insufficient amount he is willing to pay her for her maintenance and support, the court is justified in finding that the acts of the husband constitute non-support and extreme cruelty." Miller v. Miller, 320 Mich. 43, 48-49, 30 N.W.2d 509, 511 (1948). In the *Miller* case the wife had not separated from her home. The husband, at the time of the suit slept in a different room, failed to take meals with her and did not speak.

42. *E.g.*, Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928).

home is egregiously unfit or dominated by in-laws.[43]

We can emphasize the argument that when a wife deprives her husband of the benefit of living with her and of the contribution of her wifely services, he need no longer reciprocate with support or we can underscore the fact that in a statement of the ideal a wife who runs away is not deserving of the care, protection and support of her husband. For either reason a wife who abandons her husband is not entitled to support and, as we should expect, a husband who runs away without just cause carries his duty to support with him. When husband and wife live apart without mutual consent, the duty of the husband to support turns upon a question of fault.[44] The wife forfeits her right to support if she leaves for an inadequate reason or if she give her husband just cause for leaving. A husband must continue to contribute if he abandons her wrongfully or if he, by his misconduct, drives her from the home.

Adequate reasons for living apart are not everywhere the same. Clearly if one party gives the other a cause for divorce the injured party may leave home with justification. In some states if no ground for divorce has been given, that ends the matter. In those states a wife who leaves her husband is entitled to support only if his conduct provides a ground for divorce and he may not rightly leave her unless she has given grounds.[45]

In other states, where a wife may expect separate support following misconduct toward her that is less serious than a ground for divorce, the facts to be shown have been described by various formulae. Cruel and abusive treatment is generally a sufficient reason for the injured party to leave even in states where divorces are not given for such an offense.[46] The rules may have their source in the case law of equity jurisprudence[47] or specific legislative enactments. In either event the rules may be quite vaguely phrased. The Illinois Separate Maintenance Act does no more than declare, by legislation, an equitable remedy which might exist irrespective of the act:

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43. *E.g.*, State v. Bagwell, 125 S.C. 401, 118 S.E. 767 (1923). It has been held that refusing to live at the home of the husband's parents when there is no economic necessity to do so is a "reason adequate in law" for separation under the Pennsylvania law. Commonwealth v. Di Pietro, 175 Pa. Super. 18, 102 A.2d 192 (1954). Generally a wife's refusal to live with in-laws must be justified by past experience. State v. Allderige, 124 Conn. 377, 200 Atl. 341 (1938). Cases involving in-laws are collected in Annots., 38 A.L.R. 338 (1925), 47 A.L.R. 687 (1927).

44. The issue of fault is present in every support case. A concise treatment of the rules is found in Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921). Many cases dealing with the issue are collected in Annot., 6 A.L.R. 6 (1920).

45. *E.g.*, Price v. Price, 281 S.W.2d 307 (Mo. App. 1955); Irvin v. Irvin, 88 N.J. Eq. 139, 102 Atl. 440 (1917), *aff'd*, 88 N.J. Eq. 596, 103 Atl. 1052 (Ct. Err. & App. 1918).

46. *E.g.*, Turgeon v. Turgeon, 329 Mass. 364, 108 N.E.2d 532 (1952) (cruel treatment not a ground for divorce but a reason for separate support.)

47. *E.g.*, Machado v. Machado, 220 S.C. 90, 66 S.E.2d 629 (1951).

> Married men or women who, without their fault, now live or hereafter may live separate and apart from their wives or husbands may have their remedy in equity, in their own names, respectively, against their said wives or husbands in the Circuit Court of the county where the wife or the husband resides, for a reasonable support and maintenance while they so live or have so lived separate and apart.[48]

In Pennsylvania she may depart for a "reason adequate in law";[49] in Connecticut for "any improper conduct upon the part of the husband, which would defeat the purpose of the marriage relation."[50] South Carolina has put it quaintly by permitting a wife to leave if the husband:

> . . . practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic to the sex, that a modest and pure-minded woman would find these grievances more dreadful and intolerable to be borne than most cruel inflictions upon her person.[51]

These imprecise rules require the courts to distinguish between fault and legally inoperative matters such as normal quarreling,[52] falling out of love[53] and bad housekeeping.[54]

> Both parties to a marriage should realize that living conditions can seldom be continuously perfect and that each is called upon to tolerate such inconveniences and annoyances and make such sacrifices for the common welfare as necessity imposes or circumstances reasonably require.[55]

Fault, once identified in a marriage partner will relieve the other spouse of his obligation of support or her duty of cohabitation. If the fault is the wife's she may demand no further maintenance, if the husband's he must contribute though his wife leaves. If the parties are equally at fault the wife has no right of support and no duty to cohabit with her husband.[56]

The blame for a separation can shift upon an offer to return home.[57]

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48. ILL. ANN. STAT. c. 68, § 22 (1955). Other statutes contain similar provisions; *e.g.*, COLO. REV. STAT. ANN. 46-2-1(3) (1953) (any ground generally recognized in equity); FLA. STAT. ANN. § 65.10 (1943) (liability to wife living apart "through his fault"); GA. CODE ANN. § 30-210 (1952) (wife "abandoned or driven off by her husband").

49. Commonwealth v. Pinkenson, 162 Pa. Super. 227, 57 A.2d 720 (1948), contains frequently cited language summarizing the Pennsylvania rules.

50. State v. Newman, 91 Conn. 6, 9, 98 Atl. 346, 347 (1916).

51. Wise v. Wise, 60 S.C. 426, 447, 38 S.E. 794, 805 (1901).

52. *E.g.*, Carey v. Carey, 8 App. D.C. 528 (1896).

53. Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928).

54. State v. Kelley, 100 Conn. 727, 125 Atl. 95 (1924).

55. State v. Allderige, 124 Conn. 377, 381, 200 Atl. 341, 343 (1938).

56. *E.g.*, Zichterman v. Zichterman, 308 Mich. 76, 13 N.W.2d 213 (1944); Obermire v. Obermire, 232 S.W.2d 205 (Mo. App. 1950); Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 Pac. 21 (1913). *But cf.* Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443 (1919).

57. Kurzatowski v. Kurzatowski, 116 A.2d 906 (Conn. 1955); Barefoot v. Barefoot, 83 N.J. Eq. 685, 93 Atl. 192 (Ct. Err. & App. 1914); Zinno v. Zinno, 106

A wife who has abandoned her husband without just cause is entitled to be received in his home if she makes a request in good faith that she be permitted to return. His failure to take her in puts the fault on his shoulders. So also a run-away husband can destroy the wife's right to separate support by a bona fide offer to return. These effects of an offer to resume living together do not operate if the reason for the separation was the offerors's serious misconduct other than the desertion and no evidence is presented that offeror has changed his ways.[58] Obviously offers to return are often made without sincerity as a part of the strategy of marital warfare.[59]

The fault for which a woman may lose her right to maintenance must have occurred after the marriage. In some states the concealment of wrongdoing may be a ground for annulment on a theory of fraud but if the marriage is not voidable a woman of defective character or easy virtue before marriage is as much a wife and as fully protected by the law as the most virtuous of her sisters. As the Delaware court recently said in this connection:

> All we mean here to assert is the basic principle that support to the wife, so long as she remains the wife, must be *as the wife*, not as some creature of inferior standing. Ours is not one of those civilizations which recognizes degrees of wifehood.[60]

The conduct of the parties after separation can have importance. It has been held that a wife who leaves her husband for cause loses her right to support by her adulterous conduct[61] and contrariwise a wife has been able to claim support from a husband who has taken a mistress although, in the beginning, the wife had left wrongfully.[62]

John and Alice can kiss and make up. If the party at fault is forgiven by the innocent party the support rights and duties revert to normal. The possibility that a cause for cutting off support may be condoned has been given as a reason for barring a husband's recoupment from his wife for support money supplied her but spent for the benefit of her lover.[63] At the time of making the payments the husband did not know of his wife's infidelity. A wife who took her husband back for ten days after he had been arrested for carrying on with a mistress lost her right to separate maintenance.[64]

A.2d 256 (R. I. 1954). Cases on the effect of an offer to return are collected in Annot., 6 A.L.R. 6, 46 (1920).

58. Kurzatowski v. Kurzatowski, 116 A.2d 906 (Conn. 1955).

59. See, *e.g.*, Hoffman v. Hoffman, 316 Ill. 204, 147 N.E. 110 (1925).

60. Du Pont v. Du Pont, 103 A.2d 234, 238 (Del. 1954). See also, State v. Hill, 161 Iowa 279, 142 N.W. 231 (1913) (lack of chastity before marriage does not destroy wife's right to support).

61. Webster v. Boyle-Pryor Const. Co., 144 S.W.2d 828 (Mo. App. 1940); M. Martin Polokow Co. v. Industrial Comm'n, 336 Ill. 395, 168 N.E. 271 (1929).

62. Commonwealth v. Cartinell, 164 Pa. Super. 261, 63 A.2d 691 (1949).

63. Hobbs v. Hobbs, 201 Ga. 791, 41 S.E.2d 428 (1947).

64. Williams v. Williams, 188 Va. 543, 50 S.E.2d 277 (1948). It has been

By the law of most states the couple may live apart by mutual consent without changing support rights and duties.[65] A few states cut off a husband's responsibility should the partners live separately by agreement,[66] while in others the amount which he must supply is reduced by whatever income the wife has from her separate estate.[67] A small number of cases, emphasizing that a husband's duty to support depends on the wife's services to him, have held that a husband need not support a wife committed by operation of law to a public institution.[68] Most cases are to the contrary, reflecting, it seems to me, what most people think to be proper affection and obligation between married persons.[69]

The Reality

In the preceding pages we have seen some of the principal doctrines respecting a husband's duty to support his wife, a duty which, I believe, reflects a conception of how an ideal married couple would share their lives. The rules of support mirror the norms of married life. This points up a source of trouble. Almost none of the actual litigation raising questions of support duties involve couples living together in the ordinary way.

In fact, a wife living with her husband has no effective legal remedy to enforce a money payment to make her husband provide more adequately.

It would be difficult to devise a stronger case for judicial intervention than Nebraska's *McGuire v. McGuire*.[70] Mrs. McGuire, living with her husband, brought a suit in equity against him. At the trial she established the most astonishing niggardliness on the part of her husband, described by the court as a person of "more than ordinary frugality." She was a dutiful, hard-working wife who had been given almost no money for her own use in thirty-three years of mar-

held that a reconciliation as such will not terminate an order for separate support. Termination will take place only if the parties intend a termination or the resumption of marital relations under circumstances showing a "bona fide reconciliation had in fact occurred." Justice v. Justice, 108 N.E.2d 874, 876 (Ohio C.P. 1952). A contrary rule would discourage reconciliation attempts and give hope to a scheming spouse.

65. *E.g.*, Munger v. Munger, 21 N.J. Super. 49, 90 A.2d 539 (1952); Commonwealth v. Myerson, 160 Pa. Super. 432, 51 A.2d 350 (1947).

66. *E.g.*, Jenny v. Jenny, 178 Cal. 604, 174 Pac. 652 (1918).

67. *E.g.*, Benjamin v. Benjamin, 283 App. Div. 455, 128 N.Y.S.2d 401 (1st Dep't 1954).

68. The leading case is Richardson v. Stuesser, 125 Wis. 66, 103 N.W. 261 (1905).

69. *E.g.*, Department of Mental Hygiene v. Thrasher, 105 Cal. App. 2d 768, 234 P.2d 230 (1951); Snyder v. Lane, 135 W. Va. 887, 65 S.E.2d 483 (1951). The defendant husband in the *Lane* case succeeded in relieving himself of liability later by proving that his wife, while still lucid, had abandoned him. Snyder v. Lane, 89 S.E.2d 607 (W. Va. 1955). Collections of cases are found in Aurora Casket Co. v. Ropers, 117 Ind. App. 684, 75 N.E.2d 680 (1947), and in the dissenting opinion in Warren v. Boney, 52 So. 2d 896, 897 (Fla. 1951).

70. 157 Neb. 226, 59 N.W.2d 336 (1953).

riage. Mr. McGuire, age 80, was worth about $200,000 in 1953 but permitted himself only the extravagance of operating two automobiles, a 1927 Chevrolet pickup truck and a 1929 Ford coupe equipped with a defective heater. Mr. McGuire lived in a run down house not provided with a bathroom or bathing facilities and satisfied himself with an old-fashioned kitchen without a kitchen sink. The trial court judge was so moved by Mrs. McGuire's story that he entered an order of extraordinary particularity. Among other items the husband was to provide her $50.00 per month, to pay for certain items in the nature of improvements and repairs, furniture and household appliances, and to buy a new automobile with an efficient heater within 30 days. The Nebraska Supreme Court reversed both as to the monthly payments as well as to the specific items.

> The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.[71]

Most legal questions of support are raised in respect to marriages that are, in fact, broken (at least for a time). The legal relationship persists while the parties have separated and either (1) they are engaged in litigation between themselves; or (2) a third person is trying to collect from the husband for supplying the separated wife; or (3) the state is prosecuting a criminal action for non-support. In most cases the fundamental bases of close personal relations have already been destroyed; only the legal shell remains. The rules taken from the ideal of normal married life are applied to human relationships that have disintegrated.

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71. *Id.* at 238, 59 N.W.2d at 342. The plaintiff in Commonwealth v. George, 358 Pa. 118, 56 A.2d 228 (1948), contended that her husband controlled the spending of money too strictly. A support order was denied. "The arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of a husband shall be expended where he has neither deserted his wife without cause nor neglected to support her and their children." *Id.* at 123, 56 A.2d at 231.

In State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951), the accused successfully defended against a criminal charge of neglect to support his wife while they were living together. The defendant's failure to provide spending money and maternity dresses was not sufficient to constitute the "willfull neglect" required under the North Carolina criminal non-support statute. *Cf.* Miller v. Miller, 320 Mich. 43, 30 N.W.2d 509 (1948), in which the wife was given $300.00 to support herself and the family, including a niggardly husband. His lack of generosity was one ground for the decree of separate maintenance. The husband was still physically present in the house but slept in his own room, ate meals outside the home, and did not speak to his wife. The *Miller* case is typical of many on the question whether physical separation of the parties is required before a support decree will be entered.

Except for the legal consequences, a long and hostile separation is in most important respects much like a divorce. Rules based on thinking about a normal marriage should be bent to take account of the facts of marital disorganization. Some of the results do, in fact, reflect the reality.

As we have seen, antenuptial contracts cutting off a woman's right to support and contracts made during a marriage fixing a sum to be paid for support are invalid and unenforceable. However, when separation is in view, an agreement fixing a wife's support claim is generally enforceable, provided its terms are fairly reasonable. In most states an adequate property settlement may be the basis for cutting off further periodic payments completely. Not only is a fair separation agreement calling for periodic payments enforceable, but it has been held that a wife's claim may never exceed the sum agreed upon.[72] It is better for the separated parties to settle their problems by contract once and for all than to battle unceasingly in the law court.[73]

Nevertheless, useful contractual accommodations between separated parties are still sometimes upset because a court has applied rules appropriate to the ideals of married life. In *Haas v. Haas*[74] a husband agreed to pay $100.00 per week under a separation agreement which provided, as well, that payment would be suspended if the wife should engage in business competition with the husband. The court held that a husband could not so relieve himself of the duty to support his wife—a duty imposed by the nature of the relationship and not terminable by contractual arrangement. Yet the agreement, acceptable to the wife in the beginning, had provided the basis for economic settlement in a distressing marital separation. The agreement may have prevented the bitterest warfare. It is hard to see what objective is advanced by the *Haas* decision save to make peacemaking contracts more difficult between parties to a marriage.

The amount to which the wife is entitled has often been described in terms of an unrealistic standard, if we realize that in most support litigation we are confronted, by and large, with persons who are divorced in all but name. It is all very well to speak of Alice's right to support according to John's station in life but, except for the very rich, that standard is impossibly high. One of the least publicized aspects of divorce is the economic catastrophe which it brings. Separate support brings the same disaster. In rejecting the notion that a separated wife is entitled to exactly the same style of life as her husband the Supreme Court of Delaware has recently said: "Any

72. Cases are collected in Annot., 6 A.L.R. 6, 75 (1920).
73. A useful commentary is Note, *Contractual Liquidations of the Husband's Duty to Support His Wife*, 40 COLUM. L. REV. 677 (1940).
74. 298 N.Y. 69, 80 N.E.2d 337 (1948).

such absurd general holding on our part would constantly fly in the face of the fundamentals of economics. . . ."[75]

A standard which seeks to keep the parties in the same economic pattern cannot be met. A moment's reflection will reveal two apart cannot be maintained as cheaply as two together. Further, such a standard obscures the task which confronts courts which seek to construct the proper financial arrangement in cases of marital failure. The job is exceedingly difficult and the judges should be permitted to consider a wide range of factors.

Yet statements such as the following are still repeated in the reports: "She is entitled to be maintained on the same basis mutually agreed upon by the parties and found satisfactory before family troubles put in an appearance."[76] Certainly the style of living adopted by the parties is a factor which the courts will take into account. Further, the pre-separation rate of expenditure may act as a ceiling on the amount of the order. In *Coe v. Coe*,[77] Mrs. Coe had to remain content with $35.00 weekly because, although her husband was wealthy and could have spent lavishly, he did not do so.

Generally the formulations of a separated wife's standard of support do not aim so clearly at retaining her pre-separation economic position. Some opinions tell of trial judges who neither look backward to the style of the parties' former life not dig very deeply into circumstances of the present, but rather employ as the basis for an award a certain fixed portion of the husband's income. One-third or one-fourth are favorite fractions for this purpose.[78] The appellate courts have generally disapproved of the mechanical division of income in favor of a less rigid approach to the problem. "The matter of the allowance and the amount, however, are within the sound discretion of the court, depending on the circumstances, one of which would be whether the wife is without means."[79] The Supreme Court of Errors of Connecticut has said that a husband must "provide for her within the reasonable limits of his ability, and what is reasonable must be determined . . . after a full disclosure of his financial condition and his and her station in life."[80] In 1954 the Maryland Supreme Court said: "In determining an award of alimony or support, the court has no precise rule or standard formula. . . . The ability of the husband to provide support and the wife's need for it are controlling

75. Du Pont v. Du Pont, 103 A.2d 234, 238 (Del. 1954).
76. Adams v. Adams, 17 N.J. Misc. 234, 242, 8 A.2d 214, 219 (Ch. 1939).
77. 313 Mass. 232, 46 N.E.2d 1017 (1943).
78. *E.g.*, Thomas v. Thomas, 211 Ala. 504, 100 So. 766 (1924) (one-fourth). One-third of a husband's income has been a common measure of support for a wife alone. This automatic division is criticized in a thoughtful New Jersey opinion: O'Neill v. O'Neill, 18 N.J. Misc. 82, 11 A.2d 128 (Ch. 1939).
79. Rowe v. Rowe, 256 Ala. 491, 493, 55 So. 2d 749, 750 (1951).
80. Smith v. Smith, 114 Conn. 575, 581, 159 Atl. 489, 491 (1932).

factors."[81] The Alabama Supreme Court has said that support should be "adequate and proper, taking into consideration his income."[82]

Other statements recognize that judges ought to have the freedom to consult a wide range of factors in fixing the extent of a husband's duty.[83] Typical is this excerpt from a recent Massachusetts opinion:

> A wife living apart from her husband for justifiable cause is entitled to an allowance for her support . . . which is fair and reasonable, having in mind the station in life of the parties, their financial means, their needs and necessities, and all other factors which ought to be considered in determining what the husband should pay in satisfying an obligation which the law places upon him.[84]

Among the "other factors" should surely be the circumstances leading up to the separation. Some courts have suggested that equal treatment with her husband is the limit of the wife's expectation. "[S]he is entitled to no better support from him than he can provide for himself."[85]

The legislation, in those states which so provide for support orders or separate maintenance, generally makes no reference at all to the

81. Brown v. Brown, 204 Md. 197, 103 A.2d 856, 861 (1954).

82. Cairnes v. Cairnes, 211 Ala. 342, 343, 100 So. 317 (1924). See also Rowe v. Rowe, *supra* note 79, 55 So. 2d at 750.

83. "Former Advisory Master Herr, in his work Marriage, Divorce and Separation (2d ed.1950) (10 New Jersey Practice), § 430, pp. 421-430, has comprehensively enumerated some of the factors which have been considered by courts in fixing the amount of support to be paid by the husband, without suggesting that other elements might not be taken into account in certain cases. Some of these factors are: (1) the interest of the State, society, and the community where the wife resides; (2) the wife should not be enriched nor the husband penalized; (3) the husband's property and income—and here the court may also consider his capacity to earn money through personal attention to his business; (4) the bona fide indebtedness of the husband; (5) the actual needs of the wife, although her wants are not the sole criterion; (6) the wife's age, condition of health and ability to earn support; (7) her separate property and income; (8) the sum she would have a right to expect had she and her husband continued to live together; (9) income tax; (10) the amount should be so limited as not to render separation attractive to the wife, and yet not so meagre as to make cohabitation a necessity." Turi v. Turi, 34 N.J. Super. 313, 112 A.2d 278, 283 (App. Div. 1955). See also, § 6 of the Uniform Civil Liability Act, 9 U.L.A. 51 (Cum. Supp. 1955): "When determining the amount due for support the court shall consider all relevant factors including but not limited to:
(a) the standard of living and situation of the parties;
(b) the relative wealth and income of the parties;
(c) the ability of the obligor to earn;
(d) the ability of the obligee to earn;
(e) the need of the obligee;
(f) the age of the parties;
(g) the responsibility of the obligor for the support of others."

84. White v. White, 329 Mass. 768, 109 N.E.2d 646, (1952). See also, Coe v. Coe, 313 Mass. 232, 46 N.E.2d 1017 (1943); O'Neill v. O'Neill, 18 N.J. Misc. 82, 11 A.2d 128 (Ch. 1939).

85. Smith v. Smith, 50 R.I. 278, 146 Atl. 626, 627 (1929). *Cf.* "[T]here is nothing in the laws of God or man that requires a husband and father to give up his all so as to deprive himself of a support or exhaust the corpus of his estate to provide an income for his wife with whom he is not living as her husband." Cairnes v. Cairnes, 211 Ala. 342, 343, 100 So. 317, 317-18 (1924).

objective of keeping up the former standard of life. Rather the statutes direct the courts to enter an order appropriate in the light of all the circumstances.

We have not come far toward solving a support problem merely to say that we ought to consider all of the relevant factors. We go further by considering some of the problems which recur in the cases.

Obviously, one of the most important considerations is the ability of the husband to pay. This factor has been regarded as more important than the parties' usual style of living in a case where the style of living was far beyond the husband's means.[86] In most cases the husband's ability to earn places sharp limits upon the amount of an award for support, and hence the award will be inadequate for needs of the wife. Often there is so little after division that both parties inevitably are in most tragic circumstances.[87] There may, however, be a division even of very little.[88] In *Jokai v. Jokai*,[89] an unemployed strudel baker of advanced age received a support order for $25.00 per month from an unemployed husband afflicted with arthritis, defective eyesight and bad hearing, whose income totaled about $70.00 per month. We can guess that in such cases the Department of Welfare will soon have a lively interest. The hard life that lies ahead for the litigants is brought home as well by *Morgan v. Morgan*.[90] Mr. Morgan was ordered to pay $29.00 per week for the support of his wife, their child and her child by a former marriage. He grossed about $68.00 per week with deductions for (a) union dues $.50, (b) sick benefits $.52, (c) Social Security $.68, (d) hospitalization $1.13 and (e) withholding $4.08. After taking into account an additional $1.25 for insurance on a car used in his business, Mr. Morgan had take-home pay of about $59.00 with which to pay the order.

The husband's ability to pay will be determined by a consideration of all his economic resources and potential. The extent of his property will be a factor in setting a periodic award, although in separation

86. Jones v. Jones, 348 Pa. 411, 35 A.2d 270 (1944). "[T]he financial ability of the defendant to provide the means of maintaining the wife and the children in the way to which they are accustomed or which would be most desirable, must, in the last analysis, control the award to be made by the court." Hill v. Hill, 115 N.E.2d 399, 402 (Ohio App. 1953).

87. This unhappy observation has often been made in the New York courts accompanied with a citation to Justice Panken's opinion in Domb v. Domb, 176 Misc. 409, 27 N.Y.S.2d 601 (N.Y. Dom. Rel. Ct. 1941).

88. In addition to the cases discussed in the text, *Everett v. Everett*, 94 N.Y.S.2d 562 (N.Y. Dom. Rel. Ct. 1949), provides a good illustration of the awful problem of trying to divide a husband's income between himself and his wife and three children. The husband, a policeman earning a net wage of $316.00 per month, was ordered to pay support of $160.00 monthly. The economic reverse suffered because of the separation was undoubtedly frightful for both parties.

89. 121 N.Y.S.2d 517 (N.Y. Dom. Rel. Ct. 1953).

90. 191 Misc. 53, 76 N.Y.S.2d 356 (N.Y. Dom. Rel. Ct. 1948).

cases courts are not ordinarily empowered to award the wife a portion of his property. One resource which could be quite valuable, but which is not taken into account, is the wealth of the husband's parents. The estimate of his means can properly include a fair guess at an annual bonus,[91] and in like manner earnings of a corporation owned and controlled by the husband.[92] The power to earn not presently realized may be a reason for a higher award than present earnings would justify.[93] Although a wise court will not require a medical intern to cut short his training simply because, immediately, he can earn more at another job,[94] a husband may not defeat his responsibility by seeing to it that he is poorly paid.[95] Repayment of a husband's indebtedness will have to be fitted into a reasonable scheme of family support.[96] The Federal Income Tax will be taken into account in estimating a husband's ability to pay, but one case has held that the deductions from gross income for tax purposes do not necessarily reduce a husband's income for purposes of determining the proper level of support.[97]

Clearly a wife's wages, ownership of property or capacity to earn does not relieve a husband of all responsibility to provide for her support.[98] On the other hand, a wife's earnings have often been taken into account in setting the amount provided by an order of support.[99] It has also been suggested that if the couple live apart voluntarily

91. Commonwealth v. Bicking, 163 Pa. Super. 454, 62 A.2d 118 (1948).
92. Sack v. Sack, 328 Mass. 600, 105 N.E.2d 371 (1952).
93. *E.g.*, Bonanno v. Bonanno, 4 N.J. 268, 72 A.2d 318 (1950) ($14.00 per week ordered out of $22.00 unemployment compensation income; court emphasized that the unemployment was probably only temporary.).
94. In Commonwealth v. Lazarou, 119 A.2d 605 (Pa. Super. 1956), a trial court had ordered a medical school graduate to pay $100.00 per month in spite of his income of $75.00 per month as an intern. The trial judge had noted that pharmaceutical manufacturers would be willing to pay over $100.00 a week for his services. The appellate court's modification of the award to $15.00 per month was made in the light of several considerations: (a) the good faith of the young man's choice of a low paying job; (b) the fact that his wife would have shared this low salary had she remained married to him; and (c) support orders may be modified in the future. It was, perhaps, also of importance that the wife was working as a school teacher at $2,800.
95. See Commonwealth v. Wieczorkowski, 155 Pa. Super. 517, 38 A.2d 347 (1944). Kramer v. Kramer, 248 App. Div. 781, 289 N.Y. Supp. 49 (2d Dep't 1936), holds a dentist in contempt for failure to meet a support order. The defendant had accepted non-professional employment at $1080.00 per year, much less than he could have earned as a dentist. Adams v. Adams, 174 N.J. Misc. 234, 8 A.2d 214 (Ch. 1939), holds that the amount of an award can be calculated by taking into account income from a business which the husband had conveyed to his brother for the purpose of defeating his wife's claim.
96. Nilsson v. Nilsson, 200 Misc. 841, 108 N.Y.S.2d 954 (N.Y. Dom. Rel. Ct. 1951); Commonwealth v. Horner, 178 Pa. Super. 411, 77 A.2d 641 (1951).
97. Commonwealth v. Rankin, 170 Pa. Super. 570, 87 A.2d 799 (1952).
98. *E.g.*, Waldrop v. Waldrop, 222 Ala. 625, 134 So. 1 (1931) (wife's ability to earn does not relieve a husband of the duty of maintenance.)
99. See, *e.g.*, Kaufman v. Kaufman, 63 So. 2d 196 (Fla. 1953); Spalding v. Spalding, 280 App. Div. 836, 114 N.Y.S.2d 19 (2d Dep't 1952). *Cf.* Hensinger v. Hensinger, 334 Mich. 344, 54 N.W.2d 610 (1952) (wife's earnings not a ground for modification of separate maintenance decree.)

the husband is responsible only if the wife has no means of her own.[100] In devising the best and most practical way to take care of the economic problems of a broken home certainly a woman's means are highly relevant. There is much to recommend the provision in an order of a Massachusetts trial court: "As soon as the petitioner is well and able to go to work, the petition for modification may be reopened, and if the petitioner is able to support herself, the twenty dollar a week order is to be revoked."[101] A New Jersey court has reminded us that apart from benefiting the husband, the wife's employment ". . . also benefits society. Self-support, whether of men or women, is to be encouraged."[102]

After a separation a husband loses much of his control over the standard of living to be enjoyed by his wife.[103] His ability to provide becomes much more important than his willingness to do so. Within wide limits a husband may set the pattern of expenditure while the parties are living together. After separation the amount which a husband voluntarily sends to his wife does not limit his liability for her support.[104]

All marriages need not be treated on the same basis. There is a great deal of force in the dissenting judge's view in a recent Delaware case that a wife was entitled to a smaller sum than would otherwise be the case because "she married for money, without love, and by her actions as a wife helped produce the ultimate separation after a childless marriage of a year and a half."[105] Some cases have taken into

100. "We think that the rule ought to be that where the wife has capital funds which produce income after a separation by mutual consent, the net amount of income left to her when taxes are paid ought to be credited to the amount found to be due for necessaries. This is especially persuasive in its force when the husband himself has furnished the capital to the wife." Benjamin v. Benjamin, 283 App. Div. 455, 457, 128 N.Y.S. 2d 401, 403 (1st Dep't 1954). See also, Fredd v. Eves, 4 Har. 385, 387 (Del. 1846); St. Mary's Hospital v. Paxton, 10 N.J. Misc. 514, 159 Atl. 803 (Sup. Ct. 1932), Decker & Bros. v. Moyer, 121 N.Y. Supp. 630 (Sup. Ct. 1910).

101. Perry v. Perry, 329 Mass. 771, 110 N.E.2d 498, 499 (1953).

102. Turi v. Turi, 34 N.J. Super. 313, 323, 112 A.2d 278, 284 (App. Div. 1955). *Cf.*, the charge to the jury in a Georgia case of alimony after divorce "[The jury was to consider] whether or not it is wise or unwise to give her an amount which would enable her to lead a life of idleness or whether under all the facts and circumstances it would better serve public policy to require the wife to contribute something to her own support." Fried v. Fried, 208 Ga. 861, 862, 69 S.E.2d 862, 864 (1952). The instruction was held erroneous because it put the question of public policy to the jury.

103. See Pattberg v. Pattberg, 94 N.J. Eq. 715, 120 Atl. 790 (Ch. 1923).

104. Smith v. Smith, 114 Conn. 575, 159 Atl. 489 (1932) (no defense to support order that husband is sending his wife ten dollars a week); Miller v. Miller, 241 S.W.2d 805 (Mo. App. 1951) (husband's voluntary contribution of $25.00 per week for wife and child supplanted order of $50.00 per week); Gross v. Gross, 22 N.J. Super. 407, 92 A.2d 71 (App. Div. 1952) ($60.00 per week supplied held insufficient). In a criminal non-support case such voluntary payments would be evidence of the husband's lack of willfulness in his neglect of duty.

105. Du Pont v. Du Pont, 103 A.2d 234, 244 (Del. 1954) (dissenting opinion).

account the fact that neither party "received quite what he bargained for."[106] Age, health, duration of the marriage, and the lack of children have been given importance in setting the level of support.[107]

Conduct, of course, is a factor which the courts ought to and do take into account in setting the amount of an award. As one court has put it:

> [I]t is most difficult to say who is at fault. The couple seems to have been ill assorted in their marriage relations; and, in fixing the amount of support which the wife is entitled to, a court always takes into consideration the conduct of the wife, as well as that of the husband.[108]

The conduct of the parties is more than a factor to be taken into account in setting the level of support. Whether any duty at all remains with the husband to support a separated wife will depend on her conduct. If the separation is his "fault" the duty to support remains; if hers, the duty no longer exists. Imposing responsibility for the broken emotional ties of marriage on an all or nothing basis is easily done only by failing to make careful and dispassionate inquiry. Ordinarily it takes two to break a home. Both parties usually bear some of the fault; both ought to bear some of the financial responsibility. In *Leach v. Leach*[109] the wife left home and the husband sued for divorce. Mrs. Leach counterclaimed for divorce. Divorce was denied both, but Mrs. Leach was given a support order of $300.00 per month. She charged that he gave too much attention to his business, paid no attention to her, and failed to participate in a normal social life. The trial court found that the "record abounds in proof of trivialities" yet gave the award on the ground of her need caused by poor health. The trial judge did not limit himself to an inquiry into fault. "It is evident to the court that her physical and nervous condition has had a great deal to do with the strained relationship which has gradually arisen between the parties."[110] The Supreme Court

106. Everman v. Everman, 243 S.W.2d 58 (Ky. 1951). Here the parties, age 57 and 67, were together about 17 months. Both had been previously married and before the ceremony both had made "some misrepresentation . . . as to financial condition." The trial concluded that the wife was in some degree at fault. A lump sum award of $200.00 was affirmed. See also, Commonwealth v. Weible, 159 Pa. Super. 290, 48 A.2d 161 (1946).

107. *E.g.*, in Jokai v. Jokai, 121 N.Y.S.2d 517 (N.Y. Dom. Rel. Ct. 1953), the court took into account "the short duration of this marital relationship, the fact that it was for each a third marriage, that there is no issue, the age of the parties, the fact that respondent is not well . . . that before the marriage the petitioner had supported herself and still has the ability to work." *Id.* at 520. See also, Sugarman v. Sugarman, 197 Md. 182, 78 A.2d 456 (1951).

A court may provide that the husband must pay extra-ordinary medical expenses. Hill v. Hill, 115 N.E.2d 399 (Ohio App. 1953).

108. Symington v. Symington, 36 Atl. 21 (N.J. Ch. 1896). See also Chapman v. Chapman, 13 Ind. 396 (1859) (conduct of the wife is a proper factor to consider in setting the amount of support.)

109. 261 Wis. 350, 52 N.W.2d 896 (1952).

110. *Id.*, 52 N.W.2d at 899.

of Wisconsin reversed the award to the wife because she had left home "without just cause." Her health was not an adequate reason to give a support order because she had not been confined to bed and had spent most of her evenings away from home playing cards with friends. The Wisconsin Court's disposition of this case cannot be sound. In theory she could attempt to return home to a husband who had attempted to divorce her and resume a relationship already productive of much emotional disturbance. In practice, she is not likely to do so. Granting that the husband should not be forced to support her for the rest of her days, most persons will still feel she is deserving of some financial help for a time.[111]

To permit the duty of support to stand or fall on the issue of fault is to introduce undesirable rigidity in the disposition of separate support problems. Determination of fault by mechanical tests can make the rigidity ludicrous. Two examples can show how unsatisfactory is a rigid approach to these problems. As we have seen, fault even shifts with the latest offer to return. In a nineteenth century case from Illinois the blame for a separation remained on a wife who had wrongfully left her husband although she had offered to return to him and he had agreed to receive her.[112] The issue remaining was the question whether she should return home alone (a distance of two miles) or whether the husband should escort her. The court held that because she insisted upon the escort her separation was still wrongful. In *Martin v. Martin*[113] a wife locked her husband out after a quarrel and he then left home. Two weeks later the parties *and their lawyers* had a conference in which the wife asked the husband to resume living with her. He refused and she sought an equitable order for support. The trial court's finding that the husband was at fault received support from the fact that the wife had requested the husband to return . . . "The court could reasonably find that the . . . [wife's] conduct had not been such as to justify him in failing to resume cohabitation *at her request*, or, in the alternative to support her."[114] It is hard to think that the request, "come home, all

111. See also, Montgomery v. Montgomery, 183 Va. 96, 31 S.E.2d 284 (1944). This is a tragic case denying separate maintenance to a wife whose husband paid an unusual amount of attention to his mother. Separate support was denied although the parties were in a situation which probably could no longer be brought to rights. In Short v. Short, 151 Md. 444, 135 Atl. 176 (1926), a support order was denied because the husband was not "at fault" although the opinion indicates that gruffness, indifference, and rudeness had destroyed the happiness of the marriage. In Maryland a separate maintenance decree is possible only if the wife has ground for divorce. These examples of broken human relations left without a reasonable economic adjustment because of the fault issue could be multiplied many times. Those who like to try their hand at judging the responsibility for marital breakdown might also like to consult, Obermire v. Obermire, 232 S.W.2d 205 (Mo. App. 1950).

112. Thomas v. Thomas, 152 Ill. 577, 38 N.E. 794 (1894).

113. 134 Conn. 354, 57 A.2d 622 (1948).

114. *Id.* at 358, 57 A.2d at 624.

is forgiven" made at conference upon advice of counsel would be other than a battle field tactic.

As a practical matter, the fault which must be shown before a wife or husband may rightfully leave home is often proved by conduct which is a product of mental disease. Legal insanity excuses the misconduct of either party,[115] but mental illness often falls short of legal insanity. Little psychiatric training is needed to hold the opinion that the husband adjudicated "at fault" in *Irvine v. Irvine*[116] was a sick man. Among other things he believed his wife was poisoning his children's affection towards him, wrote his wife a letter of praise and enclosed a copy of divorce complaint with a note saying he hoped it would never be necessary to file it, and printed a chart for the routine of his children bearing the legend:

> They have to do what they are told. *Are made to mind.* If they don't and continue to buck authority, a punishment follows and they are made to do what they have been asked to do in the first place. No compromise. The fuss is shortlived and the incident soon forgotten with no ill feelings remaining.[117]

Sometimes we can see signs that perhaps "fault," which now must be shown if a wife is to get support according to her husband's means and which now can bar a wife's support petition completely should the husband make such a showing, is becoming only one factor for courts to consider.

Courts and legislatures have placed responsibility irrespective of fault upon a husband to provide something for his wife if she is likely to become a public charge.[118] It is commonly said that a wife need not be blameless to obtain support from her husband if the main "fault" is his.[119] Most courts while recognizing the husband's obligation in such circumstances have taken the wife's conduct into account in setting the amount of the order. For example, the Alabama court has said:

> Overindulgence is not to be shown to a wife whose husband has given her grounds for separate maintenance, when her own failure to act the part of a dutiful wife has helped to put her in the position of "having the law on her side." Such misconduct on the part of the wife may be considered as in a measure palliating the offense of the husband, and as abridging her claim to allowance from him for separate maintenance.[120]

From Minnesota we have *Atwood v. Atwood,*[121] a case holding that

115. Cases are collected in Annot., 19 A.L.R.2d 144 (1951).
116. 339 Mich. 375, 63 N.W.2d 618 (1954).
117. *Id.* at 382, 63 N.W.2d at 621.
118. See People v. Schenkel, 258 N.Y. 224, 179 N.E. 474 (1932).
119. *E.g.,* Holley v. Holley, 257 Ala. 250, 58 So. 2d 783 (1952); Martin v. Martin, 134 Conn. 354, 57 A.2d 622 (1948).
120. Puckett v. Puckett, 240 Ala. 607, 609, 200 So. 420, 421 (1941).
121. 229 Minn. 333, 39 N.W.2d 103 (1949).

a wife with two children may receive an order for $500 per month support for her support and that of her children, even though the necessity or justification for living separately was not adjudicated. The trial court said, *"the provisions for the support of plaintiff were made primarily as a necessary incident to the support order for the children,* and not by reason of any merit on plaintiff's part."[122]

The law ought to aim at the fairest possible arrangement in each case rather than to deny liability if the wife is "at fault" and to impose it fully on a guilty husband. To say that the purpose of a support order is to "right the wrongs of an injured spouse" is to entertain the most simple-minded point of view about marital discord.[123] The conduct of the parties ought to be decisive of liability only in the most extreme cases.

When a couple lives together in a marriage they share the fluctuations of fortune naturally. Each in his own way contributes to the material success of the family enterprise. Statements found in many opinions would treat separated couples as if such were the case for them:

> The obligation must be . . . fulfilled out of the husband's contemporaneous faculties whether in wealth, in moderate means or in poverty. Within this gamut of fortune the wife shares . . . [C]hange in tangible property and in income and in earnings may occur as well after as before the separation of the spouses.[124]

A separated couple is no longer sharing life; there is not the same reason to share an income. The parties to a marriage, dead in all but name, no longer contribute to a common enterprise as do those united in an existing partnership. Courts should fix support claims as justly as possible at the outset, and then leave the order undisturbed, absent of showing of unfairness or some other reason having to do with special need. Courts would recognize that a wife may be given too much or too little for reasons existing at the time of the order. The husband may have been unemployed or still at school; the wife may have had a particular problem of a temporary sort. Later events such as illness or disability create the need for modification also. In short, we need flexibility because we are concerned with the ever-changing human problems but not because we ought to carry out an ideal appropriate to a going enterprise. In practical terms, a support order should neither be increased nor decreased *simply because* the

122. *Id.* at 339, 39 N.W.2d at 107.
123. Waldrop v. Waldrop, 222 Ala. 625, 627, 134 So. 1, 2 (1931).
Many opinions support quite a different philosophy. "The support laws were meant to provide reasonable support for a wife, not to penalize an erring husband," Commonwealth v. Lazarou, 180 Pa. Super. 342, 344, 119 A.2d 605, 607 (1956).
124. Winkel v. Winkel, 178 Md. 489, 499, 15 A.2d 914, 919 (1940).

husband's income has become greater or less. A showing of other reasons should be required.

Although I can't demonstrate the proposition, I hazard the guess that, in spite of the language in many of the cases, few modifications are actually made because of a change in income alone. In some instances the modification of support arrangements is not possible at all. A lump sum award for maintenance and support is not unknown[125] and, generally, a reasonable separation agreement sets the limit on a wife's demand provided the husband has complied with the contracts.[126] At least one trial court judge has expressed his view that support orders should not be as easily modified as they are in the New York Family Court.[127]

Very little consideration has been given to the question whether a support claim should be cut off at some point. Wives have been able to assert a claim after ten, fifteen or even twenty years after separation from her husband. Yet in most cases the need of the wife will be greatest at the beginning of the period of separation. This will be particularly true when small children are involved. One of the strongest practical arguments for awarding maintenance to a wife is the fact that she may have passed up much by way of economic opportunity during the period of homemaking. Time may permit her to gain the place in the economy which her services in the home have denied her. It may be wise and fair to terminate a support order, after a wife, by further education, has prepared herself for employment. Though reversed on appeal, a Florida trial court may have been moved by factors such as these when it ordered a husband to pay $17.50 per week for the term of a year.[128]

Living separately under a support arrangement is a happy way

125. *E.g.*, Wagoner v. Wagoner, 306 Mo. 241, 267 S.W. 654 (1924). *Wagoner* is a good example of the persuasive case which can sometimes be made for the final fixing of support claims. The parties were without hope of reconciliation, had been carrying on the most extensive litigation for years, and were of advanced age.

126. "If . . . support could be increased under her theory it could also be reduced by the court upon a proper showing of changed circumstances without restoring to her the property with which she had parted. Untold mischief and the disruption of settled financial arrangements of many separated spouses would result if such agreement could be set at naught." Finnegan v. Finnegan, 262 P.2d 49, 53 (Cal. App. 1953), *aff'd*, 42 Cal. 2d 762, 269 P.2d 873 (1954), 43 CALIF. L. REV. 530 (1955). *But see* Haas v. Haas, 298 N.Y. 69, 80 N.E.2d 337 (1948), holding that the provision for termination of support in a separation may not be made to depend on conduct of the wife "not fairly or reasonably related to the marriage relationship."

127. Panken, J., in Klein v. Klein, 87 N.Y.S.2d 293 (N.Y. Dom. Rel. Ct. 1949).

128. Sorrells v. Sorrells, 53 So. 2d 645 (Fla. 1951). See also, Perry v. Perry, 329 Mass. 771, 110 N.E.2d 498 (1953), in which the trial court decreed that as soon as the wife was able to work, a $20.00 per week order would be revoked. In Wood v. Wood, 258 Ala. 72, 61 So. 2d 436 (1952), a husband was relieved of further alimony payments because his wife was self-supporting and his children were grown up and married.

of life for only a few people. The parties are bound by economic ties without the rewarding personal relations which may ease financial burdens. In some states the door is opened to brighter prospects by allowing divorce irrespective of fault if the parties have lived under a separation order for a certain period of time. Illinois enacted an interesting statute in the 30's which permitted the parties to divorce after two years of living under a separate maintenance order. The act (held unconstitutional in 1936) encouraged divorce by a provision forbidding, to a childless wife, separate maintenance awards lasting longer than two years.[129]

Protecting the Public Purse

If a married woman should become the recipient of public assistance the authorities supplying the needed relief have a claim for reimbursement (save for a few early cases) against her husband.[130]

The general trend of legislation, spurred by mounting relief budgets, has been to broaden the liability of spouses in assistance cases beyond the ordinary responsibility of one spouse to another. By force of modern legislation the wife of an indigent person must support him and must respond to a claim for reimbursement made by public officials if she were possessed of sufficient means at the time public assistance was given.[131] More recent legislation would require the wife to reimburse the state from property acquired after the expenditure of tax funds.[132] Generally, legislation provides for the

129. "[P]rovided that there are no living children born of such marriage no person having once received separate maintenance or temporary alimony for a period of two (2) years or a fraction thereof shall be entitled to further separate maintenance or temporary alimony against the same spouse, except for such portion of the two (2) years as remains unexpired. . . ." ILL. ANN. STAT. c. 68, § 22 (1935). This act was held invalid on local constitutional grounds in DeMotte v. DeMotte, 364 Ill. 421, 4 N.E.2d 960 (1936). *Cf.* N.H. REV. STAT. ANN. § 458:19 (1955), which limits, initially, an alimony decree to three years in the case of a childless wife. CONN. GEN. STAT. § 3007d (Supp. 1955), permits the courts to grant a divorce at any time to a couple living under an order of legal separation.

130. Goodale v. Lawrence, 88 N.Y. 513 (1882), is a leading case. The contrary opinions were based on the idea that poor relief was a work of public charity and not a response to needs created by the husband's default. Board of Comm'rs of Switzerland County v. Hildebrand, 1 Carter 555 (Ind. 1849). In a more modern case, Haakon County v. Staley, 60 S.D. 87, 243 N.W. 671 (1932), a county sued a husband for necessaries furnished under the poor laws and for amounts furnished under a mother's aid plan. The county received reimbursement for the poor relief but not for the mother's pension payments on the ground that the latter were made pursuant to a public policy of keeping mothers in the home, a policy for which the husband was not responsible. In Baldwin v. Douglas County, 37 Neb. 283, 55 N.W. 875 (1893), a statute permitting a county to recover sums spent for keeping defendant's wife in a mental institution was held unconstitutional on the ground that recovery would be a vicious instance of double taxation.

131. *E.g.*, Hodson v. Stapleton, 248 App. Div. 524, 290 N.Y. Supp. 570 (1st Dep't 1936); State v. Whitver, 71 N.D. 664, 3 N.W.2d 457 (1942).

132. *E.g.*, N.Y. Soc. WELFARE LAW § 104(1): "No claim of a public welfare official against the estate . . . shall be barred or defeated . . . by any lack of sufficiency of ability . . . during the period assistance and care were received."

making of orders for periodic payments to an indigent spouse. Typically, these orders may be entered on the petition of the authorities. Indeed, under the Pennsylvania statute, they apparently may be granted at the instance of a private charitable institution caring for the needy partner.[133]

A husband or a wife may find himself with a duty to make payments not because the other spouse is deserving but because the taxpayer is to be protected. In *People v. Schenkel*[134] a husband was convicted as a "disorderly person" for having neglected to provide for his wife despite the contention that, by her conduct, she had forfeited her right to support.

> [The] duty of provision is absolute and regardless of the wife's fault. The public interest, in the opinion of the Legislature, requires that the husband, not the taxpayer, shall bear the burden of her support as long as the relationship of husband and wife is not altered or dissolved by decree of the court.[135]

Under the New York Domestic Relations Court Act the Domestic Relations Court of New York City may order support payments irrespective of fault, if the unsupported partner is, or is likely to become, a public charge.[136] The amount of the award is supposed to be just enough to keep the pauper off the public assistance list.

On the other hand, in England and many American states the normal support rules linking responsibility and fault remain unchanged even when the government makes a claim.[137] A husband need not pay back the state for assistance given a wife wrongfully separated from him.

If the New York statute is sound in some cases in that the innocent marriage partner may often have a greater responsibility for the care of the guilty one than the general public, the act surely goes too far in other instances. To hold a husband or wife liable for welfare payments made to a runaway spouse, gone from home for ten or twenty years is to protect the taxpayer by jungle warfare.[138] Under the New

133. Commonwealth v. Kotzker, 179 Pa. Super. 251, 118 A.2d 271 (1955).
134. 258 N.Y. 224, 179 N.E. 474 (1932).
135. *Id.* at 227-28, 179 N.E. at 475, 476.
136. Jones v. Jones, 161 Misc. 660, 292 N.Y. Supp. 221 (N.Y. Dom. Rel. Ct. 1937).
137. State v. Jordan, 142 Conn. 375, 114 A.2d 694 (1955); Town of Milton v. Bruso, 111 Vt. 82, 10 A.2d 203 (1940). The authoritative English case is National Assistance Bd. v. Wilkinson, [1952] 2 Q.B. 648.
"But the widening of the new statutory liability of the wife for the support of her husband is a revolutionary piece of legislation without warrant in previous poor law or family law: it marks indeed a further step towards that complete equality of the sexes before the law which has characterized much of the legal development of the last century." Brown, *National Assistance and The Liability to Maintain One's Family*, 18 MODERN L. REV. 110, 116-17 (1955).
138. The following is a summary of the views of an Iowa trial judge holding unconstitutional a statute placing a lien on the land of a wife for the old-age assistance payments given to her absent husband; the trial judge was reversed on appeal: "In the finding of fact and conclusion of law the trial

York law taxpayer protection is accomplished by shifting automatically the burden of supporting the poor to husbands or wives provided they have means to supply. In some instances the law has recognized that determining which of several persons should bear the cost of state aid is a matter for the careful exercise of discretion on a case by case basis.[139] In a similar way a look into the particular circumstances would answer with greater fairness the question whether the taxpayer or the marriage partner should pay the relief bill. In deciding whether the public or the wife should pay to a pauper husband, is it not helpful to know that the wife, abandoned by her mate twelve years ago, is 61, has gall bladder trouble, possesses $1618.05 in a dwindling bank account and receives an income of only ten dollars a week?[140] She has *some* means. She *can* work. She is *still* his wife. Even so, in such a case it would be just for the taxpayers to forego both repayment and the protection of an order that this luckless wife make periodic payments to her husband.

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court stated that the facts had a 'lot of equitable appeal'. The court was of the opinion that during the time plaintiff and Oliver Thomas were separated the family relationship ceased to exist between them; that for all practical purposes the marriage between them had ceased to exist and that, all that remained was the 'mere naked relationship' of husband and wife. The court further held that the old-age assistance furnished her husband was of no benefit to plaintiff and that as she was under no legal duty to support him there could be no valid lien placed upon her property for aid furnished to him." Thomas v. State, 241 Iowa 1072, 1075, 44 N.W.2d 410, 411 (1950).

Although Judge Musmanno of the Supreme Court of Pennsylvania is often given to dramatic overstatement, I agree with his point of view as stated in this paragraph from Department of Public Assistance v. Sharago, 381 Pa. 74, 112 A.2d 162, 163 (1955): "The Commonwealth of Pennsylvania seeks in this case . . . to collect from . . . a 72 year-old widow, $1,181.74 which admittedly she never received, never contracted to pay, and benefits from which never entered her sphere of enjoyment. For the State to impose such a palpable injustice requires specific authority in law which cannot be found in all the books of Pennsylvania."

The imposition of liability as an exercise of power without justice is illustrated by Gilpin v. Gilpin, 197 Misc. 319, 94 N.Y.S.2d 706 (N.Y. Dom. Rel. Ct. 1950). The defendant, without knowing it, had married a woman already married. She became pregnant (so he says) without the husband's help. The court ordered him to pay $150.00 for medical expenses in connection with the birth without investigating the facts about paternity. The defendant's argument that he was responsible for neither the wife nor the child was brushed aside with the statement: "After all, the husband did marry the mother even if he was deceived."

139. *E.g.*, in Wisconsin whether the patient or her husband should bear the cost of care in a public institution is a matter of judgment by the officials of government in each case. *In re* Sykora's Guardianship, 271 Wis. 455, 74 N.W. 2d 164 (1956). See also, the opinion of Judge Sicker in Posner v. Posner, 201 Misc. 432, 110 N.Y.S.2d 515 (N.Y. Dom. Rel. Ct. 1952). The Judge suggests that should a husband be indigent, a wife does not necessarily bear the whole burden of his support to the exclusion of the children. He would proceed simultaneously against the wife and the children so that a fair order can be made taking into account all the circumstances. See the flexible scheme set forth in Mallatt v. Luihn, 294 P.2d 871 (Ore. 1956).

140. These are the facts in Posner v. Posner, 110 N.Y.S.2d 515 (N.Y. Dom. Rel. Ct. 1952).

Remedies

A wife living with her husband has almost no remedy to enforce her right to support except her personal persuasiveness. We must say "almost" because both self help and pledging the husband's credit for the purchase of necessaries are, theoretically, means of enforcing a wife's rights against a spouse with whom she lives.

A woman may take matters into her own hands and use the husband's money to discharge his obligation. For this purpose, she may use all the money from a note owned partly by him,[141] withdraw all the funds in a joint checking account[142] or spend the proceeds of property he has empowered her to sell.[143] In few cases will this way of getting support money be very helpful for very long.

The classic remedy is the wife's power to pledge her husband's credit for her necessaries. There is a great deal of confusion surrounding this remedy which ought to be dispelled.[144] Unfortunately courts often refer to this power as an "agency of necessity" and much of the language is in terms of the agency law. We should first point out that a husband-wife relationship often involves a true agency of one spouse acting for the other as might be the case if two persons, not married, were living together in a common household. The apparent authority of a wife acting for a husband; the position of a husband as an undisclosed principal; the effect of a husband's ratification of a wife's purchases are all agency problems as much as any but they have little to do with the question of a wife's right to support. One important difference between the two matters lies in the fact that a husband can terminate the agency relationship by notifying those who deal with his wife but not so her power to pledge his credit to supply necessaries for her support. It should be noted that, in a given transaction, credit may be extended to the wife personally rather than to the husband. Should that be the case the seller can look only to the wife for payment.[145]

Only the main outlines of the husband's liability to suppliers of necessaries need be given because it is not an important means of enforcing a husband's support duty. The reason is quite simple. A husband may have defenses against the supplier which are difficult for the business man to discover. Furthermore, even if a husband is

141. Whittle v. Whittle, 5 Cal. App. 696, 91 Pac. 170 (1907).
142. Kaufmann v. Kaufmann, 166 Pa. Super. 6, 70 A.2d 481 (1950).
143. Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871 (1950).
144. Smedly v. Sweeten, 11 N.J. Super. 39, 77 A.2d 489 (App. Div. 1950), is a helpful discussion. See also Ott v. Hentall, 70 N.H. 231, 47 Atl. 80 (1900). Johnson v. Briscoe, 104 Mo. App. 493, 79 S.W. 498 (1904), is a good example of a true husband-wife agency problem.
145. *E.g.*, Mather-Groover Co. v. Roberts, 54 Ga. App. 398, 187 S.E. 913 (1936); Mathews Furniture Co. v. La Bella, 44 So. 2d 160 (La. 1950); Saks & Co. v. Barrett, 109 N.J.L. 42, 160 Atl. 405 (1932).

liable, the merchant may be able to convince him only after bringing an expensive action in court.

A husband may defend on the ground that his wife is wrongfully separated from him, a question beyond the competence of most credit departments.[146] He is liable for her necessaries only if he has not already provided them.[147] A merchant will not readily be able to tell if a wife is buying her first or second pair of shoes. In addition, the seller must guess at how appropriate the purchase is. The husband is liable only for "necessaries" a term which should be distinguished from "necessities." "Necessaries" are those items appropriate to wife's station in life.[148] What a wife may properly buy and require her husband to pay for will vary greatly from one marriage to another. Perhaps the point can be made by reverting to a relatively recent New York case holding that whale meat and caviar are necessaries because "in the gilded world wherein the Benjamins moved, whale meat and caviar may very well have been regarded as plain but honorable fare."[149]

Not many merchants will supply necessaries to a wife over a period of time in return for a doubtful claim against her husband, but a member of the wife's family or a friend may be willing to provide funds for her support. If so, the amounts spent can be recovered from the husband provided, again, that the money was spent for necessaries, that he has not supplied them, that he was liable to do so and, further, that the sums were not intended as a gift.[150]

In some states a wife, separated from her husband, who has the estate or the earnings to provide her own maintenance may recoup expenditures in an action against her husband. This result has been reached without the aid of a specific statute on the theory that the Married Women's Acts of the nineteenth century have extinguished the husband's claim to his wife's earnings and have given

146. *E.g.*, Cowell v. Phillips, 17 R.I. 188, 20 Atl. 933 (1890); Gimbel Bros. v. Adams, 178 Wis. 590, 190 N.W. 357 (1922).

147. Keller v. Phillips, 39 N.Y. 351 (1868), is a leading case. The merchant's position was made difficult by placing upon him the burden of proving the failure to provide. See also, *e.g.*, Guthrie v. Bobo, 32 Ala. 355, 26 So. 2d 203 (1946); Saks & Co. v. Bennett, 12 N.J. Super. 316, 79 A.2d 479 (1951); McCreery & Co. v. Martin, 84 N.J.L. 626, 87 Atl. 433 (1913).

148. The opinion in Woodward & Perkins v. Barnes, 43 Vt. 330 (1871), contains a typical statement defining "necessaries." See also Labadie v. Henry, 132 Okla. 252, 270 Pac. 57 (1928); Hinton Dept. Co. v. Lilly, 105 W. Va. 126, 141 S.E. 629 (1928).

149. Bloomingdale Bros., Inc. v. Benjamin, 200 Misc. 1108, 1110, 112 N.Y.S.2d 33, 35 (N.Y. City Ct. 1951).

The price of a lawyer to defend a murder case on appeal after conviction has been held a "necessary." Read v. Read, 119 Colo. 278, 202 P.2d 953 (1949).

150. *E.g.*, Kenyon v. Farris, 47 Conn. 510 (1880). Skinner v. Tirrell, 159 Mass. 474, 34 N.E. 692 (1893), is the leading case denying recovery for money advanced a wife. The *Skinner* decision has not been widely followed. In Taylor v. Brown, 195 Misc. 840, 91 N.Y.S.2d 76 (Syracuse Mun. Ct. 1949), a wife's sister failed to recover because the court believed that she did not extend credit to the husband but made a gift to the wife.

a wife the power to sue her husband.[151] The remedy has also been created by legislation.[152]

To recover money spent, of course, is not at all satisfactory relief if the wife has no money to spend nor someone who is willing to advance the funds. Unless the husband is cooperative new actions must be brought periodically. A court, faced with a claim based on a part of a year's expenditure, will have difficulty in determining the amount which would be proper to spend on annual basis. In *Benjamin v. Benjamin*[153] the New York court attempted to control the annual rate of expenditure by announcing, in an opinion allowing recovery for a wife's expenses during four months, that a certain sum would be "approximately the maximum that would be recoverable for necessaries in any one year."[154]

For most women entitled to support yet not wishing a divorce the only truly practical remedy is an order providing for periodic payments.

Some way of providing weekly or monthly payments to a wife is probably available in every state although the particular method is not the same everywhere. Most states which have considered the question will grant separate support under the general powers of a court of equity.[155] The others provide the remedy by statute.

Courts, giving relief by invoking inherent equity powers, found little helpful precedent in the English materials because in England matrimonial matters were in the charge of the ecclesiastical courts. Those American courts permitting the equitable proceeding have emphasized the separated wife's inadequate remedy at law, as well as the multiplicity of suits necessary to gain her objective, as grounds for granting a support order. To these reasons have been added the points that (1) a wronged woman should not be forced to resort to divorce with attendant alimony and (2) a husband has a duty of a high moral order which he should not be permitted to evade.

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151. "The plainest principles of justice require that a wife should have some adequate legal redress upon such a state of facts as that set forth in this complaint, and the beneficial character of our legislation removing the former disabilities of married women could not be evidenced more forcibly than it is in its application to the present case." DeBrauwere v. DeBrauwere, 203 N.Y. 460, 461, 96 N.E. 722, 723 (1911). In Manufacturers Trust Co. v. Gray, 278 N.Y. 380, 16 N.E.2d 373 (1938), it was held that the committee of an insane wife's estate could recover for necessaries provided by the estate after the adjudication of insanity although when possessed of her reason she had apparently preferred to provide for herself without looking to the husband for support. See also, Sodowsky v. Sodowsky, 51 Okla. 689, 152 Pac. 390 (1915); Adler v. Adler, 171 Pa. Super. 508, 90 A.2d 389 (1952).

152. *E.g.*, CONN. GEN. STAT. § 7308 (1949).

153. 283 App. Div. 455, 128 N.Y.S.2d 401 (1st Dep't 1954).

154. *Id.* at 458, 128 N.Y.S.2d at 404.

155. Galland v. Galland, 38 Cal. 265 (1869), is a leading case. See also, Radermacher v. Radermacher, 61 Idaho 261, 100 P.2d 955 (1940); Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941); Lang v. Lang, 70 W. Va. 205, 73 S.E. 716 (1912). The cases are collected in Annot., 141 A.L.R. 399 (1942).

The inherent power of equity may be recognized even though a statute providing for a similar statutory action exists[156] or there is a provision making the failure to support a crime.[157] In at least one state, repeal of the statutory limited divorce did not destroy the existence of the equitable suit for separate support.[158] It has been held that a support order can be given only in a proceeding directed to that end alone.[159] In others, if either party seeks a divorce (everywhere an action authorized by statute only), a maintenance order may be made in the same action although a divorce is denied.[160]

Apart from express statutory provisions the courts have no power to give a wife any portion of the husband's property by way of separate maintenance.[161] The order does not terminate the marital status and a wife has no interest save dower in her husband's accumulated separate property. Furthermore, a conveyance of property to the wife might make reconciliation more difficult. Some courts have permitted the use and occupancy of real property to be decreed the wife[162] while others have not even permitted that remedy. In the latter case the rule is easy to circumvent. In *Radermacher v. Radermacher*,[163] the court admitted that no power existed to provide a wife with the family house in which to live but noted that she was in possession of it and indicated that if the husband repossessed it the amount of the payments to his wife would be increased. Also the amounts given a wife may be made a lien on the real property of the husband.

The award given either in equity or under a separate support statute will be enforced by the contempt power. The danger of unfair harassment by contempt proceedings has been given as a reason for refusing to enter a support order against a husband without means.[164] The duty to provide support is not a debt within the meaning of constitutional provisions forbidding imprisonment for debt; therefore the person of a non-complying husband may be attached.[165] The obliga-

156. *E.g.*, Du Pont v. Du Pont, 32 Del. Ch. 130, 79 A.2d 680 (1951).
157. *E.g.*, Heflin v. Heflin, 177 Va. 385, 14 S.E.2d 317 (1941).
158. Barich v. Barich, 201 Minn. 34, 275 N.W. 421 (1937).
159. *E.g.*, the trial court in Buss v. Buss, 252 Wis. 500, 32 N.W.2d 253 (1948).
160. *E.g.*, Sauvageau v. Sauvageau, 59 Idaho 190, 81 P.2d 731 (1938).
161. *E.g.*, Rowe v. Rowe, 256 Ala. 491, 55 So. 2d 749 (1951); Brown v. Brown, 204 Md. 197, 103 A.2d 856 (1954).
162. *E.g.*, Polander v. Polander, 338 Mich. 646, 62 N.W.2d 449 (1954).
163. 61 Idaho 261, 100 P.2d 955 (1940).
164. Roberts v. Roberts, 22 Tenn. App. 651, 125 S.W.2d 199 (W.S. 1938). No decree will be granted unless the husband fails to support in fact. Mere nervousness about future conduct is not a sufficient ground. Bingham v. Bingham, 325 Mo. 596, 29 S.W.2d 99 (1930). On this point see also Mark v. Mark, 145 Ohio St. 301, 61 N.E.2d 595 (1945). *But see* Morden v. Morden, 119 Wash. 176, 205 Pac. 377 (1922).
165. Commonwealth v. Berfield, 160 Pa. Super. 438, 51 A.2d 523 (1947), contains a concise summary of a wife's position in enforcing a support order. See also Annot., 30 A.L.R. 130 (1924).

tion under a support order is not discharged by bankruptcy nor as a general matter is a wife prevented from enforcing her support claim by invading a spendthrift trust.[166] A wife has been permitted to garnish a pension fund protected by legislation against the claims of "creditors" but not a similar fund exempt from garnishment "or any other process."[167] She, of course, can take advantage of the statutes which permit fraudulent conveyances to be set aside.[168]

Some courts have found problems in awarding support *pendente lite* during the course of matrimonial action. The right to support order during a period of matrimonial litigation should follow from the general right to support but in some states the court can give an order only if authorized by statute.[169] In contrast with the obligation under the general duty of support, maintenance pendente lite is often given only when the wife is without means.[170]

In theory, the amount of a periodic award is, ordinarily, for the discretion of the trial court. The appellate courts repeat over and over again that the trial judge has the best opportunity to make a judgment on the basis of the detail which he has heard personally. A reversal is proper only upon showing an abuse of discretion or at least after giving proper "weight" to the exercise of discretion by the court below.[171] Yet appellate courts do reverse or modify with considerable frequency. The wisdom of appellate modification of a decree is sometimes raised in opinions but most appellate courts apparently feel free to increase or decrease an award on the basis of the record on appeal.[172] The difficulty of judging the proper amount using only the printed testimony may be a less important consideration than the delay of remand with the attendant possibility of a second appeal.[173]

In every state but one the failure to support a wife may be a crime. These statutes vary somewhat in the definition of the crime. The Uniform Desertion and Non-Support Act proscribes deserting and

166. *In re* Moorehead's Estate, 289 Pa. 542, 137 Atl. 802 (1927), is the leading case.

167. *Compare* Zwingmann v. Zwingmann, 150 App. Div. 358, 134 N.Y. Supp. 1077 (2d Dep't 1912), *with* Commonwealth v. Mooney, 172 Pa. Super. 30, 92 A.2d 258 (1952).

168. Murray v. Murray, 115 Cal. 266, 47 Pac. 37 (1896).

169. See Hodous v. Hodous, 76 N.D. 392, 36 N.W.2d 554 (1949), limiting the power to order payments *pendente lite* to those specifically authorized by statute.

170. Jennings v. Jennings, 78 R.I. 139, 79 A.2d 920 (1951), tells of an interesting argument under a Rhode Island statute.

171. *E.g.*, Cairnes v. Cairnes, 211 Ala. 342, 100 So. 317 (1924); Coe v. Coe, 313 Mass. 232, 46 N.E.2d 1017 (1943).

172. *E.g.*, Brown v. Brown, 204 Md. 197, 103 A.2d 856 (1954) (appellate court increased an award from $50.00 to $100.00 per week); Gross v. Gross, 22 N.J. Super. 407, 92 A.2d 71 (App. Div. 1952) (award increased from $125.00 to $175.00 per week). In Waldrop v. Waldrop, 222 Ala. 625, 134 So. 1 (1931), the appellate court reduced an order from $60.00 to $50.00 per month.

173. The majority and dissenting opinions in Du Pont v. Du Pont, 103 A.2d 234 (Del. 1954), consider the question of the appellate role very carefully. The opinions are worth reading.

willfully neglecting or refusing without just cause, to support and maintain a wife in necessitous circumstances.[174] The impact of the criminal law will not be of much help to enforce support duties in many cases if the crime only embraces the failure to support a wife reduced to destitution. Many states, in recognition of this limitation, do not confine the criminal offense to such circumstances.[175] The requirement that the husband's neglect be "willfull" gives a non-supporting spouse his first line of defense. Many prosecutors have tripped on that hurdle.[176]

The criminal penalty does not, of itself, produce any money for an unsupported wife. The statutes have attacked this problem in several ways. Typically, the courts are given the power to suspend the sentence and to put the defendant on probation upon the condition that he pay his wife a certain sum for her support. The promise of the defendant is often guaranteed by the posting of a bond.[177] If the defendant husband must be jailed or imprisoned the state may be required to turn over to the wife a certain sum for each day of labor performed by the prisoner.[178]

As a practical matter these criminal proceedings are ordinarily employed in support problems of persons on the lowest rung of the economic ladder. For people in such circumstances the remedy has some useful features. The criminal penalty can be imposed without any separation of the husband and wife. Furthermore, the wife need not hire a lawyer to begin a private action; she will be able to use the services of the court prosecutor. In many places, the courts may require the defendant's payments be made to a government agency rather than the wife herself. If so she need not call upon a lawyer to enforce payment as she would in a private action.[179] The dereliction of the husband is brought to the attention of the authorities immediately.

174. The Uniform Act, now withdrawn by the Commissioners on Uniform State Laws, is the subject of 10 U.L.A. (1922), a volume still valuable for research into the criminal law of desertion and non-support. The volume counts 24 states as having some form of the Uniform Act. The various forms which the Uniform Act takes in the 24 states and appellate court cases arising under the various acts are found in 10 U.L.A. (1922), which provides the principal documentation for the text statements respecting the crimmal sanction.

175. An example is Maryland. Ewell v. State, 207 Md. 288, 114 A.2d 66 (1955), is recommended as an instructive opinion on the subject of criminal non-support.

176. *E.g.*, State v. Thurmes, 233 Minn. 153, 46 N.W.2d 258 (1951).

177. It has been held that, upon the husband's default and imprisonment the bond may be taken not only to pay sums past due but also to make periodic payments until the bond has been spent. The person liable on the undertaking unsuccessfully argued that two payments were thus being made: one by the imprisonment, the other by the bond. People v. Faculak, 325 Mich. 56, 37 N.W.2d 709 (1949).

178. See § 7 of the UNIFORM DESERTION AND NON-SUPPORT ACT, 10 U.L.A. 77-83 (1922), and 10 U.L.A. 43-44 (Cum. Supp. 1955).

179. Boswell, *Probation in Non-support Cases, Crime Prevention Through Law*, 1952 N.P.P.A. YEARBOOK 156, tells of the work of enforcement in Marion County, Indiana (Indianapolis).

Because these proceedings are criminal, the protective rules of the criminal law respecting such things as the sufficiency of the accusation, the burden of proof, the presumption of innocence and the right to jury trial (if the offense is, in a given state, within the class of those entitled to a jury trial) are usually available to the defendant.[180]

Proposals for bettering the remedial scheme have been directed to these principal objectives: (1) to improve enforcement procedures, (2) to improve techniques for getting at the facts, (3) to set up a family court, (4) to take into account the fact that a support proceeding is evidence of the breakdown of marital relations and not simply a matter of economics.

Enforcement procedures have been improved. The Uniform Reciprocal Non-Support Acts have greatly facilitated the collection of support orders across state lines. A detailed description of this legislation is beyond the scope of this article.[181] Suffice it to say the act permits a wife to start non-support proceedings in her home state and the husband will be compelled to respond in his. A husband who successfully runs away is becoming a rare bird. One of the great intrastate problems is how to secure payment for a wife without making it necessary to get a lawyer and begin contempt proceedings (which can be long drawn out and costly) if her husband is in default. In some places payment is ordered not to the wife personally but to a state or city agency so the enforcement can be quick and inexpensive.[182] In this way also, the record of payments made is apt to be accurate.

Getting at the facts in family litigation is exceedingly difficult if evidence gathering is left to the parties. Such lawsuits are almost sure to be charged with emotion and therefore the parties are not likely to present the court a balanced picture. Important facts can often be concealed by one party from the other. Some states have given the courts the means of making an independent investigation by authorizing the employment of social workers to make case studies in support matters.[183] Presumably the social workers can

180. *E.g.*, State v. Thurmes, 233 Minn. 153, 46 N.W.2d 258 (1951) (proof beyond reasonable doubt); May v. State, 153 Neb. 369, 44 N.W.2d 636 (1950) (sufficiency of accusation and accuracy of charge to the jury). The *May* case actually was a prosecution for failure to support a child rather than a wife. However, the crimes are practically identical save for the person in need of support.

181. See Brockelbank, *Multiple-State Enforcement of Family Support*, 2 ST. LOUIS U.L.J. 12 (1952).

182. See Boswell, *supra* note 179.

183. "Upon request by the court, state police, local police or probation officers shall make an investigation in relation to any proceeding hereunder and report to the court. Every such report shall be in writing and shall become part of the records of such proceedings." MASS. ANN. LAWS c. 209, § 32 (1955). See also N.Y.C. DOM. REL. CT. ACT §§ 113-17. Gelhorn's fine study, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY, (1954), reaches the conclusion, after a careful review of the facts, that "the Domestic Relations

make a useful evaluation of the total family picture so judges will be better able to decide whether an award should be made and, if so, how much should be given.

Support problems are closely related to many other legal questions of domestic relations. Family litigation can take many forms and give rise to a set of legally different problems that ought to be cared for in the same court. As many as possible of the legal problems related to intrafamily troubles ought to be brought before the same court. If assault and battery between husband and wife is a matter for one court and non-support for another and divorce for a third, *et cetera,* a single case of family disorganization and disharmony may be completely fragmentized by the court system. Proposals for family courts with adequate facilities for social work assistance and with a wide scope of jurisdiction have often been made.[184] In a few places the proposals have become the reality.

A family court with broad jurisdiction could hope to get at the basic reasons for family trouble. In such a court a support problem would appear as a part of a total picture. In a few places family courts with conciliation services have been set up and, in those places a significant number of successes have been reported.[185] Setting up conciliation services may run into constitutional difficulties. For example, Illinois has made two attempts to but the Illinois Supreme Court has blocked both efforts on state constitutional grounds.[186] There would seem to be an especially strong argument for giving advice and guidance in a support proceeding. While it is true that in most cases the marriage is in serious danger yet it has not been destroyed completely. The irrevocable step has not been taken. A petition for a support order should be a signal for a thorough investigation into the situation of the parties, not only to determine what the wife ought to have but also what, if anything, can be done to save the family.

Court has been asked to perform a potentially great public service—and has been denied the means of doing so." *Id.* at 466.

184. An especially good factual study accompanied by a family court proposal is Gelhorn, *op. cit. supra* note 183. See also NEW YORK LEGISLATIVE DOC. No. 18, REPORT OF THE TEMPORARY COMMISSION ON THE COURTS 50-69 (1956).

185. Efforts at conciliation are directed by N.Y.C. DOM. REL. CT. ACT § 118. The results of conciliation attempts in Seattle, Los Angeles, Toledo and Cleveland are summarized in NEW YORK LEGISLATIVE DOC. No. 18, *op. cit. supra* note 184, at 65-66.

186. People *ex rel.* Christiansen v. Connell, 2 Ill. 2d 332, 118 N.E.2d 262 (1954); People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950). The Illinois legislature made another attempt at setting up conciliation procedures in the 1955 session.