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A Survey of Florida Alimony Since Passage of the 1971 Dissolution of Marriage Act

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process. The mere existence of the rule will call the doctrine to the attention of both judges and trial attorneys.[243] Rule 201(d), which provides for mandatory notice on request by a party, should result in increased applications to the courts for the taking of judicial notice. Additionally, Rule 201(c) permits the court to take judicial notice on its own initiative. The settlement of the Morgan-Wigmore controversy and the provision of adequate procedural safeguards should alleviate the fears of judges who previously approached the doctrine with caution.[244] Furthermore, Rule 201 should promote increased use of the doctrine in the states by providing guidelines for state courts and by encouraging codification of state judicial notice principles.

The failure to codify judicial notice of legislative facts, however, may have a detrimental impact on the role of judicial notice. Although the Advisory Committee intended courts to continue noticing legislative facts as before, judges may nevertheless have a tendency to apply to legislative facts the standards for adjudicative facts set forth in Rule 201. The result would be restricted notice of legislative facts, which would inhibit the judicial reasoning process, or increased notice of legislative facts without explicit acknowledgment, which would deprive the parties of even minimal procedural safeguards. To avoid both of these undesirable results and to ensure uniformity of practice within the federal court system, Rule 201 should be amended to include judicial notice of legislative facts.

The codification of judicial notice represented by Rule 201 is a significant step toward the needed expansion of the law of judicial notice. The rule refines the traditional doctrine by introducing into practice the distinction between adjudicative and legislative facts. Employment of the suggested approach for making the distinction in unclear cases would eliminate any confusion that might otherwise arise from the courts' application of this new approach. A provision for instructing the jury in criminal cases to accept as conclusive judicially noticed facts and the codification of notice of legislative facts would further ensure attainment of the meritorious objectives of judicial notice: prevention of flagrant error and promotion of trial expediency.

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A SURVEY OF FLORIDA ALIMONY SINCE PASSAGE OF THE 1971 DISSOLUTION OF MARRIAGE ACT

A radical modification of Florida's divorce law occurred with the enactment of the Dissolution of Marriage Act in 1971,[1] which provides for what is commonly termed no-fault divorce. The purpose of this note is to survey and analyze alimony awards in the state of Florida since the passage of

243. Bush, Jr., *Article II—Judicial Notice of Adjudicative Facts*, 23 FED. INS. COUN. Q. 14, 20 (Spring 1973).

244. Hefflinger, *Proposed Rule Broadens Scope of Judicial Notice*, 53 NEB. L. REV. 333, 345-46 (1974).

1. FLA. STAT. §§61 *et seq.* (1975).

this act.[2] This note will consider alimony awarded in the final judgment and will not cover alimony pendente lite[3] nor alimony unconnected with divorce.[4] After a brief history of alimony in the state, the reported decisions since the Dissolution of Marriage Act will be examined with attention to the established general principles of divorce law and the criteria used to determine alimony. Rehabilitative alimony[5] and lump sum alimony,[6] particularly the award of the marital home as lump sum alimony, will be considered, as well as setoffs against alimony payments and the consideration of adultery in determining alimony. Finally, some proposed statutory amendments to the alimony provisions of the act will be discussed.

Brief History of Alimony in Florida to 1971

Prior to 1971, alimony was awarded exclusively to women[7] and almost as a matter of right.[8] Passed by the territorial legislature in 1828, the original Florida alimony act[9] provided that the determination of alimony rested in the discretion of the chancellor, with the single exception that alimony could not be given to an adulterous wife.[10] The Florida supreme court decided at an early date that the right to grant alimony was an incident to the power to grant divorces.[11] Alimony incident to divorce, or permanent alimony, was defined by the supreme court in *Philan v. Philan*[12] as "a continuous allotment of sums payable at regular periods for [the wife's] support from year to year."[13] The factors considered in determining the amount of this periodic payment were the actual income of the husband and his ability to pay.[14] At

2. For the views of a Florida circuit judge on alimony and other incidents of divorce just prior to the enactment of the new act, see Waybright, *The Silver of Hatred: Financial Aspects of Divorce*, 44 Fla. B.J. 134 (1970).

3. Alimony pendente lite is temporary alimony that is awarded pending final judgment or appeal.

4. Alimony unconnected with divorce is alimony awarded to enforce the husband's duty to support his wife when the parties are still married but are separated.

5. See text accompanying notes 116-140 *infra*.

6. See note 141 *infra*.

7. In cases of insanity, however, the plaintiff requesting the divorce was required to provide for the maintenance and care of the insane defendant regardless of sex, although this support was not termed alimony. Fla. Laws 1969, ch. 69-142, §2, at 676.

8. Brown v. Brown, 300 So. 2d 719, 722 (1st D.C.A. Fla. 1974).

9. Fla. Laws 1828, sess. 7, §§7, 12, at 12, 13.

10. *Id.* This adultery provision remained in the statute unchanged until 1971. In that same year, in Pacheco v. Pacheco, 246 So. 2d 778 (Fla. 1971), it was challenged as discriminatory by modern standards. In upholding the constitutionality of the provision, the supreme court noted that alimony upon divorce *a vinculo* (dissolution of marriage) in American law was patterned after the English ecclesiastical divorce *a mensa et thoro* (legal separation) since there was no common law power to grant alimony. Therefore, the "right" to alimony as an incident to divorce *a vinculo* exists only as granted by statute. *Id.* at 780-81. *See also* H. Clark, The Law of Domestic Relations in the United States §14 (1968).

11. Chaires v. Chaires, 10 Fla. 308, 312 (1863).

12. 12 Fla. 449 (1868).

13. *Id.* at 456.

14. *Id.*

this time, the court maintained that a specific sum or portion of the husband's estate given outright to the wife did not constitute alimony,[15] and the nature of permanent alimony, with respect to the legal liability of the husband, was an obligation or duty independent of the marital relationship.[16]

The initial appearance in Florida of the doctrine of special equity occurred in 1919,[17] when the supreme court awarded a wife reasonable allowance for maintenance and support in recognition of her special equity in the husband's property.[18] The supreme court subsequently[19] established a distinction between special equity and alimony. A special equity was described as a vested equitable property right that the wife is not required to forfeit and which does not constitute alimony.[20] This distinction was important because it allowed the court to make an award to an adulterous wife who was statutorily precluded from alimony.[21]

In 1947 the legislature amended the alimony statute to allow lump sum alimony,[22] recognizing a form of permanent alimony previously rejected by the supreme court.[23] The court complied with the statute by allowing lump sum alimony but also reaffirmed the *Philan* definition of permanent alimony.[24] In the same decision, the court established two criteria for determining an award of permanent alimony: the needs of the wife and the financial ability of the husband to supply those needs.[25] By this time the court also began to recognize the theories that marriage was a partnership to which both spouses contributed and that alimony was a method of reimbursing the wife to prevent her from becoming a public charge.[26] Furthermore, the change occurring in the societal concept of alimony was reflected in *Kahn v. Kahn*,[27] in which the supreme court introduced the ideas embodied in the concept of rehabilitative alimony.[28]

15. *Id.*

16. Duss v. Duss, 92 Fla. 1081, 111 So. 382, 385 (1927).

17. Carlton v. Carlton, 78 Fla. 252, 83 So. 87 (1919).

18. *Id.* at 254, 83 So. at 88. This award reversed a denial of alimony and apparently was meant to be alimony. Special equity is an interest in property due to substantial contributions to its acquisition and preservation of funds and services above and beyond the performance of ordinary marital duties. Heath v. Heath, 103 Fla. 1071, 138 So. 796, 798 (1932). *See generally* Note, *Special Equities in Dissolution Proceedings*, 27 U. MIAMI L. REV. 177 (1972). This doctrine was initially applied solely to wives but later was also applied to husbands. *See* Burns v. Burns, 174 So. 2d 432 (2d D.C.A. Fla. 1965); Francis v. Francis, 133 Fla. 495, 182 So. 833 (1938).

19. Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932).

20. *Id.* at 1074, 138 So. at 797.

21. *Id.* at 1075, 138 So. at 797.

22. Fla. Laws 1947, ch. 23,894, §1, at 539. The section was amended by adding a final sentence: "In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payments in a lump sum."

23. See text accompanying note 15 *supra*.

24. Welsh v. Welsh, 160 Fla. 380, 35 So. 2d 6, 8 (1948).

25. *Id.* at 384, 35 So. 2d at 9.

26. Chestnut v. Chestnut, 160 Fla. 83, 33 So. 2d 730, 731 (1948).

27. 78 So. 2d 367 (Fla. 1955).

28. While the court discussed rehabilitative concepts in its assessment of the case, it did not grant rehabilitative alimony; instead, it affirmed the portion of the decree denying alimony. *Id.* at 368-69.

Sixteen years after the introduction of lump sum alimony, the legislature amended the statute to allow concurrent awards of lump sum and periodic alimony.[29] Prior to this amendment, the courts had permitted the award only of one or the other.[30] A further refinement of lump sum alimony occurred in *Ortiz v. Ortiz*.[31] Instead of awarding permanent alimony, the court provided for lump sum alimony payable in monthly installments in order to preserve the wife's right to alimony payments against the husband's estate.[32] The pertinent factors considered by the court in determining the alimony award were the needs of the wife, the ability of the husband to respond, and the standard of living during the marriage.[33]

In 1971 the Dissolution of Marriage Act, popularly known as the no-fault divorce act,[34] was passed by the Florida legislature, abolishing the former fault grounds for divorce and the relevant defenses.[35] This act made several significant changes pertinent to alimony.[36] It introduced rehabilitative alimony into the statutory law and, in accordance with the 1968 amendment to the Florida Constitution,[37] permitted the award of alimony to either spouse.[38] It also provided that adultery might be considered in the determination of alimony but removed the absolute denial of alimony to an adulterous party.[39] The act further provided that any factor necessary to achieve equity and

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29. Fla. Laws 1963, ch. 63-145, §1, at 306. The amendment added to the end of the last sentence the phrase "or both, in its discretion." This amendment was modified in 1967 but not substantively. Fla. Laws 1967, ch. 67-254, §16, at 608. This modification, *inter alia*, deleted the phrase "in its discretion" at the end of the last sentence and renumbered the former §65.08 as §61.08.

30. Gordon v. Gordon, 204 So. 2d 734, 735 (3d D.C.A. Fla. 1967).

31. 211 So. 2d 243 (3d D.C.A. Fla. 1968).

32. *Id.* at 244. The award provided for a lump sum of $48,400 to be paid in installments of $400 for 121 months.

33. *Id.* at 245.

34. FLA. STAT. §61 (1975). This statute was modeled after the Uniform Marriage and Divorce Act. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MARRIAGE AND DIVORCE ACT §§302(2), 305 (1971). For an evaluation of the no-fault concept, see FLORIDA FAMILY LAW ch. 21 (Fla. Bar Continuing Legal Education 2d ed. 1972); Honigman, *What "No-Fault" Means to Divorce*, 51 MICH. STATE B.J. 16 (1972).

35. FLA. STAT. §§61.044, 61.052 (1975). For discussion of the Florida no-fault act and its effect, see Murray, *Family Law: Survey of Florida Law*, 28 U. MIAMI L. REV. 330 (1974); Murray, *Family Law: Survey of Florida Law*, 26 U. MIAMI L. REV. 566 (1972); Church, *Faults in Florida No-Fault Divorce*, 45 FLA. B.J. 568 (1971).

36. FLA. STAT. §61.08 (1975).

37. FLA. CONST. art. X, §5 provides: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal . . . ."

38. The previous statute provided that "the court shall make such orders about maintenance, alimony and suit money of the wife, or any allowance to be made to her . . . as from the circumstances of the parties and nature of the case is equitable. . . ." Fla. Laws 1967, ch. 67-254, §16, at 608. The new statute provides that "the court may grant alimony to either party . . . ." FLA. STAT. §61.08(1) (1975). Despite this change, the vast majority of cases to date have continued to award alimony only to the wife. For the few exceptions, see text accompanying notes 168-171 *infra*.

39. *See generally*, Commentary, *Alimony in Florida: No-Fault Stops at the Courthouse Door*, 28 U. FLA. L. REV. 521 (1976).

justice could be considered by the court in determining alimony.[40] The constitutionality of the act was upheld by the supreme court in 1973.[41]

District Courts of Appeal and Supreme Court Decisions

Established General Principles

A survey of district courts of appeal and supreme court cases since the passage of the Dissolution of Marriage Act reveals certain basic principles that are uniformly accepted as "settled law." As provided by statute,[42] the determination of alimony is within the sound discretion of the chancellor, and this discretion is very broad in ascertaining both the amount and the most equitable arrangement of alimony.[43] The decision of the trial court is presumed correct and should be disturbed only when there is an abuse of discretion by the chancellor, or the decision is clearly erroneous on the face of the record.[44] On appeal the burden rests on the party seeking to modify the award to demonstrate either abuse of discretion or error on the record.[45]

Another well established principle is also authorized by the current statute.[46] When the trial court has retained jurisdiction, an alimony award can be modified if such action is justified by a showing of change in circumstances after the effective date of the final judgment.[47] A recent Fourth District decision, *Wilson v. Wilson*,[48] emphasized that failure to show a change in circumstances will result in a denial of relief. At the time of adjudication the wife had no income or income production ability, but the trial court awarded alimony for only four years on the assumption that she could rehabilitate herself. In requiring that she be given permanent periodic alimony, the district court stressed that under the original alimony award, she could not petition the court for relief if she failed to rehabilitate herself because she would be unable to show a change in circumstances.[49]

The requisite change of circumstances must be substantial,[50] and an

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40. Fla. Stat. §61.08(2) (1975).

41. Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973). The court also determined that the act applied retroactively to marriages already in existence at its effective date. *Id.* at 273-74.

42. Fla. Stat. §61.08(2) (1975).

43. *See, e.g.*, Bosem v. Bosem, 279 So. 2d 863, 864 (Fla. 1973); King v. King, 271 So. 2d 159, 160 (1st D.C.A. Fla. 1973); Weston v. Weston, 251 So. 2d 315, 315 (4th D.C.A. Fla. 1971).

44. *See, e.g.*, Kennedy v. Kennedy, 303 So. 2d 629, 629 (Fla. 1974); McGarry v. McGarry, 247 So. 2d 13, 14 (2d D.C.A. Fla. 1971); Fishman v. Fishman, 245 So. 2d 258, 258 (3d D.C.A. Fla. 1971).

45. *See, e.g.*, Goldstein v. Goldstein, 310 So. 2d 361, 363 (3d D.C.A. Fla. 1975); Schultz v. Schultz, 290 So. 2d 146, 147 (2d D.C.A. Fla. 1974); Singer v. Singer, 262 So. 2d 731, 733 (3d D.C.A. Fla. 1972).

46. Fla. Stat. §61.14 (1975).

47. *See, e.g.*, Bock v. Bock, 302 So. 2d 774 (2d D.C.A. Fla. 1974); Plevy v. Plevy, 295 So. 2d 139 (4th D.C.A. Fla 1974); Bloemendaal v. Bloemendaal, 275 So. 2d 30 (4th D.C.A. Fla. 1973).

48. 279 So. 2d 893 (4th D.C.A. Fla. 1973).

49. *Id.* at 895.

50. Calhoun v. Calhoun, 292 So. 2d 624, 625 (4th D.C.A. Fla. 1974).

adverse change must not be the result of the party's voluntary action.[51] For example, in a Fourth District court case the original alimony award was reinstated because the evidence indicated that the husband's decreased income was caused when he voluntarily closed his medical practice and made no effort to obtain other employment.[52]

The courts usually require that the change of circumstances be financial,[53] although the ambiguous language of the statute may allow for other changes.[54] In most cases the change *is* financial, but other factors have been pleaded, such as in a Third District court case[55] in which a husband sought termination of his alimony payments alleging increasing poor health as the change in circumstances. The court held that the factor controlling alimony modification was financial ability and that no alimony modification was warranted as long as he had the ability to pay.[56] The court's refusal to anticipate loss of income in this case illustrates the generally recognized proposition that the change of circumstances must have occurred before the court will consider modification. Thus, a trial court's decree based partially on the possible future unemployment of the husband was reversed in *Bailey v. Bailey*.[57] Considering that factor too speculative, the district court indicated that the proper time to seek modification was after the husband became unemployed.[58]

Criteria for the Determination of Alimony[59]

The Florida courts typically refer to the primary criteria employed in the determination of alimony as "well established." A survey of recent cases, however, shows that two versions of these primary criteria are currently in use. The difference lies in whether the standard of living enjoyed by the parties during their marriage is to be considered. In some cases courts have stated that the established criteria for awarding alimony are the needs or reasonable needs of the spouse requesting alimony and the ability of the other spouse to pay.[60] In other cases courts (often the same courts) with equal certainty have asserted that the clear requirements to be followed in awarding alimony are the ability of the non-recipient spouse to pay and the needs of the recipient spouse, taking into consideration the standard

51. Kalmutz v. Kalmutz, 299 So. 2d 30, 36 (4th D.C.A. Fla. 1974).

52. *Id.* at 37. The court pointed out that, although the husband lacked cash on hand, he had the capacity to earn a substantial income, and a modification of his alimony payments would be encouraging him to avoid his obligations.

53. Maroun v. Maroun, 277 So. 2d 572, 574 (3d D.C.A. Fla. 1973).

54. FLA. STAT. §61.14(1) (1975). This section provides for application for modification of alimony payments when "the circumstances or the financial ability of either party has changed . . . ."

55. Osman v. Osman, 280 So. 2d 67 (3d D.C.A. Fla. 1973).

56. *Id.* at 69.

57. 300 So. 2d 294, 296 (4th D.C.A. Fla. 1974).

58. *Id.*

59. For consideration of adultery as a factor in determining alimony, see notes 209-222 *infra* and accompanying text.

60. *See, e.g.*, Hanzelik v. Hanzelik, 294 So. 2d 116, 119 (4th D.C.A. Fla. 1974); Tierney v. Tierney, 290 So. 2d 136, 137 (2d D.C.A. Fla. 1974); Roberts v. Roberts, 283 So. 2d 396, 397 (1st D.C.A. Fla. 1973).

of living shared by the parties during the marriage.[61] Although the traditional[62] and more commonly used former version has been designated as the proper standard to apply under the new no-fault divorce statute,[63] the latter variation has also been declared correct under the new act.[64] When the standard of living factor is included, the courts have established that it must be the standard of living that the husband and wife maintained, or were capable of maintaining, without help from third parties.[65] The court will infer that the spouse who established the standard of living has the ability to continue to maintain his spouse at approximately the same level unless there is sufficient evidence to the contrary.[66]

The great majority of cases using the standard of living factor as part of the primary criteria for determining alimony are from the Third District Court of Appeal.[67] This same court, however, has also excluded consideration of the standard of living in some cases.[68] The distinguishing factor seems to be the wealth of the parties. Cases that include the standard of living as a criterion typically involve substantial amounts of money – the parties during coverture have been accustomed to a high standard of living, and the spouse who is to pay is wealthy.[69] For example, in *Carmel v. Carmel*,[70] the court reinstated the wife's $1,500 per month alimony award although she was

61. *See, e.g.*, Lash v. Lash, 307 So. 2d 241, 243 (2d D.C.A. Fla. 1975); Baker v. Baker, 299 So. 2d 138, 140 (3d D.C.A. Fla. 1974); Kalmutz v. Kalmutz, 299 So. 2d 30, 36 (4th D.C.A. Fla. 1974).

62. See text accompanying note 25 *supra*.

63. *See, e.g.*, Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973); Thigpen v. Thigpen, 277 So. 2d 583, 585 (1st D.C.A. Fla. 1973); Lefler v. Lefler, 264 So. 2d 112, 114 (4th D.C.A. Fla. 1972).

64. *See, e.g.*, Hagen v. Hagen, 308 So. 2d 41, 42 (3d D.C.A. Fla. 1975); Baker v. Baker, 291 So. 2d 33, 34 (3d D.C.A. Fla. 1974).

65. Bob v. Bob, 310 So. 2d 328, 330 (3d D.C.A. Fla. 1975). In this case, since large contributions by the wife's parents created a standard of living beyond that which the couple itself could have provided, the court held that the trial court's finding as to the standard was incorrect. *Cf.* Silvers v. Silvers, 274 So. 2d 555, 556 (3d D.C.A. Fla. 1973), in which the standard of living during the marriage was based on the husband's salary as dictated by his family from the family corporations, with the husband suddenly experiencing a drastic drop in salary after the institution of the divorce proceedings. Recognizing the influence of third parties on the standard set during the marriage, the court nevertheless held that this was the correct standard to be considered and assumed that the husband still had a comparable ability to pay.

66. *See Silvers v. Silvers*, 274 So. 2d 555, 556 (3d D.C.A. Fla. 1973); Klein v. Klein, 122 So. 2d 205, 207 (3d D.C.A. Fla. 1960).

67. *See, e.g., Hagen v. Hagen*, 308 So. 2d 41, 42 (3d D.C.A. Fla. 1975); Baker v. Baker, 291 So. 2d 33, 34 (3d D.C.A. Fla. 1974); Royal v. Royal, 263 So. 2d 277, 279 (3d D.C.A. Fla. 1972).

68. *See* Primato v. Primato, 274 So. 2d 568, 569 (3d D.C.A. Fla. 1973); Fishman v. Fishman, 245 So. 2d 258, 258-59 (3d D.C.A. Fla. 1971).

69. *See* Baker v. Baker, 299 So. 2d 138 (3d D.C.A. Fla. 1974) (husband's net worth was approximately $500,000, and his income was $133,000 per year); Arnold v. Arnold, 292 So. 2d 384 (3d D.C.A. Fla. 1972) (husband's gross income was $70,000 per year); Dash v. Dash, 284 So. 2d 407 (3d D.C.A. Fla. 1973) (husband's net worth exceeded $1,000,000, and his income was $61,000 per year). *But see* Sharpe v. Sharpe, 267 So. 2d 665 (3d D.C.A. Fla. 1972) (husband's income was $10,440 per year).

70. 282 So. 2d 6 (3d D.C.A. Fla. 1973).

earning $7,265 per year. The husband's exact financial worth was not disclosed, but he admitted that it was increasing and that he had the ability to pay the amount awarded. Detailing the lavish standard of living the wife had enjoyed during the marriage, the court noted that she clearly could not maintain that life style on her earning capacity alone.[71] Similarly, in *Bosem v. Bosem*,[72] the wife's award of $1,500 per month periodic alimony and $1,000 per month child support was affirmed by the court. The husband's net worth exceeded $2,000,000, and his annual income was over $100,000. The court observed that the award was reasonable even though it would not maintain the extravagant standard set by the husband during the marriage.[73] Conversely, in *Primato v. Primato*,[74] the husband's income was only $11,000 to $12,000 per year during the marriage, and the same court made no mention of the standard of living.[75]

While the Second District Court of Appeal has in most cases not included the standard of living factor,[76] it does not deny the validity of it. For example, in *Sapp v. Sapp*,[77] the court found that it was within the sound discretion of the chancellor to consider the ability of the husband to provide according to the standard of living enjoyed by the parties prior to the beginning of their marital troubles. Although the relevant facts were not particularized in *Sapp*, the previous standard of living was characterized as "good."[78] In a more recent case, *Lash v. Lash*,[79] the Second District court included the standard of living factor, specifically asserting that where the need and ability factors had been proved, the husband must support his wife in a manner "reasonably commensurate" with the standard established during coverture.[80] Again, as in the Third District court cases, the standard of living was high, with the marital home valued from $50,000 to $60,000 and the husband earning an annual salary of $29,000.[81]

The First District court, in contrast, has totally excluded the standard of living factor, even in cases in which the Third District's formula would warrant its consideration. For example, in *Brust v. Brust*,[82] the court did not consider the standard of living but looked only to the wife's ability to support herself. Although she had been accustomed to living on $1,194 per month during the marriage and was now earning only $370 per month, the

71. *Id.* at 8.
72. 269 So. 2d 758 (3d D.C.A. Fla. 1972).
73. *Id.* at 762. The court was also influenced by the fact that the husband was spending $50,000 per year on his mistress and himself.
74. 274 So. 2d 568 (3d D.C.A. Fla. 1973).
75. The court increased the wife's alimony award from $15 per week for one year to $30 per week for one year, for a *total* amount of $1,560. *Id.* at 569.
76. *See, e.g.*, Tierney v. Tierney, 290 So. 2d 136, 137 (2d D.C.A. Fla. 1974); Kamensky v. Kamensky, 282 So. 2d 670, 671 (2d D.C.A. Fla. 1973).
77. 275 So. 2d 43 (2d D.C.A. Fla. 1973).
78. *Id.* at 45.
79. 307 So. 2d 241 (2d D.C.A. Fla. 1975).
80. *Id.* at 243.
81. *Id.* at 242.
82. 266 So. 2d 400 (1st D.C.A. Fla. 1972).

court denied an alimony award.[83] In *Roberts v. Roberts*,[84] the court stated that under the no-fault act there is no basis for alimony unless there is evidence that the wife cannot supply her own needs. The court then assessed those needs in terms of potential for self-support.[85]

This attitude is obviously inconsistent with the philosophy supporting inclusion of the standard of living factor. In *Sherman v. Sherman*,[86] the Third District court extended this philosophy by holding that alimony could be increased by petition for modification where the sole change of circumstances was a substantial increase in the earnings of the former husband. In *Carmel* the court held that it was an abuse of discretion to reduce and terminate alimony solely on the basis of the wife's recent employment and capacity for self-support.[87] The husband's earnings and net worth had continued to increase after the dissolution of the marriage, and the court held it was error for the chancellor not to consider that fact. Since the wife's earnings were insufficient to maintain the lifestyle established during the marriage and the husband could afford to pay, the court reinstated the $1,500 per month alimony award.[88] The Third District court went even further in *Punie v. Punie*,[89] in which the wife had become capable of supporting herself at the level of and possibly beyond the standard of living established during the marriage. The court held that the chancellor was not bound to look only at the wife's change in circumstances and approved the continuation of the alimony award because the husband's financial position had increased substantially more than the wife's.[90]

Following a different approach in *Sisson v. Sisson*,[91] the First District court emphasized the wife's need based solely on capacity for self-support and ignored the husband's ample ability to pay. While the husband in that case had an income of $1,292 per month and assets of $218,700, the wife earned only $480 per month and had assets of only $1,600. The court nevertheless reversed as "grossly excessive" the $30,000 lump sum award to the wife.[92]

The Fourth District court has generally not included the standard of living factor.[93] In fact, it explicitly discounted this factor in *McRee v. McRee*.[94]

83. *Id.* at 403. *See* Brust v. Brust, No. 71-696 (Duval County Ct. Fla., April 22, 1971).

84. 283 So. 2d 396 (1st D.C.A. Fla. 1973).

85. *Id.* at 397.

86. 279 So. 2d 887 (3d D.C.A. Fla. 1973).

87. 282 So. 2d 6, 8 (3d D.C.A. Fla. 1973).

88. *Id.*

89. 291 So. 2d 23 (3d D.C.A. Fla. 1974).

90. *Id.* In Conklin v. Conklin, 286 So. 2d 236 (3d D.C.A. Fla. 1973), however, the Third District court affirmed a reduction of alimony when the husband's income increased by 25%, and the wife had begun to earn $425 per month.

91. 311 So. 2d 799 (1st D.C.A. Fla. 1975).

92. On appeal, the supreme court reversed the First District, holding that the trial court did not abuse its discretion. Sisson v. Sisson, 336 So. 2d 1129 (Fla. 1976). The supreme court concluded that the key factors are "the need of the spouse seeking alimony and the ability of the other spouse to pay." *Id.* at 1130.

93. *See, e.g.*, Hernandez v. Hernandez, 312 So. 2d 466, 467 (4th D.C.A. Fla. 1975); Hanzelik v. Hanzelik, 294 So. 2d 116, 119 (4th D.C.A. Fla. 1974); Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973).

94. 267 So. 2d 21, 22 (4th D.C.A. Fla. 1972).

Although it noted that the wife's standard of living had diminished, the court stated the criteria for alimony as the need of one spouse and the ability of the other to pay, stressing that this formula did not mandate an award maintaining the standard of living established during coverture.[95] While the court did not require that the standard of living be maintained, it did not prohibit inclusion of that factor in the deliberations of an alimony award. Similarly, the Third District court, although a strong proponent of the standard of living factor, has expressly recognized that consideration of the standard of living does not necessitate an award of alimony maintaining the pre-divorce standard.[96]

Despite its apparent opposition to the standard of living factor, the Fourth District court has more recently included this factor as part of the criteria for alimony. In a brief opinion[97] that simply affirmed the amount of permanent alimony awarded, the court specifically referred to "the standard of living to which the parties had become accustomed during their many years of marriage."[98] Again, the Fourth District court weighed the standard of living factor in *Kalmutz v. Kalmutz*,[99] a case that involved a substantial amount of money, the husband having a net worth of $150,000 and a gross income of $130,000 per year.

This difference of opinion among the district courts, most prominent between the Third and First Districts, has not been clearly settled by the supreme court, which has embraced both sets of criteria. In *Firestone v. Firestone*,[100] the supreme court expressly affirmed the inclusion of the standard of living factor in the primary criteria used in establishing the amount of alimony. Requiring an alimony award of $3,000 per month to be reviewed for a possible increase, the court admitted that the original award was substantial but held that its sufficiency must be judged by whether it allowed the wife to live in a manner reasonably similar to that provided during the marriage. The court indicated, however, that its holding was to be limited to the facts of the case and emphasized the very high standard of living during the marriage and the husband's enormous wealth.[101] Subsequently, in *Kennedy v. Kennedy*,[102] the court apparently rejected the inclusion of the standard of

95. *Id.*

96. Massey v. Massey, 205 So. 2d 1, 2 (3d D.C.A. Fla. 1967). After concluding that the husband had established a certain standard of living during the marriage, the court added: "Nevertheless, it would be foolhardy to assume that he could and unjust to require him to maintain precisely that standard. It is difficult enough to stretch one income to provide one home and next to impossible to expand it to a degree to where it can provide two homes on the same standard as the joint home was established." *Id.* In Bosem v. Bosem, 269 So. 2d 758, 762 (3d D.C.A. Fla. 1972), the Third District court again recognized that while it was appropriate to consider the standard of living, the alimony award need not maintain the established standard.

97. Rogers v. Rogers, 297 So. 2d 853 (4th D.C.A. Fla. 1974).

98. *Id.* at 854. This version of the standard of living factor indicates that the court may have considered the length of marriage a pertinent factor. See text accompanying notes 109-113 *infra*.

99. 299 So. 2d 30, 36 (4th D.C.A. Fla. 1974).

100. 263 So. 2d 223, 226 (Fla. 1972).

101. *Id.* at 228.

102. 303 So. 2d 629 (Fla. 1974).

living factor, deleting it from its statement of primary criteria. The court quoted the Fourth District's contention in *McRee* that maintenance of the pre-divorce standard is not compelled and the First District's statement in *Roberts* that under the new law there is no basis for an award of alimony if the spouse is self-supporting.[103] Since the wife in *Kennedy* was independently wealthy, the court denied an award of alimony. The holding in this case, as in *Firestone*, was limited to the facts of the case, with the court emphasizing the reasonable equality of the parties.[104] More recently, however, the supreme court once again affirmed the inclusion of the standard of living factor in *Keller v. Keller*.[105] Characterizing the award as "niggardly" and quoting extensively from *Firestone* and a Third District court case,[106] the court accentuated the husband's extreme wealth and the luxury of the established standard of living and held that the trial court had abused its discretion in determining the amount of alimony.[107]

Although the supreme court has not dealt squarely with the issue, it appears to adhere to the position that the standard of living can be considered when the parties have been accustomed to luxurious living, particularly where the paying spouse is quite wealthy and the spouse requesting alimony is not. The rationale of the court stems from a belief that the wealthy party is responsible for having accustomed his spouse to expect a high standard of living.[108]

There is also some indication that the courts consider the duration of the marriage in applying the standard of living factor. In *Firestone* the supreme court stated that the case at hand, which involved a marriage of more than three years, was "not to be confused with the 'marry in June and sue the following September' situation that would require an entirely different analysis. . . ."[109] The court later quoted this statement in the *Keller* decision.[110] As previously noted,[111] the Fourth District court has also concluded that the length of marriage is pertinent. The Third District court, quoting *Firestone*, weighed this factor in one case involving a 24-year marriage.[112] Of the many Third District court cases using the standard of

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103. *Id.* at 631.

104. *Id.* In this case, the wife apparently could support herself at the standard established during the marriage without relying on alimony. She was worth close to a quarter of a million dollars and earning more than $20,000 per year. *Id.* at 630.

105. 308 So. 2d 106 (Fla. 1974).

106. Dash v. Dash, 284 So. 2d 407 (3d D.C.A. Fla. 1973).

107. Keller v. Keller, 308 So. 2d 106, 108 (Fla. 1974). This case came up on appeal from the Third District court which, in a brief and uncharacteristic decision and without mention of the criteria being used, affirmed the trial court's award of only $7,200 alimony to the wife whose husband had a stipulated worth in excess of $3,000,000 and a yearly income of over $90,000.

108. Sisson v. Sisson, 336 So. 2d 1129, 1130 (Fla. 1976); Firestone v. Firestone, 263 So. 2d 223, 227 (Fla. 1972).

109. *Id.* at 228.

110. 308 So. 2d 106, 108 (Fla. 1974). The marriage in this case lasted seven years.

111. See note 98 *supra* and accompanying text.

112. Sharpe v. Sharpe, 267 So. 2d 665, 668 (3d D.C.A. Fla. 1972). The court stated that "this case is not to be confused with a situation ofttimes appearing where there is a

living factor, however, this is the only one that mentioned the length of marriage. Additional support for this factor can perhaps be gleaned from the fact that the Third District court cases excluding consideration of the standard of living involved short marriages.[113]

The duration of the marriage appears significant only in cases of great wealth and extremely short marriages. In such cases, the standard of living would not be pertinent, presumably because the recipient spouse would not have had time to become accustomed to the lavish marital scale of living. The primary determinant motivating the courts to consider the standard of living appears to be the wealth of the parties. In effect, the courts[114] are applying a double standard, using one set of criteria for the wealthy and another for the not so wealthy.

Rehabilitative Alimony

Rehabilitative alimony, as previously noted,[115] was authorized for the first time in the 1971 statutory revision.[116] The legislature, however, did not define rehabilitative alimony or distinguish it from permanent alimony, leaving the courts to determine the parameters of the concept. Historically, the courts have stated that alimony provisions in this state are based on the common law obligation of the husband to support his wife[117] and that the word "alimony" means nourishment or sustenance.[118] The traditional purpose of alimony, therefore, was to furnish a former spouse sustenance, nourishment, and generally the necessities of life when that spouse did not have the ability or resources to be self-sustaining.[119] It has generally been recognized that the implementation of the no-fault divorce act, which allows alimony to be granted to either spouse, did not change this concept and that the basic nature and purpose of alimony remains the same.[120]

In keeping with this concept, the purpose of rehabilitative alimony as commonly stated by the courts is to provide nourishment, sustenance, and the necessities of life to a former spouse until he or she is in a position of being self-supporting.[121] Maintenance of a spouse until rehabilitated has

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short courtship, short marriage and an effort to obtain a lifetime of independence from a shipwrecked marriage." *Id.*

113. Primato v. Primato, 274 So. 2d 568 (3d D.C.A. Fla. 1973) (three years); Fishman v. Fishman, 245 So. 2d 258, 259 (3d D.C.A. Fla. 1971) ("We have carefully considered appellant's petition in the light of the record showing the short duration of the marriage . . . .").

114. The First District Court of Appeal is an exception because it has not recognized the standard of living factor. See text accompanying notes 82-85 *supra.*

115. See text accompanying note 36 *supra.*

116. FLA. STAT. §61.08(1) (1975) provides: "[T]he court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature."

117. Floyd v. Floyd, 91 Fla. 910, 108 So. 896 (1926).

118. Jacobs v. Jacobs, 50 So. 2d 169 (Fla. 1951).

119. Dash v. Dash, 284 So. 2d 407, 408 (3d D.C.A. Fla. 1974).

120. *See, e.g.*, Tierney v. Tierney, 290 So. 2d 136, 137 (2d D.C.A. Fla. 1974); Thigpen v. Thigpen, 277 So. 2d 583, 586 (1st D.C.A. Fla. 1973); Lefler v. Lefler, 264 So. 2d 112, 113-14 (4th D.C.A. Fla. 1972).

121. *See, e.g.*, Dash v. Dash, 284 So. 2d 407, 408-09 (3d D.C.A. Fla. (1973); Lefler

been couched in terms of a supplement to the spouse's own resources,[122] outright financial support for the duration of an illness or until recovered from the trauma of the divorce,[123] and assistance in regaining a "useful and constructive role in society" through training or retraining.[124] An additional purpose advanced is to preclude financial hardship on society during the period of rehabilitation by preventing the individual from becoming a public charge.[125] Furthermore, the spouse receiving rehabilitative alimony is expected to make a reasonable effort to become self-supporting.[126] This view of rehabilitative alimony necessarily requires the ability to attain a capacity for self-support.[127] When the spouse is incapable of such rehabilitation, permanent rather than rehabilitative alimony is appropriate.[128]

A different approach to rehabilitative alimony was expressed by the First District in *Brown v. Brown*.[129] Ignoring the wife's capacity for self-support and the traditional obligation of the husband to support his wife, this view concentrates on the wife's equal property rights. The majority opinion began by defining "rehabilitative" as the restoration of property that has been lost.[130] The court then stated that under the no-fault statute,[131] periodic alimony can no longer be paid as nourishment or sustenance of the wife,[132] and lump sum alimony may be used to adjust the financial conditions of the parties.[133] According to the court, the new act permits husband and wife to be partners in the marriage with equality of rights and responsibilities.[134] In keeping with this view of marriage as an equal partnership to which the wife has contributed and for which she is entitled to reimbursement, the court expressed the opinion that alimony may be used to adjust the material assets of the parties at the time of dissolution of the marriage, which would intertwine alimony with property settlements.[135] The court in *Brown* ordered lump sum alimony as a rehabilitative award to compensate the wife for her contribution to the

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v. Lefler, 264 So. 2d 112, 113 (4th D.C.A. Fla. 1972); Beard v. Beard, 262 So. 2d 269, 273 (1st D.C.A. Fla. 1972).

122. Sisson v. Sisson, 311 So. 2d 799, 800 (1st D.C.A. Fla. 1975).

123. Brown v. Brown, 300 So. 2d 719, 727 (1st D.C.A. Fla. 1974) (McCord, J., concurring).

124. Mertz v. Mertz, 287 So. 2d 691, 692 (2d D.C.A. Fla. 1973).

125. *Id.*

126. Sisson v. Sisson, 311 So. 2d 799, 800 (1st D.C.A. Fla. 1975).

127. Kalmutz v. Kalmutz, 299 So. 2d 30, 34 (4th D.C.A. Fla. 1974).

128. Schwartz v. Schwartz, 297 So. 2d 117, 119 (3d D.C.A. Fla. 1974).

129. 300 So. 2d 719 (1st D.C.A. Fla. 1974).

130. *Id.* at 724. The concurring and dissenting opinions vigorously disagreed with this definition.

131. "[I]t is our considered judgment that a new day has been created by the 1971 legislative enactment . . . ." *Id.* at 725.

132. Rather, periodic alimony is mainly to be paid based on the need and ability criteria with special attention to the possibility of awarding rehabilitative alimony. *Id.*

133. *Id.*

134. *Id.* at 726.

135. For further information concerning property rights under the no-fault act, see Kulzer, *Law and the Housewife: Property, Divorce and Death*, 28 U. FLA. L. REV. 17-28 (1975).

marriage and to reimburse her for her rightful share of the property accumulated during the partnership of the marriage.[136]

In *Reback v. Reback*,[137] the Third District Court of Appeal expressed a third opinion of the concept of rehabilitative alimony. The court asserted that since there is no legislative guidance to the proper construction of the term "rehabilitative," the court must refer to its common definition and usage, which is to restore to a former capacity.[138] When the term rehabilitative is applied to alimony, there is an assumption that the spouse had either a capacity or a potential capacity for self-support that was lost or not developed during the marriage and that can be restored.[139] Therefore, an award of rehabilitative alimony is used to allow a spouse to regain such lost capacity. This concept of rehabilitative alimony is directly related to the recent attitude toward property distribution that recognizes that both spouses contribute to the accumulation of marital property even though such contribution may not be financial. For this reason, the apportionment between the parties of the property accumulated during the marriage is an important factor that must be considered in the determination of alimony.[140] This position incorporates both the concept of rehabilitative alimony as restoration of lost assets and as maintenance of a spouse until such spouse is self-supporting.

Lump Sum Alimony

The 1971 Dissolution of Marriage Act did not change the provision allowing the award of alimony in a lump sum.[141] The courts have declared that the purpose of lump sum alimony is to release one spouse from any further liability to the other after the final judgment is entered.[142] Since

136. 300 So. 2d 719, 726 (1st D.C.A. Fla. 1974). The wife has been awarded money and property amounting to a total of $27,700, which included a rehabilitative alimony award of $6,000. The husband's net worth was $232,843, and his annual income was between $36,000 and $40,000. The court pointed out that the wife had given up her career as a nurse on the birth of her first child and had devoted the next 18 years to keeping house and raising their four boys instead of acquiring a personal estate. Simultaneously, the husband was busy accumulating a sizeable amount of property with the intent, at least for the last nine years, to prepare for the divorce. The court felt that the wife had been "short changed" and held that the trial court's award of such a small amount of the assets of the marriage constituted an abuse of discretion.

137. 296 So. 2d 541 (3d D.C.A. Fla. 1974).

138. *Id.* at 543.

139. *Id.*

140. *Id.* at 544. In this case, the wife, age 56, was awarded a small amount of rehabilitative alimony that would terminate when she reached 61. The court, noting that there was no indication that she was employable or would be rehabilitated by that time and that most of the marital property remained with the husband, found rehabilitative alimony inappropriate and the small award of alimony an abuse of discretion.

141. FLA. STAT. 61.08(1) (1975). "In any award of alimony, the court may order periodic payments or payments in lump sum or both." See notes 22, 29-30 *supra* and accompanying text. Lump sum alimony is a gross allowance for the maintenance of one spouse by the other. FLORIDA FAMILY LAW ch. 22.11 (Fla. Bar Continuing Legal Education 2d ed. 1972).

142. *See* Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973); Rankin v. Rankin. 275 So. 2d 283 (2d D.C.A. Fla. 1973).

the statute specifically provides that lump sum and periodic alimony may be awarded simultaneously,[143] the courts do make such joint awards.[144] It is also generally recognized that a lump sum award can be made payable in periodic installments,[145] which increases its similarity to an award of periodic alimony. For example, in a Third District court case the lump sum alimony was payable over a period of almost 10 years, with jurisdiction reserved to later consider periodic alimony.[146] The distinction between periodic alimony and lump sum alimony payable over a period of time is whether the award is for an amount subject to modification by subsequent events or for a specific, fixed amount.[147] In *Morris v. Morris*,[148] an award of $25 per week for four years was held not to be lump sum alimony because the amount was not specific—a provision of the alimony decree terminated the payments on the remarriage of the ex-wife.

The courts have generally asserted that lump sum alimony should be awarded only when some reasonable purpose would be accomplished. Justifications for lump sum awards include rehabilitation and factors such as the financial position of the spouses, the length of the marriage, or the lack of children.[149] When lump sum alimony is appropriate for rehabilitative purposes to sustain the recipient spouse until he has become self-supporting, it can be awarded instead of permanent periodic alimony.[150] The grant of such an award may have important consequences since permanent periodic alimony terminates on the death of either spouse[151] or the remarriage of the recipient

143. See note 141 *supra*.

144. *See, e.g.*, Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973); King v. King, 271 So. 2d 159, 160 (1st D.C.A. Fla. 1973); Langston v. Langston, 257 So. 2d 625, 626 (3d D.C.A. Fla. 1972).

145. *See, e.g.*, Owen v. Owen, 284 So. 2d 384, 384 (Fla. 1973); Horne v. Horne, 289 So. 2d 39, 40 (2d D.C.A. Fla. 1974); Morris v. Morris, 272 So. 2d 202, 203 (2d D.C.A. Fla. 1973). See notes 31, 32 *supra* and accompanying text.

146. Langston v. Langston, 257 So. 2d 625, 626 (3d D.C.A. Fla. 1972). The court affirmed a lump sum award of $183,750 to the wife to be paid over nine years and eleven months.

147. Horne v. Horne, 289 So. 2d 39, 40 (2d D.C.A. Fla. 1974).

148. 272 So. 2d 202 (2d D.C.A. Fla. 1973).

149. *See, e.g.*, Keller v. Keller, 308 So. 2d 106, 107 (Fla. 1974); Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973); Calligarich v. Calligarich, 256 So. 2d 60, 61 (4th D.C.A. Fla. 1971).

150. *See* Kennedy v. Kennedy, 303 So. 2d 629, 631 (Fla. 1974); McRee v. McRee, 267 So. 2d 21, 22 (4th D.C.A. Fla. 1972).

151. *But see* First Nat'l Bank v. Ford, 283 So. 2d 342 (Fla. 1973). An award of permanent alimony to the wife provided that the payments should continue for the wife's lifetime or until her remarriage and did not expressly authorize such payments to continue out of the husband's estate after his death. Nevertheless, the supreme court observed that in view of the provision of §61.08(2) allowing the court to "consider any factor necessary to do equity and justice" in awarding alimony, it is permissible to bind the estate without such express agreement if undue hardship would otherwise result. *Id.* at 346. If this is done, the chancellor may consider granting a lump sum out of the estate in lieu of the spouse's interest. *Id.* at 345. The district courts disagree as to whether this statement by the supreme court constitutes binding precedent. In Bunn v. Bunn, 311 So. 2d 387, 389 (4th D.C.A. Fla. 1975), the Fourth District Court concluded that this part of the *Ford* opinion was dictum and thus not binding precedent and declined to follow it.

spouse.[152] Lump sum alimony, however, whether in the form of a single payment or periodic installments, is a property right that vests on the date that the final judgment is entered.[153] If the payor of lump sum alimony dies, his estate can be held liable for any remaining amount due. Similarly, a lump sum award is binding after the death of the recipient spouse. For example, in *Morris*[154] the trial court held that an award of $5,200 payable in 208 weekly installments was lump sum alimony and that the remaining unpaid portion of the award should be paid to the wife's estate after her death.[155] Moreover, in *Keller v. Belcher*,[156] the court held that the husband must continue to pay a lump sum alimony award of $444,000 in monthly installments of $3,333.33 over a period of 11 years even though the wife remarried less than a year after the dissolution of the marriage.[157]

Award of the Marital Home as Lump Sum Alimony

Where spouses own property as tenants by the entirety, one spouse's interest may be awarded to the other as lump sum alimony.[158] This type of lump sum award, which occurs frequently,[159] is one of two exceptions[160] to the doctrine that on the dissolution of a marriage the spouses become tenants in common of any real property previously held as tenants by the entirety[161] with the right to effect the disposition of such property themselves.[162] This rule is based on the general principle that the court cannot determine the disposition of property between the parties as an incident to divorce proceedings unless the parties either have made a property agreement or have

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See also Ulbrich v. Ulbrich, 317 So. 2d 460, 461 (4th D.C.A. Fla. 1975). *But see* Rouse v. Rouse, 313 So. 2d 458, 460 (3d D.C.A. Fla. 1975), in which the Third District Court treated the *Ford* case as authority for this proposition.

152. Schwartz v. Schwartz, 297 So. 2d 117, 120 (3d D.C.A. Fla. 1974); Horne v. Horne, 289 So. 2d 39, 40 (2d D.C.A. Fla. 1974). Periodic rehabilitative alimony shares this characteristic with permanent periodic alimony in that it can also be modified (including termination) on proof of a change in the circumstances of the parties.

153. Horne v. Horne, 289 So. 2d 39, 40 (2d D.C.A. Fla. 1974).

154. 272 So. 2d 202 (2d D.C.A. Fla. 1973).

155. The district court reversed the trial court's decision. See text accompanying note 148 *supra*.

156. 256 So. 2d 561 (3d D.C.A. Fla. 1971).

157. *Id. See also* Horne v. Horne, 289 So. 2d 39, 40 (2d D.C.A. Fla. 1974).

158. *See* Owen v. Owen, 284 So. 2d 384, 385 (Fla. 1973); Maroun v. Maroun, 277 So. 2d 572, 573 (3d D.C.A. Fla. 1973). But, in Barrett v. Barrett, 305 So. 2d 260 (3d D.C.A. Fla. 1974), the award of the marital home to the wife was termed rehabilitative alimony by the court. The wife, who had been a private nurse, was shot and disabled by her husband. Since her husband seemed to have very limited funds, the court recognized that "one income that we are certain that the woman could use to rehabilitate herself would be her house." *Id.* at 261.

159. *See, e.g.*, Nevins v. Nevins, 305 So. 2d 63, 64 (3d D.C.A. Fla. 1974); Linares v. Linares, 292 So. 2d 63, 64 (3d D.C.A. Fla. 1974); Schalk v. Schalk, 285 So. 2d 39, 39 (4th D.C.A. Fla. 1973).

160. For the other exception, see text accompanying note 172 *infra*.

161. FLA. STAT. §689.15 (1975) provides: "[I]n cases of estates by entirety, the tenants, upon divorce, shall become tenants in common."

162. Owen v. Owen, 284 So. 2d 384, 385 (Fla. 1973).

made appropriate pleading for the partition of jointly owned property.[163] An award of lump sum alimony can be made for any personal property jointly owned[164] or any real property held by the entirety.[165] Because the marital residence is the property most commonly owned by the entireties, the lump sum award most often involves the marital home.[166] In addition, awards of the other spouse's interest in the marital home often include a grant of the furniture and furnishings of the house.[167] While most such awards are given to the wife, it is interesting to note that the wife's interest in the marital home was awarded to the husband as lump sum alimony by the trial court in *Lefler v. Lefler*,[168] one of the few cases under the new act involving an alimony award to the husband. The appellate court reversed, however, because there was no showing of the husband's need or lack of ability to provide for himself.[169] Similarly, in *DeLones v. DeLones*,[170] the court reversed an award to the husband of one-half interest in his wife's separate property on the grounds, *inter alia*, that it could not be sustained as lump sum alimony when his income was approximately the same as his wife's.[171]

The other recognized exception to the general rule that a court cannot award one spouse's interest in property to the other is one party's establishing a special equity in the property.[172] Since they are based on different principles,[173] these two exceptions should not be confused as was done in *Keller v. Keller*.[174] When counsel urged that giving the home to the wife as lump sum alimony was error because the evidence did not establish a special equity, the court noted that counsel was not recognizing the legal distinction between the two doctrines and upheld the award.[175] If the court does not make an express finding of a special equity or of a lump sum award, it may not award one party's interest in the jointly owned property to the other. For example, in *Kamensky v. Kamensky*,[176] the trial court made a lump sum money

163. *See* Sharpe v. Sharpe, 265 So. 2d 665, 666 (3d D.C.A. Fla. 1972); Coscia v. Coscia, 262 So. 2d 254, 255 (4th D.C.A. Fla. 1972). See note 135 *supra*.

164. Schalk v. Schalk, 285 So. 2d 39, 40 (4th D.C.A. Fla. 1973) (dissenting opinion). For examples of such awards, see Wilson v. Wilson, 279 So. 2d 893, 894 (4th D.C.A. Fla. 1973) (a savings account).

165. Maroun v. Maroun, 277 So. 2d 572, 573 (3d D.C.A. Fla. 1973).

166. See note 159 *supra*.

167. *See, e.g.*, Waddell v. Waddell, 305 So. 2d 30, 31 (3d D.C.A. Fla. 1974); Baker v. Baker, 299 So. 2d 138, 140 (3d D.C.A. Fla. 1974); Kamensky v. Kamensky, 282 So. 2d 670, 671 (2d D.C.A. Fla. 1974).

168. 264 So. 2d 112 (4th D.C.A. Fla. 1972).

169. *Id.* at 114.

170. 297 So. 2d 585 (3d D.C.A. Fla. 1974).

171. *Id.* at 588.

172. *See* Owen v. Owen, 284 So. 2d 384, 385 (Fla. 1973); Lefler v. Lefler, 264 So. 2d 112, 114 (4th D.C.A. Fla. 1972). See notes 17-18 *supra* and accompanying text.

173. Schalk v. Schalk, 285 So. 2d 39, 40 (3d D.C.A. Fla. 1974).

174. 302 So. 2d 795 (3d D.C.A. Fla. 1974). See text accompanying notes 19-20 *supra*.

175. 302 So. 2d at 796. *But see* Schalk v. Schalk, 285 So. 2d 39 (4th D.C.A. Fla. 1973) (affirming an award of one-half interest in municipal bonds as "additional lump sum alimony and as a special equity.").

176. 282 So. 2d 670 (2d D.C.A. Fla. 1973).

award but did not specifically designate the award of the jointly held marital home to the wife as lump sum alimony. On appeal, the Second District court found that the judgment did not constitute a lump sum award and reversed on the ground that there was no finding of a special equity.[177] Similarly, in *Venzer v. Venzer*,[178] the award of the marital home to the wife as a lump sum alimony was reversed because the appellate court held that the wife did not need alimony and that no special equity had been established.[179]

It is also within the trial court's discretion to award the exclusive use and occupancy of the marital home to one spouse.[180] This usually occurs when the parties have retained joint ownership,[181] but it can also be awarded when the spouse not entitled to possession has sole ownership.[182] Although there are exceptions,[183] exclusive use of the marital home is most often awarded to the spouse who was given custody of the minor children.[184] Such awards are commonly limited to the duration of the custody, with the right to exclusive possession terminating when the minor children are grown and no longer living there.[185] An additional ground for termination of exclusive use sometimes given by the courts is the remarriage of the spouse.[186] In the majority of cases the recipient spouse is the wife, but in *Schneider v. Schneider*,[187] the husband was given custody of the three children and was also given exclusive use of the jointly owned home for as long as he lived there with any of the minor children.[188] Such awards of exclusive use are often accompanied by a similar award of the use of the furniture and furnishings of the house.[189] In addition, there may be a provision for the

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177. *Id.* at 672.

178. 308 So. 2d 544 (3d D.C.A. Fla. 1975).

179. *Id.* at 546-47. The wife had remarried a few months after the divorce.

180. Schalk v. Schalk, 285 So. 2d 39, 40 (4th D.C.A. Fla. 1973).

181. *See, e.g.*, Schwartz v. Schwartz, 297 So. 2d 117, 118 (3d D.C.A. Fla. 1974); Baker v. Baker, 291 So. 2d 33, 34 (3d D.C.A. Fla. 1974); Weston v. Weston, 251 So. 2d 315, 316 (4th D.C.A. Fla. 1971).

182. Fligelman v. Fligelman, 272 So. 2d 199, 200 (3d D.C.A. Fla. 1973).

183. *See* Bernst v. Cotter, 256 So. 2d 529, 530 (4th D.C.A. Fla. 1972); Weston v. Weston, 251 So. 2d 315, 316 (4th D.C.A. Fla. 1971).

184. *See, e.g.*, Brown v. Brown, 300 So. 2d 719, 721 (1st D.C.A. Fla. 1974); Beard v. Beard, 262 So. 2d 269, 271 (1st D.C.A. Fla. 1972); Landsberg v. Landsberg, 259 So. 2d 727, 728 (3d D.C.A. Fla. 1972).

185. *See, e.g.*, Ruhnau v. Ruhnau, 299 So. 2d 61, 63 (1st D.C.A. Fla. 1974); Baker v. Baker, 291 So. 2d 33, 34 (3d D.C.A. Fla. 1974); Fligelman v. Fligelman, 272 So. 2d 199, 200 (3d D.C.A. Fla. 1973).

186. Ruhnau v. Ruhnau, 299 So. 2d 61, 63 (1st D.C.A. Fla. 1974).

187. 296 So. 2d 77, 78 (3d D.C.A. Fla. 1974).

188. *Id.* The trial court later altered the judgment to give the home and its contents to the wife, although custody of the children remained with the husband; however, the district court held the amended judgment invalid. *See* Richardson v. Richardson, 315 So. 2d 513 (4th D.C.A. Fla. 1975).

189. *See, e.g.*, Ruhnau v. Ruhnau, 299 So. 2d 61, 63 (1st D.C.A. Fla. 1974); Beard v. Beard, 262 So. 2d 269, 271 (1st D.C.A. Fla. 1972); Landsberg v. Landsberg, 259 So. 2d 727, 728 (3d D.C.A. Fla. 1972).

spouse not in possession to pay the various expenses of the domicile such as taxes, insurance, mortgage payments, and maintenance costs.[190]

The Third and Fourth District courts have expressed different views of the award to one spouse of the exclusive use of the marital home. The Third District court has not considered use of the marital home as alimony when the trial court did not so designate it.[191] Thus, in *Landsberg v. Landsberg*,[192] the wife's right to possession of the marital residence and to the use of the personal contents was affirmed while the "awards in the nature of alimony" were reversed.[193] Conversely, the Fourth District court has maintained that award of the use of the marital home always constitutes alimony because it is an incident of support.[194] Reversing the $50 per week alimony in *Weston v. Weston*,[195] the Fourth District Court emphasized that the wife would still have some alimony by virtue of the award of exclusive use and occupancy of the marital dwelling.[196]

Setoffs Against Alimony Payments

Generally, setoffs against alimony payments are viewed with disfavor because they are based on the different and potentially incompatible purposes of ensuring fair-dealing in joint business affairs and of providing support or maintenance for a spouse.[197] The courts have expressly recognized that the obligation to pay alimony is not an ordinary debt but something more than a debt.[198] Since alimony is a requirement to pay for a spouse's support according to the needs of the spouse as determined by the court, the paying spouse should not be allowed to vary those terms at his convenience.[199] The test used to determine whether an expenditure should be allowed to be offset against alimony payments is whether the recipient spouse has unrestricted control over how the alimony is spent.[200] If the spouse does not have such control, the setoff is not permitted.

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190. *See* Schwartz v. Schwartz, 297 So. 2d 117, 119 (3d D.C.A. Fla. 1974); Baker v. Baker, 291 So. 2d 33, 34 (3d D.C.A. Fla. 1974).

191. Fligelman v. Fligelman, 272 So. 2d 199, 200 (3d D.C.A. Fla. 1973).

192. 259 So. 2d 727, 728 (3d D.C.A. Fla. 1972).

193. *Id.* These alimony awards included payments by the husband for the mortgage, taxes, utility bills, and home maintenance and had not been designated as a fixed amount by the trial court.

194. Bernst v. Cotter, 256 So. 2d 529, 530 (4th D.C.A. Fla. 1972). In this case, "no monetary alimony was awarded to the wife but she was given the *'use and occupation'* of the marital domicile, held by a tenancy by the entireties. . . ." *Id.* When she remarried, the ex-husband petitioned to terminate his alimony obligation, to be allowed to collect rent, and to partition the home. The court agreed, holding that the wife was no longer entitled to the exclusive use of the home.

195. 251 So. 2d 315, 316 (4th D.C.A. Fla. 1971).

196. *Id.*

197. Chappel v. Chappel, 253 So. 2d 281, 283 (4th D.C.A. Fla. 1971).

198. Rankin v. Rankin, 286 So. 2d 573, 574 (3d D.C.A. Fla. 1972).

199. Chappell v. Chappell, 253 So. 2d 281, 283 (4th D.C.A. Fla. 1971).

200. *Id.* This test is in keeping with FLA. STAT. §61.11 (1975), which provides: "A judgment of alimony granted under §61.08 or §61.09 releases the party receiving the alimony from the control of the other party, and the party receiving the alimony may use

In *Chappell v. Chappell*,[201] a case of first impression, the court held that payment of a joint and several income tax liability cannot be setoff against alimony payments unless there are compelling equitable reasons to the contrary.[202] The wife would not have had the requisite control over expenditure of the support money because the husband had already paid the tax deficiency to the Internal Revenue Service and wanted a credit against his delinquent and future alimony payments. There being no compelling equitable considerations to the contrary in this case, the court reversed the order that had permitted the setoff.[203] Similarly, in the Third District court case of *Rankin v. Rankin*,[204] the husband was delinquent in his alimony payments and claimed he was entitled to a setoff because the wife had received more income than he had from a farm held in common. Because the wife would not have unrestricted control over how the alimony was spent, the Third District court held that a setoff for possible business debts could not be allowed against alimony.[205]

The Second District Court of Appeal in *Rankin v. Rankin*,[206] however, approved the setoff of temporary alimony pending appeal against the payment of a lump sum alimony award. Since the purpose of the lump sum award was to release the paying spouse from further obligations after the date of the final judgment, any payments made subsequent to that date must be applied to the discharge of that obligation.[207] The same court in *Lash v. Lash*[208] likewise permitted a setoff of alimony pending appeal. In that case the temporary alimony paid was credited against permanent alimony payments awarded on appeal. Although the court did not mention this as a basis for its decisions, the payments being offset in both cases had been paid directly to the wife, which gave her complete control over how the money was spent.

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his alimony and acquire, use, and dispose of other property uncontrolled by the other party."

201. 253 So. 2d 281 (4th D.C.A. Fla. 1971).

202. *Id.* at 287. For further information on tax considerations, see Note, *Alimony: Income Taxation of Installment Payments*, 24 U. FLA. L. REV. 499 (1972).

203. Chappell v. Chappell, 253 So. 2d 281, 287 (4th D.C.A. Fla. 1971). The court considered that the wife had not worked during the marriage, and thus the tax liability was based on the husband's income. It also stated that the wife had relied on the husband in perfunctorily signing the joint return. The court pointed out that the husband, in the event the payment of the tax levy was onerous, had an alternative means of relief by petitioning for a modification of the alimony award because of a change in his ability to pay.

204. 268 So. 2d 573, 574 (3d D.C.A. Fla. 1972).

205. *Id.* The appellate court reversed because the trial court had based its decision on the erroneous classification of alimony as an ordinary debt.

206. 275 So. 2d 283 (2d D.C.A. Fla. 1973).

207. *Id.* at 284. The wife had been awarded temporary alimony pending the divorce proceedings but had not applied to the court for alimony pending appeal. Thus she was not entitled to the payments in question. Since the husband had continued to make the monthly payments, however, there was some question as to whether he had misled her into not requesting the alimony pending appeal, in which case estoppel would apply. This issue was declared moot since, by the court's reasoning, the offset would be allowed regardless of whether the wife was entitled to the payments.

208. 307 So. 2d 241, 244 (2d D.C.A. Fla. 1975).

Consideration of Adultery

The provision in the prior statute prohibiting an award of alimony to an adulterous wife[209] was modified in the 1971 Dissolution of Marriage Act, which provides that consideration of adultery in the determination of alimony is permissible.[210] In keeping with this new provision, the courts have recognized that a spouse defending against a claim for alimony must be allowed to raise the issue of adultery as a mitigating defense.[211] Evidence concerning the adultery of the spouse requesting alimony can therefore always be introduced, and the trial judge may not refuse to allow the issue to be raised. For example, in *Oliver v. Oliver*,[212] the court, maintaining that factors pertinent to the determination of alimony awards include the conduct and misconduct of the parties during the marriage, reversed the trial judge's refusal to permit the husband, who was defending against the alimony claim, to present evidence of the wife's misconduct.[213] Once the opportunity to raise the issue has been given, it is within the court's discretion whether to consider such evidence in its determination of alimony.[214] It is in compliance with the statute and does not constitute an abuse of discretion for the trial judge to choose to disregard the entire issue of adultery.[215]

A difference of opinion in the interpretation of the statute exists, however, as to the introduction of evidence of the adultery of the spouse not requesting alimony. In *Escobar v. Escobar*,[216] the Third District Court of Appeal focused on the adultery provision of the statute and held that a trial judge may decline to allow the introduction of testimony concerning the husband's alleged adultery when the husband is not seeking alimony. Exclusion of such evidence did not violate the statute, in the Third District court's opinion, because the adultery provision only pertains to the spouse seeking alimony.[217] The court further stated that evidence of the husband's adultery is irrelevant since alimony must be based on the wife's need and the husband's ability to pay.[218] Conversely, the Fourth District Court of Appeal has taken the position that the trial judge cannot refuse to hear such evidence. Thus, in *Pro v. Pro*,[219] the court held it was error not to require that the husband in his deposition answer the questions pertaining to his alleged adultery. In so doing, the

209. Fla. Laws 1967, ch. 67-254, §16, at 608, provides: "[B]ut no alimony shall be granted to an adulterous wife."

210. FLA. STAT. §61.08(1) (1975) provides: "The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse." *See generally* Commentary, *Alimony in Florida: No-Fault Stops at the Courthouse Door*, 28 U. FLA. L. REV. 521 (1976).

211. Stafford v. Stafford, 294 So. 2d 25, 27 (3d D.C.A. Fla. 1974).

212. 285 So. 2d 638 (4th D.C.A. Fla. 1973).

213. *Id.* at 640-41.

214. Stafford v. Stafford, 294 So. 2d 25, 27 (3d D.C.A. Fla. 1974).

215. Vandervoort v. Vandervoort, 265 So. 2d 77, 78 (3d D.C.A. Fla. 1972).

216. 300 So. 2d 702 (3d D.C.A. Fla. 1974).

217. See note 210 *supra*.

218. Escobar v. Escobar, 300 So. 2d 702, 703 (3d D.C.A. Fla. 1974).

219. 300 So. 2d 289 (4th D.C.A. Fla. 1975).

court pointed to subsection two of the statute, which provides that the court can consider any factor necessary to achieve justice.[220] According to the Fourth District court, evidence of the adultery of the spouse defending against a claim for alimony might well be an influencing factor since the entire marital picture is relevant to the award of alimony.[221] The court also supported its position with the observation that the legislature could not have intended to allow the trial court to refuse to hear such evidence because to do so would make impossible the review of such action as an abuse of discretion.[222]

Proposed Statutory Amendments

These unresolved differences among district court opinions can be settled by direct pronouncement of the supreme court in cases presenting the appropriate issues, but a more efficient method of resolution is statutory amendment. Three bills proposing such amendments to the 1971 Dissolution of Marriage Act have recently been introduced in the state legislature.

House Bill 142[223] proposes two changes. It amends the adultery provision of subsection one of section 61.08 to provide that the adultery of the recipient spouse be considered in determining alimony.[224] This change resolves the confusion in the courts over whether consideration of the adultery of both spouses is statutorily permitted by excluding that of the paying spouse. In a new subsection, the bill specifies the factors to be used in deciding the amount of alimony to be awarded.[225] This addition is a codification of the need and ability to pay criteria used by the courts to determine alimony. Significantly, it does not include the standard of living factor.

House Bill 1503[226] suggests a supplementary provision at the end of subsection two of section 61.08, which presently permits the court to consider any factor necessary to achieve equity and justice. Under the proposed bill, when one spouse's income earning ability has been diminished because he has been supported by the other spouse during the marriage, the court shall award permanent alimony to the supported spouse. The amount of the permanent alimony plus the recipient spouse's expected income should be sufficient to maintain the standard of living established during coverture.[227] By providing

220. Fla. Stat. §61.08(2) (1975) provides: "In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties."

221. For a fuller discussion of the consideration of adultery as a factor in determining alimony, see Commentary, *Alimony in Florida: No-Fault Stops at the Courthouse Door*, 28 U. Fla. L. Rev. 521 (1976).

222. Pro v. Pro, 300 So. 2d 288, 289 (4th D.C.A. Fla. 1975).

223. Fla. H.R. 142 (Reg. Sess. 1975, introduced by Rep. Papy).

224. "The court may consider the adultery of a spouse *who is claiming alimony* . . . ." *Id.* (italicized words are the proposed addition).

225. "(3) The amount of alimony awarded to a spouse shall be based on a demonstrated need for support, as well as the financial ability of the other spouse to pay such support." *Id.*

226. Fla. H.R. 1503, §1 (Reg. Sess. 1975, introduced by Rep. Gordon and others). This bill, which also proposed a change in the child support provision of §61.13(1), has been dropped and is now a dead bill.

227. "In the case of a marriage wherein one party contributed all or the preponderate

for a permanent alimony award, the sponsor attempted to redress the problem of the supported spouse who is incapable of total rehabilitation. While this proposed expansion included the standard of living factor, it did so in connection with the supported spouse's decreased earning ability and not in the context of wealth as do the courts.[228]

Identical bills have been introduced in the House and Senate, House Bill 1141[229] and Senate Bill 630,[230] which propose comprehensive changes in the alimony provisions of the no-fault statute. This proposed amendment deletes both the adultery provision of subsection one of section 61.08 and all of subsection two, which allows courts to consider any factor necessary to accomplish justice. Focusing on the earning ability of both spouses as the primary determinant, the bill offers detailed standards for the courts to follow in the determination of alimony. The spouses are separated into primary and secondary earners,[231] and the former is ineligible for alimony. The secondary earner is entitled to alimony only if his earning ability has been impaired by certain enumerated family or marital considerations, or if this spouse is mentally or physically unable to be self-supporting, or if he is entrusted with the care of a minor child and in the court's opinion should not work full time. Once it has been determined that the secondary earner is entitled to alimony, the amount and terms of the award depend on the factors previously considered by the court plus the additional factors of the age of the recipient spouse, the length of the marriage, and the established marital standard of living. The guidelines also specify that rehabilitative alimony may be awarded in appropriate situations to allow the secondary earner to pursue additional training that will increase his earning power.

This proposed amendment suggests solutions to all of the problems addressed by the other two bills. It solves the problem of the interpretation of the adultery provision by removing adultery as a permissible consideration. In its carefully detailed standards the bill codifies the criteria to be used in deciding whether to award alimony — the needs of the recipient spouse, the ability of the other spouse to pay, and the expected earning abilities of the parties. This bill makes specific provision for the spouse who was supported by the other during the marriage and has thereby suffered a diminution of earning ability. Following the decision that alimony is warranted, due consideration of the standard of living during coverture is included in determining the proper amount of the award. The standard of living factor is not limited

part of support for the other party and because of such support the party having been so supported has less income earning ability at the time of the dissolution of marriage than he or she otherwise would reasonably have had, the court shall award the party so supported with permanent alimony sufficient to supplement the party's expected income to a degree to maintain him or her in the state to which he or she has become accustomed during the marriage." *Id.*

228. See notes 68-69, 108 *supra* and accompanying text.

229. Fla. H.R. 1141 (Reg. Sess. 1975, introduced by Rep. Rish and others).

230. Fla. S. 630 (Reg. Sess. 1975, introduced by S. Scarborough). At the end of the 1976 legislative session, this bill was reported out by the Senate Judiciary Committee. It is very likely that the bill will be reintroduced in the 1977 session.

231. The primary earner is the party who has the higher anticipated annual income. *Id.* §2.

by these guidelines to cases in which the primary earner is wealthy and the marital standard of living was luxurious but is applied uniformly whenever the secondary earner requires alimony. This amendment also provides legislative guidance as to rehabilitative alimony and the basis for its award by specifying that it be granted for the purpose of training or retraining the spouse to effect an increase in anticipated annual income. The overall effect of this proposed amendment is to place the determination of alimony awards on an economic basis.

CONCLUSION

From an analysis of Florida cases, it is readily apparent that courts have reached inconsistent results in determining alimony awards. Except in the areas previously discussed, this disparity does not represent differences in interpretation or application of the law but rather is the result of the great discretion afforded the courts by the current alimony statute, which permits consideration of any factor necessary to do equity and justice.[232] The courts have properly interpreted this provision to mean that the entire marital picture should be considered in determining alimony awards, including the conduct and misconduct of the parties and the respective degrees of fault in the disintegration of the marriage. Indeed, the consideration of fault is specifically provided for in the adultery provision of the statute.[233]

The proposed amendment[234] to the no-fault divorce law not only resolves most of the present disagreements among the district courts but also removes this anachronistic fault concept from the statute. By awarding alimony on a primarily economic basis, the bill attempts to minimize the present disparity in alimony awards and allows the courts to accomplish financial justice and equity between the parties. Although it appears to make a radical change in the current statute, this bill in fact retains all of the factors that the courts have been considering with the single exception of fault. Passage of this bill or a similar amendment would put the determination of alimony on a basis compatible with the present no-fault concept of divorce — the dissolution of an equal partnership.

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232. FLA. STAT. §61.08(2) (1975).
233. FLA. STAT. §61.08(1) (1975).
234. See note 230 *supra*.