An Analysis of 1982 Wisconsin Divorce Cases Addressing Issues of Property Division and Maintenance

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RECENT DEVELOPMENTS

AN ANALYSIS OF 1982 WISCONSIN DIVORCE CASES ADDRESSING ISSUES OF PROPERTY DIVISION AND MAINTENANCE

In 1982 the Wisconsin Supreme Court handed down a number of decisions dealing with property division and maintenance awards in divorce actions. Each of these opinions serves to interpret and augment the Wisconsin Divorce Reform Act of 1977. The statutes set forth in that Act inaugurated "no fault" divorce in Wisconsin and provided for a presumption of an equal division of marital property that could be modified by a number of factors. As this review of recent decisions will illustrate, the statutory considerations will require ongoing interpretation by the courts.

Property division was formerly predicated on the presumption that the spouse making little or no financial contri-


bution would receive one-third of the estate acquired during the marriage. The present statute presumes that there will be a fifty-fifty split, but as *Jasper v. Jasper* illustrates, when a couple marries after one partner has already established a career, that partner may not have to divide property equally with the nonearning spouse. Two other 1982 decisions, *Lundberg v. Lundberg* and *Roberto v. Brown*, which are discussed elsewhere in this volume, address the property division issue in situations where marriages break up after one party has devoted years of effort to financing the career training of the other party.

On the question of maintenance the 1982 court decisions displayed solicitude for the plight of the displaced homemaker. In *Dixon v. Dixon* the court turned aside an appeal by a woman claiming that fault should be considered in setting the level of support, but also decided that a judgment providing for limited maintenance can subsequently be modified or extended. *Dixon* involved a forty-nine year old woman who had been primarily a homemaker during the twenty-five year marriage and whose minor children were teenagers.

In *Bahr v. Bahr* the court ruled that a maintenance award of $18,000 per year to an older fulltime homemaker with limited prospects for employment, whose former spouse earned over $300,000 per year, was so unreasonably low as to constitute an abuse of discretion. The court recommended that trial courts begin their maintenance evaluations with the proposition that the dependent partner may be entitled to fifty percent of the total earnings of both parties.

This survey of recent decisions will trace their historical underpinnings and analyze their potential ramifications.

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6. 107 Wis. 2d 59, 318 N.W.2d 792 (1982).
7. 107 Wis. 2d 918 (1982).
8. 107 Wis. 2d 358 (1982).
10. 107 Wis. 2d 72, 318 N.W.2d 391 (1982).
11. See infra text accompanying notes 118-35, 148-76.
12. 107 Wis. 2d 492, 319 N.W.2d 846 (1982).
13. Id. at 84-85, 318 N.W.2d at 398.
While the ideal of modern divorce law is a clean break between the parties and the economic rehabilitation of the dependent spouse, the expectation of self-sufficiency may not be realistic under present economic and social conditions. Based on these recent decisions, it appears that family courts, which are courts of equity, are being encouraged to apply the property division and maintenance statutes flexibly to avoid harsh results for either party.

I. Division of Marital Property in Wisconsin

A. History

The Wisconsin Supreme Court has defined the division of marital property as "the fair, equitable and just division of the marital estate, or assets of the parties as they exist at the time of the divorce. That is, the assets which the parties brought into the marriage and/or acquired during the marriage." Prior to 1970, a property division of one-third of the marital estate to the wife and two-thirds to the husband was considered an appropriate starting point, though not a maximum or minimum. This standard was derived from a 1914 case, Gauger v. Gauger, in which the Wisconsin Supreme Court stated that "it has been pretty well established that a clear third of the whole is a liberal allowance to the wife, subject to be increased or decreased according to special circumstances . . . ." In a 1970 case, Lacey v. Lacey, the court rejected the one-third formula as a starting point, holding that the "material facts and factors" present in each case must guide the property division. Lacey was a landmark decision in

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15. Jordan v. Jordan, 44 Wis. 2d 471, 476, 171 N.W.2d 385, 388 (1969); Schneider v. Schneider, 15 Wis. 2d 245, 247, 112 N.W.2d 584, 585 (1961); Manske v. Manske, 6 Wis. 2d 605, 607, 95 N.W.2d 401, 403 (1959).
16. 157 Wis. 630, 147 N.W. 1075 (1914).
17. Id. at 633, 147 N.W. at 1077.
18. 45 Wis. 2d 378, 173 N.W.2d 142 (1970).
19. Id. at 382, 173 N.W.2d at 144. Referring to its statement in Gauger, 157 Wis. at 633, 147 N.W. at 1077, the court said:
We do not read the quote as establishing an exact formula or mandatory measuring stick for property division in divorce cases. We find in the full quotation a clear recognition that the formula to be followed in a particular case
which the court recognized that marriage is a partnership\textsuperscript{20} and that the contribution of a homemaking wife may be as great as or greater than those of a wage earning wife.\textsuperscript{21} The opinion enunciated many of the guidelines later to be codified in the Wisconsin marital property division statute:\textsuperscript{22} 

\begin{quote}
\textit{[R]elevant factors certainly include the length of the marriage, the age and health of the parties, their ability to support themselves, liability for debts or support of children, general circumstances, including grievous misconduct, although a division is not a penalty imposed for fault. Whether the property award is in lieu of or in addition to alimony payments is a material factor. Whether the property was acquired during the marriage or brought to the marriage makes a difference.}\textsuperscript{23}
\end{quote}

The court’s rejection of the one-third rule of thumb and emphasis on an equitable result may have been a timely reflection of the burgeoning women’s movement for equality. The \textit{Lacey} court did not suggest, however, that a fifty-fifty division of property should be the starting point or norm.\textsuperscript{24} It analogized property division to a balancing of scales: 

\begin{quote}
depends upon and derives from the material facts and factors present in such case.
\end{quote}

The court went on to say that, even read in its entirety, \textit{Gauger} “stress[ed] the starting point too much, the finishing point too little. It is the equitableness of the result reached that must stand the test of fairness on review.” \textit{Lacey}, 45 Wis. 2d at 382, 173 N.W.2d at 144.

\textsuperscript{20} \textit{Lacey}, 45 Wis. 2d at 382, 173 N.W.2d at 144.
\textsuperscript{21} \textit{Id}. at 383, 173 N.W.2d at 145.
\textsuperscript{22} Wis. STAT. § 767.255 (1981-1982).
\textsuperscript{23} \textit{Lacey}, 45 Wis. 2d at 383-84, 173 N.W.2d at 145. The substance of this quotation was codified in Wis. STAT. § 247.26 (1971), which provided in pertinent part: 

\begin{quote}
The court may also finally divide and distribute the estate . . . of either party between the parties . . . after having given due regard to the legal and equitable rights of each party, the length of the marriage, the age and health of the parties, the liability of either party for debts or support of children, their respective abilities and estates, whether the property award is in lieu of or in addition to alimony, the character and situation of the parties and all the circumstances of the case . . .
\end{quote}

\textsuperscript{24} At the time of the \textit{Lacey} decision the separate estate, if any, of the divorcing wife could not be disturbed for the benefit of the husband. This may have been one reason why the court did not establish an equal division of the estate as a starting point but directed the lower courts to consider all relevant factors, including the wife’s separate estate: 

Since the Wisconsin statute provides that separate property of the wife, possessed by her before the marriage or acquired solely by her efforts, is to be awarded to her, the amount of such separate estate is a proper factor to con-
All factors favorable to either party must be placed on the scales, and the scales must then balance. The responsibility of the trial court is to fairly, equitably and justly divide the marital property between the spouses, and where it begins is not crucial. It is where it ends that is to be reviewed on appeal.25

Although a fifty-fifty division of property was not a presumption at the time of the Lacey case, the court did say that such a division might be appropriate after a lengthy marriage,26 and Mr. and Mrs. Lacey's marital estate was, in fact, ultimately so divided.27 In cases decided after Lacey, an equal or nearly equal division of marital property was not an unheard of result;28 and, if the equities of the situation leaned in favor of the wife, she received a greater than fifty percent share.29 Nevertheless, an award to the wife of more than one-third of the property continued to be considered "substantial" and was required to be well justified:

The following factors have been considered particularly relevant in determining whether the trial court has erred in awarding a substantial share (generally considered to be more than one-third) of the marital estate to the wife: (1) a long period of marriage; (2) complete lack of any separate

sider in determining how much of the husband's or marital property is also to be awarded to her.

Lacey, 45 Wis. 2d at 384, 173 N.W.2d at 145. Unlike the other Lacey factors, however, the wife's separate estate was not one of the factors codified in the 1973 property division statute because, by that time, the legislature had already made the estate of either spouse subject to division and distribution. Wis. STAT. § 247.26 (1973). See also Wilberscheid v. Wilberscheid, 77 Wis. 2d 40, 46-47 n.7, 252 N.W.2d 76, 80 n.7 (1977) (construing Wis. STAT. § 247.26 (1971)).

25. Lacey, 45 Wis. 2d at 382, 173 N.W.2d at 144.
26. Id. at 382-83, 173 N.W.2d at 145.
27. Lacey v. Lacey, 61 Wis. 2d 604, 611, 213 N.W.2d 80, 84 (1973).
28. See, e.g., Carty v. Carty, 87 Wis. 2d 759, 764, 275 N.W.2d 888 (1979) (an award to the wife of almost 47% of the estate was upheld); Parsons v. Parsons, 68 Wis. 2d 744, 229 N.W.2d 629 (1975) (the trial court's award to the wife of 39% of the net estate was raised by the supreme court to 48%); Heiting v. Heiting, 64 Wis. 2d 110, 218 N.W.2d 334 (1974) (an approximately equal division was upheld).
29. In Wilberscheid v. Wilberscheid, 77 Wis. 2d 40, 252 N.W.2d 76 (1977), the wife was awarded two-thirds of the marital estate where funds she had saved prior to the marriage as well as monies she had inherited were used to purchase the couple's unsuccessful tavern business and the marital homestead. Mrs. Wilberscheid had also worked outside the home for 13 years, and her income had been the mainstay of the family. Id. at 42, 252 N.W.2d at 78. See also Anderson v. Anderson, 72 Wis. 2d 631, 242 N.W.2d 165 (1976) (award to the wife of 51% of the marital estate upheld as not excessive).
estate in the wife coupled with her inability to support herself; (3) the misconduct of the husband contributing to the breakup of the marriage; and (4) amount of permanent alimony awarded to the wife.\textsuperscript{30}

**B. Effect of No-Fault Divorce on Property Division**

In 1977 much of the Wisconsin Family Code was revised. Of major significance was the enactment of a "no-fault" divorce statute.\textsuperscript{31} In keeping with the no-fault standard, the new property division statute\textsuperscript{32} provided for a fifty-fifty division (except for gifts and inherited property)\textsuperscript{33} as a starting point: "The court shall presume that all other property except inherited property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering [a list of twelve factors]."\textsuperscript{34}

The twelve factors included those from the previous stat-


\textsuperscript{31} Wis. Stat. \$ 247.07 (1977) (current version at Wis. Stat. \$ 767.07 (1981-1982) (making irretrievable breakdown of the marriage the sole ground for divorce)).


\textsuperscript{33} The current version also excludes gifts from the property division.

\textsuperscript{34} Wis. Stat. \$ 247.255 (1977). The list of factors was as follows:

1. The length of the marriage.

2. The property brought to the marriage by each party.

3. The contribution of each party to the marriage, giving appropriate economic value to each party’s contribution in homemaking and child care services.

4. The age and physical and emotional health of the parties.

5. The contribution by one party to the education, training or increased earning power of the other.

6. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

7. The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.

8. The amount and duration of an order under s. 247.26 granting maintenance payments to either party, any order for periodic family support pay-
ute, as well as some common-law and new considerations.\textsuperscript{35} The "earning capacity" of each party, for example, had been examined by the court in the past,\textsuperscript{36} as had the "tax consequences" to the parties.\textsuperscript{37} The value of homemaking and child care services had been recognized since \textit{Lacey v. Lacey}.\textsuperscript{38} The new factors set forth by the legislature included the existence of any prenuptial or postnuptial agreements between the parties,\textsuperscript{39} and the desirability of awarding the family home or "the right to live therein" to the party having custody of any children.\textsuperscript{40} Perhaps the most significant innovation was including the "contribution by one party to the education, training or increased earning power of the other."\textsuperscript{41} By suggesting this factor the legislature exhibited sympathy for the spouse who works to enable the other spouse to achieve a professional degree or advanced training and is left at a relative disadvantage when the marriage breaks up.\textsuperscript{42}

The expanded list of factors made for greater precision in evaluating contributions to the marriage and in attaining eq-

\begin{itemize}
\item (9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
\item (10) The tax consequences to each party.
\item (11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
\item (12) Such other factors as the court may in each individual case determine to be relevant.
\end{itemize}

\textsuperscript{35} Comment, \textit{The 1977 Amendments to the Wisconsin Family Code}, 1978 Wis. L. Rev. 882, 886.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} 45 Wis. 2d 378, 173 N.W.2d 142 (1970).
\textsuperscript{40} \textit{Id.} § 247.255(7).
\textsuperscript{41} \textit{Id.} § 247.255(5).
uity between the parties. The fifty-fifty presumption was made applicable to all noninherited property of the spouses whether acquired before or during the marriage.

C. Jasper v. Jasper

Since the fifty-fifty rebuttable presumption is operative even as to premarital separate property, one would not be surprised to see the presumption deemed rebutted, for equity's sake, in a case where one spouse brought significantly more assets into the marriage than the other spouse. Conversely, one would expect the presumption to be more resistant to rebuttal where neither spouse brought many assets into the marriage. There, absent an obvious imbalance in the efforts made or responsibilities undertaken by each of the parties, the assets accumulated during the marriage would be regarded as the product of their mutual effort and would be apportioned accordingly. Likewise, where the trial court in its discretion decided to return to the parties their premarital separate property before effecting a division of property acquired during the marriage, one would not expect rebuttal of the fifty-fifty presumption as to the latter property in the absence of extraordinary circumstances.

In Jasper v. Jasper the trial court did return to the spouses the assets each brought into the marriage. Never-
theless, with respect to assets acquired during the marriage, the fifty-fifty presumption was found to have been rebutted; the homemaking spouse was deemed not to have made an equal contribution.\(^{47}\)

1. Factual Background and Discussion

Margaret and Elmer Jasper were married just under eight years prior to their separation. It was Elmer's first marriage, after he had been a bachelor for fifty years, and Margaret's second. They had one child together, custody of whom was awarded to Margaret. Elmer was a bank employee moonlighting in insurance sales. His annual earning capacity, as estimated by the trial court, was in excess of $32,000.\(^{48}\) Margaret had outside employment for nine months during the marriage and was working as a nurse's aid at the time of trial; the trial court estimated her earning capacity at $6,500 per year presently and at over $8,000 per year when the child became older.\(^{49}\) Both spouses contributed to the care of the child,\(^{50}\) but Mrs. Jasper "운[m]anaged the operation of the home."\(^{51}\)

In dividing the couple's property the trial court first returned to each party the assets each had brought to the marriage. Second, the court divided the assets accumulated during the marriage, awarding forty percent to Mrs. Jasper and sixty percent to Mr. Jasper. Mrs. Jasper appealed the unequal division, saying her award was inadequate and an abuse of discretion.\(^{52}\) She charged that the trial court improperly considered her prior marriage and ignored her marital contributions because they were primarily domestic, rather than financial, and because no "special demands" had been made upon her.\(^{53}\) In support of her allegations, Mrs. Jasper relied on the trial court's language in its conclusions of law. The trial court "운'note[d] that no special demands

\(^{47}\) Id. at 68, 318 N.W.2d at 797.
\(^{48}\) Id. at 61, 318 N.W.2d at 793-94.
\(^{49}\) Id. at 62, 318 N.W.2d at 794.
\(^{50}\) Id. at 67-68, 318 N.W.2d at 796.
\(^{51}\) Id. at 61, 318 N.W.2d at 794.
\(^{52}\) Id. at 66, 318 N.W.2d at 796.
\(^{53}\) Id.
were made upon petitioner nor special contributions made by her in this, her second marriage, of just under eight years’ duration.’”54 The court further pointed out that “‘the financial accumulation was made almost totally through the respondent’s efforts as a bank employee, officer and insurance entrepreneur. The situation clearly calls for any inequality in the division of property to be made in favor of the respondent.’”55 On review by the court of appeals, the above language was echoed.56

The supreme court found no abuse of discretion57 in the division of assets.58 It summarily dismissed Mrs. Jasper’s allegation that the trial court was punishing her for having been married before, saying this was “totally unsupported” by the record.59 To Mrs. Jasper’s allegation that the trial court erred in demanding a “special contribution” on her part, the court responded that no such burden had been placed on her. It concluded that all the trial court meant by its language was that

Elmer’s contributions to the rather brief marriage tipped the scales in his favor, justifying alteration of the equal property division presumption. In noting the absence of any special contributions made by Margaret, . . . the trial court intended nothing more than to comment that Margaret’s contributions to the marriage were not of such a nature [as] to tip the scale back.60

54. Id.
55. Id. at 66-67, 318 N.W.2d at 796.
56. Id. at 67, 318 N.W.2d at 796.
57. An abuse of discretion in a division of property or award of support occurs when the trial court fails to consider proper factors or errs in its factual basis for the division, or when the division is excessive or inadequate. Furthermore, abuse of discretion occurs when the court’s determination is not demonstrably based upon the facts in the record or is not made in reliance upon the applicable law. Id. at 63-64, 318 N.W.2d at 795.
58. Id. at 69, 318 N.W.2d at 797. However, the judgment was reversed and remanded on other grounds: (1) the propriety of a property award in the form of cash installment payments over a period of years must be considered in light of the amount the award could have produced if paid in full at the time of the judgment, but the record did not reflect the trial court’s having done so in this case; and (2) the family support award was inadequate and an abuse of discretion. Id. at 69-71, 318 N.W.2d at 797-98.
59. Id. at 69, 318 N.W.2d at 797.
60. Id. at 68, 318 N.W.2d at 797.
The opinion gives few facts regarding the parties' respective contributions other than that Mr. Jasper was virtually the sole breadwinner and that Mrs. Jasper was a homemaker. The court also noted that Elmer Jasper contributed to the care of the child and that Margaret Jasper's domestic activities were lightened by the four to six meals per week the family ate in restaurants. If the court felt that the restaurant meals caused the division of labor in the marriage to be unequal, it did not specifically say so. The court's chief rationale in holding as it did was that Mrs. Jasper's domestic services had not contributed to Mr. Jasper's attainment of present earning capacity and had not caused her any loss of earning capacity. The presumption of an equal division, said the court, is partly founded on this scenario: "[T]he homemaking partner has contributed services which have enabled the financially supporting partner to achieve his or her station in life, and in so doing the homemaking partner has lost ground in the job market." That scenario was not descriptive of the instant case. Elmer Jasper had achieved his earning capacity over many years preceding the marriage, and Margaret, who had been a homemaker and mother in her previous marriage, had sustained no observable economic setback by marrying Elmer. Under these circumstances the court felt the sixty-forty division was a justifiable alteration of the statutory presumption.

2. Analysis

What the court glossed over was that the presumption applies to the gross marital estate, which includes all the property of the parties except gifts and inherited property.

61. Id. at 67-68, 318 N.W.2d at 796-97.
62. In an earlier 1982 case the Wisconsin Supreme Court forecast its view of the economic contribution of meal preparation. In refusing to terminate maintenance payments to a still needy woman by a financially able ex-husband, the court said:

We note that, although the trial court found Mary's budget "high," it made no comment on Floyd's spending over $400 per month (as compared with Mary's food budget of $135 per month) eating meals out because he cannot cook. We might suggest that it is not too late for Floyd to learn to cook if Mary, after twenty-six years out of the labor force, is required to obtain job training or schooling to enable her to become self-sufficient.


63. Id. at 68, 318 N.W.2d at 797.
64. Id.
When the trial court gave back to Margaret and Elmer the value of the assets each brought into the marriage, it rejected the presumption of an equal division of the estate. The supreme court's attempt to justify the subsequent sixty-forty division of property acquired during the marriage with the observation that the facts of the case deviated from those contemplated by the statutory presumption missed the point. This supposedly atypical situation had already been remedied by the return of premarital assets. In other words, the presumption had already been rebutted. If the sum total of the Jaspers' marital property were taken into account, the ratio of division would be far more unequal than sixty-forty.

Since the Jaspers' premarital separate property was restored to each of them, the relevance of Elmer already having achieved his station in life to the division of assets gained in the course of the marriage is questionable. It also appears inconsistent with the court's pronouncements dating back to Lacey and reiterated in Jasper that marriage is a partnership and that a full-time homemaking spouse's contributions to that partnership can equal or exceed those of an employed spouse. The court's holding implies instead that, with respect to property division, homemaking is on a par with outside employment only when the homemaking spouse's services concurred in time with the employed spouse's advances in the workplace. In effect, this coincidence in time becomes an extra test.

In a "typical" situation, where the parties marry in young adulthood before any major career advances are made, the working spouse's wage or salary increases and promotions do coincide with the homemaking spouse's domestic endeavors, and the court's "test" can be met. When, however, the employed spouse has at the time of marriage already achieved the major forward strikes of his or her career, as in a late or second marriage, the court's ruling puts a homemaking spouse at a disadvantage. Even though the homemaking spouse in that situation provides comfort and well being to the working spouse and enables him or her to concentrate on a job or profession, the supposed absence of a

66. Jasper, 107 Wis. 2d at 67, 318 N.W.2d at 796.
contribution to the working spouse’s current earning capacity makes the domestic spouse a less than equal partner, even as to assets accumulated during the span of the partnership. Homemaking, under this test, becomes an activity without independent economic worth in the eyes of the law. Instead, its worth is dependent upon the appreciation in economic value of the outside employment which it complements.

A synchronization between one spouse’s homemaking and the other’s career achievements was not a prerequisite to a nearly equal division of the gross marital estate in a 1979 case under facts similar to those in Jasper. In Carty v. Carty the Wisconsin Supreme Court upheld a wife’s property award of over forty-six percent of the estate after a nine year marriage under pre-1977 law (no equal division was presumed). The case stands in stark contrast to the unequal division of marital assets in Jasper.

The Carty marriage, like that of the Jaspers, was “late” for the male spouse (though not a first marriage) and not long in duration (nine years). Peter Carty was forty-two years old and had accumulated an estimated estate of $73,932.61 when he married Dorette, 23, who owned about $5,200 worth of personal property. Insofar as a sizable estate is a measure of career achievement, Mr. Carty, like Mr. Jasper, had achieved his “station in life.” The Cartys had no dependent children from their previous marriages, nor were any born to the marriage. Dorette Carty was primarily a homemaker, although she worked periodically during the marriage as a secretary, and Peter was the primary breadwinner. At the termination of the marriage, the trial court awarded Mrs. Carty almost forty-seven percent of the parties’ accumulated assets, of which a substantial portion consisted of Mr. Carty’s premarital separate property.

67. 87 Wis. 2d 759, 275 N.W.2d 888 (1979).
68. Id.
69. Id. at 762-63, 275 N.W.2d at 889.
70. Id. at 762, 275 N.W.2d at 889.
71. Id. at 763, 275 N.W.2d at 889.
72. Id. at 764, 768, 275 N.W.2d at 890-91.
appeal, the supreme court upheld the propriety of the award.\textsuperscript{73}

Although the Cartys' marriage did not endure, the court minimized the importance of length of marriage, saying that the extent of the homemaking spouse's contribution to the enterprise was more important than the number of years it lasted.\textsuperscript{74} Without denigrating Mrs. Carty's contributions to the marriage, but by way of comparison with the \textit{Jasper} case, it must be observed that her homemaking chores did not include child care. The court stressed the fact that Mrs. Carty had no separate estate and that her husband earned almost three times as much as she did.\textsuperscript{75} In \textit{Jasper} the earning capacity differential was even greater—Elmer's estimated earning capacity was at least four times as much as Margaret's.\textsuperscript{76} Furthermore, Dorette Carty was a qualified and experienced secretary, fully able to support herself.\textsuperscript{77} By contrast, Margaret Jasper had virtually no marketable skills.\textsuperscript{78}

A comparison of similar, but nonetheless unique, property division cases has limited analytic value, for the weighing of equitable considerations is an imprecise business. Because the trial court is best able to measure the weight of the evidence and the credibility of the witnesses,\textsuperscript{79} the rules of judicial discretion give it wide latitude in choosing which equitable factors to consider and how much weight to give them.\textsuperscript{80} Still, the foregoing comparison illustrates that aiding the supporting spouse in achieving his or her station in life was not always a prerequisite to a homemaking spouse receiving half of the marital estate upon divorce.

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\textsuperscript{73} \textit{Id.} at 770, 275 N.W.2d at 892.
\textsuperscript{74} \textit{Id.} at 769, 275 N.W.2d at 892.
\textsuperscript{75} \textit{Id.} at 770, 275 N.W.2d at 892.
\textsuperscript{76} \textit{Jasper}, 107 Wis. 2d at 61-62, 318 N.W.2d at 793-94.
\textsuperscript{77} \textit{Carty}, 87 Wis. 2d at 763, 275 N.W.2d at 889.
\textsuperscript{78} \textit{Jasper}, 107 Wis. 2d at 61-62, 318 N.W.2d at 794.
\textsuperscript{79} \textit{See} Bahr v. Bahr, 107 Wis. 2d 72, 77, 318 N.W.2d 391, 395 (1982); Perrenoud v. Perrenoud, 82 Wis. 2d 36, 42, 260 N.W.2d 658, 661 (1978).
\textsuperscript{80} \textit{Carty} v. \textit{Carty}, 87 Wis. 2d 759, 275 N.W.2d 888 (1978). “The trial court need not consider every one of the factors set forth in the statute or cases; moreover, it is up to the trial court to determine the weight and effect of the various considerations.” \textit{Id.} at 768, 275 N.W.2d at 891.
\end{flushleft}
D. Conclusion

In *Jasper v. Jasper*\(^8\) the Wisconsin Supreme Court said that part of the rationale behind the equal property division presumption is that the homemaking partner has contributed services which have made it possible for the supporting party to achieve his or her station in life and, in so doing, the homemaker has foregone economic opportunities. It is conceded that these facts are relevant to the division of the gross marital estate which comprises property brought into the marriage as well as property earned during the span of marriage. Achievement of station may well exhibit itself in the form of a large amount of separate property brought into the marriage, and this is one of the statutory, equitable considerations relevant to property division.\(^8\) It is urged, however, that station in life be given only a limited relevance with respect to the division of property acquired in the course of the marriage. Although the supporting party's earning capacity may have been attained without the help of the dependent party, the financial contribution to the material acquisitions of the marriage must not be given greater weight than the nonfinancial contribution absent a blatant imbalance in the respective efforts made. An unequal division of assets gained during the marriage ought to be solidly justified by the facts and based on substantially more than the relative financial contributions of the parties and the fact that the supporting party's earning capacity was achieved prior to the marriage.

II. MAINTENANCE EVALUATION IN WISCONSIN: THE REMOVAL OF FAULT AS A CONSIDERATION

Maintenance, a term used in the Uniform Marriage and Divorce Act,\(^8\) has been described as an "award made in a [divorce] proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other."\(^8\) Maintenance is often regarded "as a supplement to what is derived from a distribution of marital prop-

\(^8\) 107 Wis. 2d 59, 318 N.W.2d 792 (1982).
\(^8\) WIS. STAT. § 767.255(2) (1981-1982).
\(^8\) Note, *supra* note 44, at 425.
erty." Under the Wisconsin Family Code the court may, in its discretion, order that maintenance payments be made for a limited or an indefinite time, or not at all, depending on a number of equitable factors, including the division of property, the age and health of the parties, their respective educational backgrounds and earning capacities, and the feasibility that the party seeking maintenance can become self-supporting at a living standard similar to that enjoyed during the marriage.

A. History

The forerunner of maintenance was alimony (from the Latin alimonia meaning "sustenance"), a concept rooted in

86. Wis. STAT. ch. 767 (1981-1982).
87. Wis. STAT. § 767.26 (1981-1982) provides:

Maintenance payments. Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

1. The length of the marriage.
2. The age and physical and emotional health of the parties.
3. The division of property made under s. 767.255.
4. The educational level of each party at the time of marriage and at the time the action is commenced.
5. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
6. The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
7. The tax consequences to each party.
8. Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
9. The contribution by one party to the education, training or increased earning power of the other.
10. Such other factors as the court may in each individual case determine to be relevant.
the common-law duty of husband to support his wife. The husband's duty began at marriage and did not cease upon divorce, except when the wife had committed uncondoned adultery. The gender biased rules of alimony were reflective of economic reality. However, with the changing economic position of women in modern society and the trend toward gender neutral statutes came the beginnings of a transformation in alimony law.

The first significant change in Wisconsin alimony law came in 1971. The alimony statute was revised to allow its award to either party out of the property or income of the other. Again, adultery was a bar. The practical effect of the change was negligible; the usual recipients of alimony

89. H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 14.1 (1968). Alimony can be traced back to the English ecclesiastical courts which had jurisdiction over matrimonial actions prior to 1857. Since the church considered marriage indissoluble, divorce was prohibited. The ecclesiastical courts did, however, allow a type of legal separation known as divorce a mensa et thoro, or divorce "from bed and board." Because a husband automatically gained control of his wife's income and property with marriage, he had a corresponding duty at common law to support her. The imposition of alimony was the ecclesiastical court's means of enforcing the husband's duty of support after the divorce from bed and board. Id. American courts have granted absolute divorce since colonial times and have awarded alimony as an incident thereto. Id.

90. [The duty of the husband to support his wife] results from the marital relation. It is part of the marriage contract and is recognized as a legal duty in the statutes and in the decisions of this court.” Salinko v. Salinko, 177 Wis. 475, 478, 188 N.W. 606, 607 (1922) (citations omitted).

91. “It is well established . . . that the husband's duty to support his wife does not cease upon their being divorced.” Borchers v. Borchers, 254 Wis. 302, 305, 36 N.W.2d 79, 81 (1949).


93. In fact, the reality continues to be that spousal support is more commonly awarded to women as they are the more likely to be financially dependent. Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 U.C.L.A. L. REV. 1181, 1221 n.140 (1981).

94. Wis. STAT. § 247.26 (1971). Gender based alimony statutes were not declared unconstitutional until nine years later. In Orr v. Orr, 440 U.S. 268 (1979), the United States Supreme Court ruled that a state statute which provided that husbands, but not wives, could be ordered to pay alimony violated the fourteenth amendment's equal protection clause. By the time Orr came down, about 40 states had already made their alimony statutes gender neutral. Freed & Foster, supra note 44, at 252.

95. Wis. STAT. § 247.26 (1971), provided, in pertinent part, that “no alimony shall be granted to a party guilty of adultery not condoned . . . .”
continued to be female, and the court's use of gender in enunciating the rules reflects that fact. The court's determination of the alimony award was generally based on the needs of the wife and the ability of the husband to pay. The wife's needs were determined by her assets and income, earning capacity, age and health, special needs, customary station in life, and the age, health and special needs of any children. The husband's ability to pay was determined by his income, assets, debts, age and health. In addition, any considerations relevant to property division were relevant to the awarding of alimony.

The second significant innovation in alimony law in Wisconsin was the 1977 revision of the Family Code known as the Divorce Reform Act. A new approach was taken to alimony and a new name given to it. Maintenance, as it is now called, was treated for the first time in a statute separate from property division. The factors relevant to its deter-

96. See cases cited infra notes 97-99.
100. Tonjes v. Tonjes, 24 Wis. 2d 120, 125, 128 N.W.2d 446, 449 (1964).
102. Wis. Stat. § 247.26 (1977) provides:

Maintenance payments. (1) Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 247.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:
   (a) The length of the marriage.
   (b) The age and physical and emotional health of the parties.
   (c) The distribution of property made under s. 247.255.
   (d) The educational level of each party at the time of marriage and at the time the action is commenced.
   (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
   (f) The feasibility that the party seeking maintenance can become self-
mination were, for the first time, codified.\textsuperscript{103}

Some of the factors were already part of the case law, such as age, health and earning capacity.\textsuperscript{104} Other factors were new to maintenance evaluation but derived from previously codified property division considerations.\textsuperscript{105} These included the educational level of each party at the time of marriage and at the time the action was commenced,\textsuperscript{106} the feasibility that the party seeking maintenance can become self-supporting at a level comparable to that enjoyed during the marriage,\textsuperscript{107} the tax consequences to each party,\textsuperscript{108} and any prenuptial or postnuptial agreements made between the parties.\textsuperscript{109} While the earning capacity of the party seeking maintenance was already a factor to which the award was subject, the new statute directed the court to consider earning capacity in light of a number of specific variables: the party's education, training, skills, experience, length of absence from the job market, custodial responsibilities for children, and the time and expense of acquiring the education or training for suitable employment.\textsuperscript{110}

\textbf{B. Fault as a Consideration}

1. The Statute

A second significant change in the maintenance statute after the 1977 revisions was that adultery was no longer a

\begin{itemize}
\item (g) The tax consequences to each party.
\item (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
\item (i) Such other factors as the court may in each individual case determine to be relevant.
\end{itemize}

\textsuperscript{104} See Wis. Stat. § 247.26 (1977); see also supra text accompanying note 98.
\textsuperscript{106} Wis. Stat. § 247.26(d) (1977).
\textsuperscript{107} \textit{Id.} § 247.26(f).
\textsuperscript{108} \textit{Id.} § 247.26(g).
\textsuperscript{109} \textit{Id.} § 247.26(h).
\textsuperscript{110} \textit{Id.} § 247.26(e).
bar to the award. The statute did not make clear, however, whether and to what extent marital misconduct was still a relevant factor in the maintenance evaluation. Although marital misconduct was explicitly barred from consideration in the 1977 revision to the property division statute, its role was ambiguous in the maintenance statute. It was not included in the list of relevant factors, but neither was it explicitly removed from consideration. Therefore, whether misconduct could diminish a guilty spouse's maintenance award or inflate the amount a guilty spouse was ordered to pay to the maintenance recipient was an open question.

The omission of a conclusive reference to misconduct in the statute was not a mere legislative oversight. As Justice Abrahamson noted in Dixon v. Dixon, the original assembly bill included a provision that the court could not consider the marital misconduct of either party in ordering maintenance payments. This provision was deleted by an amendment to the bill. A further proposed amendment would have allowed the court to consider "such other factors as the Court may in each individual case determine to be

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111. Wis. Stat. § 247.255 (1977), provided, in pertinent part: "The court shall presume that . . . property . . . is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct . . . ."

112. The consideration of fault in making the financial settlement pursuant to divorce is not necessarily incongruous with the elimination of fault grounds for the divorce itself. In other jurisdictions where no-fault divorce has been instituted, but where no statutory reference has been made to fault's effect on property rights, courts have gone both ways. Annot., 86 A.L.R.3d 1116 (1978). Courts in California, Iowa and Georgia have held that where the legislature provided for divorce on grounds of irreconcilable differences but did not address the role of fault in alimony, support and property division determinations, fault could not be considered therein. In re Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972); In re Marriage of Juick, 21 Cal. App. 3d 421, 98 Cal. Rptr. 324 (1971); Lindsey v. Lindsey, 238 Ga. 685, 235 S.E.2d 6 (1977); Anderson v. Anderson, 237 Ga. 886, 230 S.E.2d 272 (1976); In re Marriage of Williams, 199 N.W.2d 339 (Iowa 1972). On the other hand, courts in Alabama, Kentucky, Michigan, Minnesota, North Dakota and Texas (whose statutes likewise were ambiguous on the role of fault in financial settlements pursuant to no-fault divorce) have held that fault is a relevant consideration. Huggins v. Huggins, 57 Ala. App. 691, 331 So. 2d 704 (1976); Chapman v. Chapman, 498 S.W.2d 134 (Ky. 1973); Kretzschmar v. Kretzschmar, 48 Mich. App. 279, 210 N.W.2d 352 (1973); Peterson v. Peterson, 242 N.W.2d 103 (Minn. 1976); Grant v. Grant, 226 N.W.2d 358 (N.D. 1975); Clay v. Clay, 550 S.W.2d 730 (Tex. Civ. App. 1977).

113. 107 Wis. 2d 492, 499, 319 N.W.2d 846, 849-50 (1982).


115. A. Amend. 10 to A. Substitute Amend. 1 to Wis. A.B. 100 (1977).
relevant, including the marital misconduct of either party.\textsuperscript{116} This proposal, too, was defeated. No further clarification was undertaken. In effect, the decision whether fault was to be banished from maintenance determinations or whether the case law prior to the Divorce Reform Act would remain intact was left to the courts. The case law had held that the marital misconduct of either spouse could be taken into account in determining the alimony award, but it could not be used in an overtly punitive fashion against the culpable party.\textsuperscript{117}

2. \textit{Dixon v. Dixon}

The legislature's failure to provide direction in the matter and the resulting statutory ambiguity was finally resolved in \textit{Dixon v. Dixon}.\textsuperscript{118} There, the Wisconsin Supreme Court decided that evidence of misconduct was not admissible in the determination of maintenance payments.

John and Ethyl Dixon had been married almost twenty-five years at the time their divorce was commenced. Ethyl held a bachelor's degree in education and was employed periodically as a substitute teacher. She suffered from hypertension and nervousness which, according to two out of three physicians who testified, would prevent her from holding a full-time job.\textsuperscript{119} John, who held a master's degree in education and was employed in a management position at a resort, had an annual income of $21,700 when the divorce action was commenced and $31,000 at the time of trial, not including fringe benefits, a company car and an expense account.\textsuperscript{120} John's monthly net pay was $1,490.51.\textsuperscript{121} The couple had three children; two of them were minors whose custody was awarded to Mrs. Dixon. She was also given

\textsuperscript{116} A. Amend. 21 to A. Substitute Amend. 1 to, Wis. A.B. 100 (1977).
\textsuperscript{117} Tonjes v. Tonjes, 24 Wis. 2d 120, 126, 128 N.W.2d 446, 450 (1964) (holding that the trial court could use marital misconduct to resolve certain "economic ambiguities" against the erring partner but could not use it to "affirmatively punish" the guilty party).
\textsuperscript{118} 107 Wis. 2d 492, 319 N.W.2d 846 (1982).
\textsuperscript{119} Id. at 494, 319 N.W.2d at 847.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 495, 319 N.W.2d at 847.
maintenance of $500 per month for thirty months, plus $50 per week per child for support of the minor children.\textsuperscript{122}

Among Mrs. Dixon's contentions on appeal was that the trial court erred in refusing to admit evidence of John's alleged adultery in its determination of the maintenance award. She argued that section 767.26 of the Wisconsin Statutes permitted the consideration of marital misconduct in maintenance determinations insofar as it contained no express prohibition of same, and it contained a catch-all provision allowing the court to consider any factor deemed relevant.\textsuperscript{123} The legislature's omission of an express prohibition against consideration of misconduct, Mrs. Dixon argued, meant that it intended to retain prior law allowing its consideration.\textsuperscript{124} The supreme court rejected this argument, holding that the legislature did not intend to allow the circuit courts to consider marital misconduct in awarding maintenance and setting forth three reasons for its holding.

First, the court observed that the declared intent of the legislature in enacting the 1977 Divorce Reform Act was to move away from assigning blame for the marriage failure and to make the needs of the parties and their children the focal point of the accompanying financial settlement.\textsuperscript{125} Evidence of misconduct of either of the parties is irrelevant to an inquiry focusing on need.\textsuperscript{126} To admit such evidence for consideration, said the court, would be contrary to the legislative purpose underlying the Act.\textsuperscript{127}

Second, prior case law allowing consideration of misconduct in alimony decisions developed at a time when there still existed the statutory prohibition against awarding alimony to an adulterous wife.\textsuperscript{128} This proscription was later repealed by the legislature.\textsuperscript{129} Thus, the statutory underpinning for the rule allowing consideration of misconduct was also eliminated.\textsuperscript{130}

\textsuperscript{122} \textit{Id.} at 495, 319 N.W.2d at 847-48.
\textsuperscript{123} \textit{Id.} at 495-96, 500-01, 319 N.W.2d at 848-50.
\textsuperscript{124} \textit{Id.} at 500-01, 319 N.W.2d at 850.
\textsuperscript{125} \textit{Id.} at 501, 319 N.W.2d at 851.
\textsuperscript{126} \textit{Id.} at 501-03, 319 N.W.2d at 851-52.
\textsuperscript{127} \textit{Id.} at 502, 319 N.W.2d at 851.
\textsuperscript{128} \textit{Id.} at 503, 319 N.W.2d at 852.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
Finally, even the prior case law limited the significance of misconduct in determining the alimony award. Case law had clearly established that the two main factors in awarding alimony were the needs of the recipient and the ability of the other spouse to pay.\textsuperscript{131} Those are economic factors, not fault-based ones. Where evidence of misconduct was taken into account, it was properly used only to resolve "'certain ambiguities in economic position against the erring partner.'\textsuperscript{132} It could not be used "as a device to affirmatively punish the 'guilty' party."\textsuperscript{133} The court pointed out that "[w]hether misconduct is used to 'punish' or simply to make 'nonpunitive adjustments,' the end result was [sic] the same: Parties guilty of misconduct did not do as well financially as they would have done had they not been guilty of misconduct."\textsuperscript{134}

The court concluded, for all of the foregoing reasons, that the legislature did not intend that fault enter into the determination of maintenance awards.\textsuperscript{135} The evidence of Mr. Dixon's adultery was, therefore, properly excluded.

\section*{C. Conclusion}

The \textit{Dixon} court's decision not to include marital misconduct as a factor in the determination of maintenance awards is logically consistent with the spirit of Wisconsin's no-fault divorce law and with the abolition of fault as a consideration in the division of marital property. The court's decision removes the last vestige of blame-assigning from the marital dissolution proceeding and focuses the financial settlement entirely on the end which it was designed to accomplish. Maintenance awards are based on the amount of financial help a dependent spouse requires after the termination of the marital partnership. Since evidence of fault does not illuminate an inquiry into economic need, it is properly

\begin{thebibliography}{16}
\bibitem{131} Id. at 504, 319 N.W.2d at 852.
\bibitem{132} Id. at 505, 319 N.W.2d at 852 (quoting Tonjes v. Tonjes, 24 Wis. 2d 120, 126, 128 N.W.2d 446, 450 (1964)).
\bibitem{133} Id.
\bibitem{134} Dixon, 107 Wis. 2d at 505, 319 N.W.2d at 852.
\bibitem{135} Id. at 505, 319 N.W.2d at 853. \textit{See also} Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (1983) (cohabitation or misconduct held not the sole consideration on a motion to terminate maintenance).
\end{thebibliography}
excluded from that inquiry. The Dixon court made a rational policy decision which dispelled the uncertainty left by the legislature's omission and comported with the philosophy of no-fault divorce.

III. THE TWO ROLES OF MAINTENANCE: REHABILITATIVE DEVICE AND PERMANENT AWARD BASED ON ECONOMIC NEED

A. The Changing Nature of Alimony

Postdivorce spousal support owes its existence to the common-law rule that a husband was legally bound to support his wife 'til death did them part, even if divorce intervened in the meantime. Not only was the divorced husband obligated to provide a basic level of sustenance, but he was required, if possible, to support his former wife in the manner to which she had become accustomed during the marriage. Alimony was a permanent obligation because the wife usually did not possess the means or ability for self-support.

With the promulgation of the "no-fault" concept has come the idea that the marital dissolution should be a clean and harmonious break rather than a bitter and disruptive one. To achieve that end, the financial settlement should be premised not upon blame and making the "guilty" party "pay," but upon the economic needs and abilities of the parties. The Uniform Marriage and Divorce Act encourages

137. See H. Clark, Jr., supra note 89, § 14.1. But see Anderson v. Anderson, 72 Wis. 2d 631, 242 N.W.2d 165 (1976); Radandt v. Radandt, 30 Wis. 2d 108, 140 N.W.2d 293 (1966); Tonjes v. Tonjes, 24 Wis. 2d 120, 128 N.W.2d 446 (1964); Bunde v. Bunde, 270 Wis. 226, 70 N.W.2d 624 (1955); Ruppert v. Ruppert, 247 Wis. 528, 19 N.W.2d 874 (1945) (where the wife had separate income and property).
138. The only exceptions were for death, remarriage or changed circumstances. Anderson v. Anderson, 72 Wis. 2d 631, 242 N.W.2d 165 (1976); Thies v. MacDonald, 51 Wis. 2d 296, 187 N.W.2d 186 (1971); Jordan v. Jordan, 44 Wis. 2d 471, 171 N.W.2d 385 (1969).
141. Id. at 566.
the use of property division as the primary means of providing for the future financial needs of the parties. For an award of maintenance to be made under the Uniform Act, certain findings of fact on the issue of need are a prerequisite: the trial court may award maintenance only when it has found that the party seeking it lacks sufficient property to meet his or her needs (including whatever marital property has been awarded) and that the party cannot find employment or cannot work because of child care responsibilities.

Alimony is viewed today as primarily rehabilitative in nature. The financially independent party's duty to support results, not from that party's sex, but from his or her ability and resources and the public policy against allowing the dependent spouse to become a ward of the state. The duty of support, however, no longer necessarily continues until death or remarriage. The goal is to release the supporting party from the obligation of support at such time as the recipient party achieves economic self-sufficiency:

The payment of maintenance is not to be viewed as a permanent annuity. Rather, such payment is designed to maintain a party at an appropriate standard of living, under the facts and circumstances of the individual case, until the party exercising reasonable diligence has reached a level of income where maintenance is no longer necessary.

142. UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 91, 160 commissioners' comment (1973). Only where the marital property is insufficient to provide for the parties' financial needs can an award of maintenance be made as a supplement. Id. commissioners' prefatory note at 93.
143. Id. § 308.
144. Comment, supra note 139, at 495. Note, supra note 44, at 425.
145. Taake v. Taake, 70 Wis. 2d 115, 130, 233 N.W.2d 449 (1975) (dissenting opinion).
146. Permanent maintenance continues until death, remarriage or a change in circumstances. See supra note 138.
147. Vander Perren v. Vander Perren, 105 Wis. 2d 219, 230, 313 N.W.2d 813, 818 (1982). See also Johnson v. Johnson, 78 Wis. 2d 137, 159, 254 N.W.2d 198, 209 (1977) (Abrahamson, J., dissenting) ("It is desirable and necessary to encourage the recipient spouse to become equipped and trained for return to the job market. Alimony is unreliable. The paying spouse may lose employment, become ill, die, or avoid payment. Alimony can be harmful psychologically and economically to both parties.").
B. Limited v. Permanent Maintenance

The idea of using postdivorce spousal support as a rehabilitative tool finds expression in Wisconsin and many other states in the form of statutory authorization for "limited" maintenance.148 This allows the court to fix a time limit on the award as an alternative to granting maintenance for an indefinite period. Indefinite, or permanent, alimony is appropriate where future employment is unlikely due to age, illness or other factors.149 However, if the dependent spouse has the potential to be self-supporting and is not unduly burdened with long term child custodial responsibilities, the maintenance award's duration should be related to the length of time necessary for that spouse to find a job or to "upgrade [his or] her educational qualifications in order to secure employment."150

Prior to 1971 the Wisconsin statutes authorized only permanent alimony,151 or alimony whose modification could be predicated only upon a material change in the needs of the party receiving the support or in the financial resources of the party paying the support.152 In 1971 the legislature amended the alimony statute to allow the court to grant alimony for a limited period of time.153 When an award of lim-


149. See, e.g., Volosin v. Volosin, 382 So. 2d 733 (Fla. App. 1980) (award of rehabilitative alimony to a 61 year old divorced wife was improper where she was in poor health, with no apparent means of support, and there was no suggestion how she could be rehabilitated to become self-supporting). But see Watkins v. Watkins, 209 Neb. 14, 305 N.W.2d 894 (1981) (although a divorced wife had not worked since marriage, had skills qualifying her only to waitress and do office work, had had ileostomy operation performed on her three years earlier, had phlebitis in one leg and had cataracts in both eyes, court upheld adequacy of award of limited alimony, saying that although she had some health problems, there was no indication she was unemployable).


152. See cases cited supra note 138.

ited maintenance is proper, should it still be subject to modification or extension at a later date? Originally, such limited awards were not subject to revision. When the legislature amended the alimony statute in 1971 to provide for a limited award, it also amended the revision of judgment statute to provide that a judgment providing for alimony for a limited period “shall not thereafter be revised or altered.” Presumably, the legislature felt both parties would be able to plan their lives better with the certain knowledge that the maintenance payments would not continue indefinitely into the future.

The Divorce Reform Act of 1977 once again changed the law. The revision of judgment statute was amended to provide that any judgment of maintenance could be revised. This provision was the subject of the second issue certified to the Wisconsin Supreme Court in Dixon v. Dixon.

2. Dixon v. Dixon

In its conclusions of law pursuant to the Dixons’ divorce judgment, the circuit court stated that the $500 per month for thirty months awarded to Mrs. Dixon as maintenance was not to be increased or decreased by virtue of any change in the economic circumstances of either of the parties. Mrs. Dixon argued on appeal that prohibition of modification was in violation of the statutes which expressly author-

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2d 9, 242 N.W.2d 214 (1976), wherein the amended statute was interpreted as intended not to remove the trial court’s right to impose permanent alimony, but rather to give the court the option of granting either permanent or limited alimony. The court’s holding was reflected in the 1977 amendment to the statute which explicitly provided that maintenance could be granted “for a limited or indefinite length of time.” Ch. 105, § 42, 1977 Wis. Laws 572 (codified at Wis. STAT. § 247.26 (1977)) (current version at Wis. STAT. § 767.26 (1981-1982)).


156. Ch. 105, 1977 Wis. Laws 560 (codified as amended at Wis. STAT. ch. 767 (1981-1982)).

157. Id. at 575 (amending Wis. STAT. § 247.32 (1977)) (current version at Wis. STAT. § 767.32 (1981-1982)).

158. 107 Wis. 2d 492, 319 N.W.2d 846 (1982).

ize revision of any maintenance award, making no distinction between limited and indefinite awards.\textsuperscript{160}

The supreme court agreed with Mrs. Dixon, ruling in favor of modification of limited awards so long as the petition for revision is filed before the maintenance payments terminate.\textsuperscript{161} The court recognized that its holding would tend to obscure the difference between limited and indefinite maintenance awards. The prohibition against revision of limited awards was the "primary distinction" under the old statutes between limited and indefinite alimony.\textsuperscript{162} It was also the chief advantage of limited alimony. Both parties were afforded certainty as to their "financial rights and responsibilities,"\textsuperscript{163} and judicial economy was promoted through a reduction in future court hearings.\textsuperscript{164} Nevertheless, the plain meaning of the statute led the court to conclude that the values of "economic certainty and reduced litigation" were not intended to be achieved "at the expense of spouses whose needs might change after judgment is entered."\textsuperscript{165} Thus, under the court’s ruling, Wisconsin circuit courts are empowered to revise maintenance payments, even when originally awarded for only a limited time.\textsuperscript{166}

\textsuperscript{160} Id. at 506, 319 N.W.2d at 853.
\textsuperscript{161} Id. at 508, 319 N.W.2d at 854.
\textsuperscript{162} Id. at 507-08, 319 N.W.2d at 853-54.
\textsuperscript{163} Id. at 507, 319 N.W.2d at 853.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 508, 319 N.W.2d at 854.
\textsuperscript{166} Id. Dixon was not the first case in which the supreme court weakened the concept of limited maintenance. The court had already made it difficult to award limited maintenance to custodial mothers of children. Hartung v. Hartung, 102 Wis. 2d 58, 308 N.W.2d 16 (1981). The court in Hartung said it recognized the right of such mothers to stay at home. Id. at 67-68, 306 N.W.2d at 21. Eleanor Hartung, the custodial parent of three young children, had been awarded maintenance of $200 a month for eighteen months plus child support. Id. at 62, 306 N.W.2d at 18. The trial court’s rationale for the limited maintenance award was that Eleanor would not want to “sit around for the rest of her life” and would “turn into a vegetable if she did that anyhow.” Id. at 62-63, 306 N.W.2d at 21. Eleanor contended on appeal that the size and duration of the award would require her to immediately seek employment to meet her undisputed monthly expenses. Id. at 62, 306 N.W.2d at 19. The supreme court reversed the award, finding the duration “arbitrary” and both the amount and duration unsupported by a reasoned consideration of the facts in the record and the statutory guidelines. Id. at 66-68, 306 N.W.2d at 20-22. The court found no evidence in support of the trial court’s apprehension that mothers of small children who remain at home to care for them turn into vegetables. Id. at 67, 306 N.W.2d at 21.
3. Effects of *Dixon* on the Principle of Rehabilitation

Although the *Dixon* ruling may seem inconsistent with the principle of rehabilitative support, other jurisdictions with limited or rehabilitative forms of alimony similarly allow modification on the theory of the continuing jurisdiction of the trial court,167 or where the trial court retains jurisdiction to modify the award in the future,168 or where it expressly declines to preclude modification in the alimony decree itself.169

There exists the possibility that the availability of modification of a limited award of maintenance may act as a disincentive for the dependent party to become self-supporting. On petition for extension, evidence of a lack of reasonable efforts to find employment should weigh in disfavor of the petitioning spouse. California has held that refusal to seek employment is a factor for the court to take into consideration on petition for modification.170 This is certainly a logical extension of the principles behind the limited award. It has been said that the primary purpose of limited maintenance is to assist the employable divorced person in regaining a useful role in society "through vocational or therapeutic training or retraining."171 Rehabilitative or limited maintenance is "not a substitute for either unemployment compensation or retirement benefits. The award is clearly an incentive to assist one in reclaiming employment skills outside the home which have atrophied during the marital relationship."172

Although the supreme court in *Dixon* did not discuss burdens of proof on petition for revision or the necessity of a good faith effort to become self-supporting (when self-support is possible), it has said in other recent cases that such

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169. See, e.g., CONN. GEN. STAT. ANN. § 46b-86 (West Supp. 1982).
good faith efforts are relevant to the awarding or termination of maintenance. For example, in *Bahr v. Bahr*\(^{173}\) the court said: "When the dependent party is capable of accepting reasonably available, gainful employment, we do not believe the dependent party can avoid such employment and simply rely upon the supporting party to provide a standard of living for the dependent party comparable to that enjoyed during marriage."\(^{174}\) And in *Vander Perren v. Vander Perren*\(^{175}\) the court said that "a party's lack of initiative or effort to become self-supporting is a relevant factor for a court to consider in awarding or terminating maintenance."\(^{176}\) Thus, even though *Dixon* effectively tolls the death knell for the truly limited maintenance award, the decision is consistent with the role of maintenance in remediating need and is not necessarily inconsistent with the award's rehabilitative function. On petitions for revision, it is reasonable to expect that circuit courts will take into account the petitioner's reasonable efforts to become self-supporting.

**C. The Permanent Maintenance Award**

Where rehabilitative, or limited, maintenance is rejected by the court in favor of a permanent award to a former spouse whose capacity for self-support is found wanting, is that spouse entitled to be maintained until death or remarriage in the affluent style of living he or she enjoyed during the marriage? A spouse capable of rehabilitation may never reach the marital standard of living, yet he or she is still encouraged to become at least a self-sufficient breadwinner. In the ordinary case, not even the wage earning spouse can live at the same socioeconomic level after divorce. "Whether or not two can live as cheaply as one, two persons living under two roofs cannot live as well as the same two persons living under one roof."\(^{177}\)

Yet, in *Bahr v. Bahr*\(^{178}\) the Wisconsin Supreme Court held that a maintenance award of $18,000 per year to a di-

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173. 107 Wis. 2d 72, 318 N.W.2d 391 (1982).
174. *Id.* at 83, 318 N.W.2d at 397-98.
175. 105 Wis. 2d 219, 313 N.W.2d 813 (1982).
176. *Id.* at 229, 313 N.W.2d at 818.
178. 107 Wis. 2d 72, 318 N.W.2d 391 (1982).
vored wife whose former husband earned over $300,000 per year was so unreasonably low under the circumstances as to constitute an abuse of discretion. In the same opinion the court proposed that an award to the dependent party of fifty percent of the parties' combined incomes might be a reasonable starting point in maintenance evaluations.

1. Factual Background of Bahr

Darlene and Robert Bahr were married for twenty-four years prior to their divorce in 1979. Their four children were all adults living outside the home. Robert Bahr, aged fifty-one at the time of the divorce, was a physician specializing in radiology with a gross annual income of over $300,000. Darlene Bahr, fifty, had a college degree qualifying her for employment as a dietician, and from 1973 until just before the divorce she worked part-time as a dietary consultant earning up to $5,000 per year. Except for that employment, she was a homemaker. She testified at the divorce trial that she had medical problems, including arthritis and back "ailments," which made it hard for her to work for long periods of time.

The trial court awarded Mrs. Bahr forty-six percent of the net marital estate (after attorney fees), or $513,279.50, plus $1,500 per month permanent maintenance. On appeal, Mrs. Bahr challenged the property award's propriety and the maintenance award's adequacy. The court of appeals agreed with her that errors in computation had been made in the property division, and it ordered the case remanded for reconsideration thereof. In addition, it or-

179. Id. at 85, 318 N.W.2d at 398.
180. Id. at 84-85, 318 N.W.2d at 398.
181. Id. at 75, 318 N.W.2d at 394.
182. Id. at 74-75, 318 N.W.2d at 393.
183. Id. at 74, 318 N.W.2d at 393.
184. The trial court ordered Dr. Bahr to contribute $33,779.40 toward Mrs. Bahr's attorney fees. Id. at 75, 318 N.W.2d at 394.
185. In Wisconsin and other jurisdictions the increase in factors to be considered by the court under equitable distribution statutes has led to a concurrent escalation in attorney fees and costs for expert witnesses. In New York, for example, fees for a typical divorce now run between $10,000 and $20,000. Goodman, With New Law, Divorce Fees Soar, N.Y. Times, Jan. 13, 1983, at Cl, col. 1.
186. Id. at 76 n.1, 318 N.W.2d at 394 n.1.
dered the trial court to reconsider whether the maintenance award should be modified to reflect the changes in the division of property, since the two awards cannot be made "in a vacuum." \(^{187}\) The court of appeals said, however, that it did not consider the maintenance award so inadequate as to constitute an abuse of discretion. \(^{188}\) The Wisconsin Supreme Court disagreed and held that the award of maintenance in the amount of $1,500 per month was "unconscionably low and an abuse of discretion." \(^{189}\)

2. The Relevance of Ability to Pay and Marital Lifestyle

As a general rule, maintenance awards are "based upon the needs and income producing abilities of the parties, with consideration of other supplementary factors." \(^{190}\) Recent decisions of the Wisconsin Supreme Court, however, have reduced the importance of need in the maintenance determination. \(^{191}\)

A person's concept of his or her own "needs" is determined in large measure by the style of living he or she is accustomed to, and it is for this reason that many courts take the marital living standard into account in determining maintenance awards. \(^{192}\) The standard of living prior to divorce has long been considered relevant under Wisconsin case law, \(^{193}\) and the present maintenance statute explicitly directs the court to consider "[t]he feasibility that the party

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187. Id. at 77, 318 N.W.2d at 394 (quoting the unpublished court of appeals opinion).
188. Id. at 77, 318 N.W.2d at 394.
189. Id. at 77, 318 N.W.2d at 395.
191. For example, no longer is need an absolute prerequisite to an award of maintenance. Under Lundberg v. Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982) and Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982), even a self-supporting spouse may be entitled to maintenance. Both Lundberg and Brown concerned wives who had put their husbands through medical school. The supreme court held that maintenance could be used as a compensatory device for material contributions and foregone opportunities that could not be fully compensated through the property division.
193. Hartung v. Hartung, 102 Wis. 2d 58, 306 N.W.2d 16 (1981); Anderson v. Anderson, 72 Wis. 2d 631, 242 N.W.2d 165 (1976); Radandt v. Radandt, 30 Wis. 2d 108, 140 N.W.2d 293 (1966); Tonjes v. Tonjes, 24 Wis. 2d 120, 128 N.W.2d 446 (1964).
seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.”194 In *Bahr v. Bahr* the supreme court said for the first time that particular weight should be attached to the marital standard of living in cases where a high standard existed during the marriage. The court interpreted the meaning of the word “enjoyed” in the maintenance statute as pertaining to situations where the parties did, in fact, have an “acceptable” standard of living. The court said that that standard “should be maintained if, under the facts and circumstances of the situation, such a result can be accomplished without unreasonable hardship to the supporting party.”195

Although the marital living standard and the supporting party’s ability to pay are well-established factors in the determination of maintenance, it can be argued that they have only a limited relevance if, indeed, the premier value to be served by the award is meeting the recipient’s needs. Even conceding that an affluent lifestyle can augment an individual’s notion of life’s “necessities,” there is a point at which any reasonable person can distinguish between necessity and luxury. It is at that point that further consideration of the marital standard of living becomes inconsistent with determining an award ostensibly based on need. The same can be said of the supporting party’s ability to pay. That ability is necessarily relevant insofar as it may enable the dependent ex-spouse to receive more than just a bare level of sustenance. However, once a level of support beyond mere sustenance has been achieved, it is at least arguable that the supporting party’s ability to contribute more should not be a material factor in determining the award’s adequacy (apart from situations where the maintenance recipient made significantly greater material contributions during the marriage to aid the other spouse in attaining his or her present greater earning capacity).196

195. *Bahr*, 107 Wis. 2d at 83, 318 N.W.2d at 397.
196. See Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982), where the court held that maintenance is not to be denied merely because a spouse is capable of self-support. Judith Brown had supported herself and her husband while he went to
The ability to contribute more was clearly present in *Bahr v. Bahr*, and the court appears to have attributed great weight to it. For example, in addressing Dr. Bahr's argument that increasing the award would reduce Mrs. Bahr's incentive to find employment, the court noted that she had left her part-time job just before the divorce but said that voluntary termination of employment by the party claiming dependence would be significant only "[i]n a case where the parties have a modest amount of income-producing property to divide and a limited income was earned by the party from whom support was sought." In other words, where there are abundant assets and the supporting party has a large income, the relevance of the "dependent" party's ability to hold a job is diminished. In a later passage the court said:

Because of the length of the Bahr marriage, the age of Mrs. Bahr, her absence from significant employment for many years, and her medical problems, Mrs. Bahr's failure to have or seek employment, particularly where the income of Dr. Bahr is so substantial, is of little consequence to the maintenance determination in this case.

The court never discussed why the award was "unconscionably low" except in terms of Dr. Bahr's capacity to pay more. Nowhere was it suggested that Mrs. Bahr could not live on $18,000 per year. Indeed, her annual income, with the inclusion of property division installment payments, was almost twice that amount. Although the division of property is a statutorily relevant factor in maintenance evaluation, the supreme court ignored Mrs. Bahr's substantial property award.

In short, need was not a palpable factor in the court's holding that Mrs. Bahr's maintenance award was inadequate. Instead of reviewing the propriety of the award on the basis of Mrs. Bahr's needs and whether the award met medical school and had deferred her own career goals. The court said it was only fair that she receive a maintenance award that would allow her to attain these goals just as she had enabled her husband to achieve his.

197. Dr. Bahr's attorney also argued "that increasing Mrs. Bahr's award would 'reduce her incentive to find a proper mate.'" *Bahr*, 107 Wis. 2d at 83, 318 N.W.2d at 397 (quoting Dr. Bahr's attorney).

198. *Id.*

199. *Id.* at 84, 318 N.W.2d at 398 (emphasis added).

them, the court assessed the award on the basis of its disproportionality to the amount Dr. Bahr was capable of paying and on the basis of the affluent living standard enjoyed prior to the divorce. The foundation rationale for reversal of a maintenance award on grounds of inadequacy ought to be the insufficiency of the award to meet the recipient's reasonable needs.

Also inconsistent with the concept of maintenance as an award based on economic necessity is the court's radical new guideline for maintenance evaluation. The court said that "[i]t would seem reasonable for the trial court to begin the maintenance evaluation with the proposition that the dependent partner may be entitled to fifty percent of the total earnings of both parties."201 The court went on to say that this percentage could be "adjusted following reasoned consideration of the statutorily enumerated maintenance factors."202 The court did not elaborate on when an award of fifty percent of the parties' earnings would be appropriate. It merely said that while the starting point was important, it was not determinative and that the important thing was the equitableness of the result reached.203

Fifty percent of the total earnings of both parties in the Bahr case would, of course, be half of Dr. Bahr's income, or about $150,000 annually. The obvious complication of the new guideline is that it may, under some circumstances, furnish an ex-spouse substantially more than a reasonable level of support. How or why a former spouse might be "entitled" to such a level of support is the issue raised by the court's guideline—a guideline for which it offered no legal, equitable, or philosophical underpinnings.

As the court itself acknowledged in Bahr, the fifty percent starting point in property division awards is founded on the notion that marriage is a partnership and on the presumed joint contribution of the partners toward the acquisition of marital property.204 After dissolution of marriage,

201. Bahr, 107 Wis. 2d at 84-85, 318 N.W.2d at 398.
202. Id. at 85, 318 N.W.2d at 398. On remand the trial court awarded Mrs. Bahr $10,000 per month as her share of his earnings. Dr. Bahr's income had increased to $420,450 in 1982. Milwaukee Sentinel, Feb. 19, 1983, § 1, at 2, col. 1.
203. Bahr, 107 Wis. 2d at 85, 318 N.W.2d at 398.
204. See id. at 81-82, 318 N.W.2d at 397.
however, whatever is acquired by either of the parties is accomplished through each party's individual efforts. The proposition of equal entitlement to these assets absent the theoretical basis of partnership and equal contribution will be difficult for some to accept. If marriage is a partnership which, upon divorce, is liquidated, there can be no "entitlement" by either ex-spouse to any set percentage, even if only a starting point, of the post-divorce income of the other. Equity may dictate that the spouse disadvantaged by the divorce be awarded some portion of this income, but the portion awarded should arguably be determined on the basis of the party's needs. If an award of maintenance, under the modern view, "is not a continuation of the right of one spouse to be supported by the other during marriage," how can the new fifty percent guideline be justified?

The court in Bahr stressed the importance of an equitable result, and that is the only clue in the opinion to understanding the new maintenance guideline. When does a maintenance award of fifty percent of the working spouse's income achieve an equitable result? One can surmise, looking at the facts of Bahr from which the guideline comes, that the court is particularly sympathetic to the long-married homemaker whose age and/or inexperience and/or ill health either preclude self-support or guarantee a meager level of support. Bahr also evidences the court's sympathy for the

205. Carr v. Carr, 300 N.W.2d 40, 46 (N.D. 1980).
206. The Wisconsin Supreme Court has also exhibited sympathy for the younger homemaker with custodial responsibilities for children. See Hartung v. Hartung, 102 Wis. 2d 58, 306 N.W.2d 16 (1981). In enunciating the right of mothers with small children to stay at home, the court may have been moved by knowledge of the severe economic and emotional impact of divorce on women and children. Dramatic downward mobility and mental and physical stress mark the postdivorce lives of a majority of divorced women. Studies have shown that in the first year after divorce the standard of living of divorced women falls by 73% (while that of divorced men rises by 42%). Weitzman, supra note 93, at 1251. Seventy percent of divorced women in a national sample said they worried about making ends meet. Id. at 1252 n.229. Children of divorced women feel the strain, not only materially, but also in terms of their mothers' diminished time and energy. Id. at 1261.

Perhaps Hartung and Bahr can be understood as the making of law which conforms to existing sociological patterns. In the ideal society women would enjoy equality with men in the labor market, and employers would accommodate the needs of the family by offering day-care on the work premises, job sharing, and flexible hours. But since most employers are not so obliging, and since women tend to work in predominantly "female" occupations with below-average pay, id. at 1230, the court
ex-spouse who lived comfortably and well during a long marriage and for whom divorce means a greater than usual reduction in circumstances. Perhaps the court views the long-married, dependent spouse as having developed a "reliance interest" in the breadwinning spouse's future income.\textsuperscript{207} Under that view, equity requires that the expectation of lifetime support be honored, even though the expectation of a lifetime marriage has not been fulfilled. In addition, the career homemaker has, in a real sense, contributed to the other spouse's future earnings by performing the domestic and social tasks that assisted the other in ascending the career ladder.

*Bahr* aims to compensate the dependent ex-spouse for the limited earning power he or she possesses after years of absence from the workplace. *Bahr* appears to view the breadwinning spouse's future earning capacity as one of the major assets of a lengthy marriage. In the future, "doing" equity between the divorcing parties may require more than an equal division of the marital estate and a subsistence level of maintenance; it may require an equal division of the breadwinning spouse's future earnings.

IV. SUMMARY

The financial settlement upon dissolution of a marriage may be understood as having two functions. It is a method, first, of equitably dividing the proceeds of a defunct joint enterprise and, second, of insuring that neither party's post-divorce standard of living is unfairly reduced. With respect to the equitable division of assets, the *Jasper* decision sanctions an unequal division of assets gained during the course of the marriage between a homemaking spouse and a wage-earning spouse when the latter had already achieved his or her station in life before entering into the marriage. The concept of marriage as an equal partnership cannot help but be eroded by a decision which approves an unequal division of property based on little more than the relative financial contributions of the parties. With respect to providing for

\textsuperscript{207} Interview with Attorney Lucy Cooper, Milwaukee, Wisconsin (Sept. 1982).
the parties' long term financial needs, the *Dixon* decision removes the last vestige of fault consideration in evaluating maintenance awards and removes any barrier to modifying such awards in the event the parties' needs change. While the *Dixon* holdings can be interpreted consistently with the contemporary view of maintenance as a rehabilitative award founded on need, the *Bahr* decision diminishes the importance of need as a factor in determining the maintenance award where the payor has the ability to maintain the recipient at a level of affluence.

Under these recent decisions, maintenance becomes the great equalizer. Disparity between the parties in income producing power is to be remedied by splitting what the court seems to view as an asset of the marital estate—namely, the supporting spouse's future earning capacity. While these decisions regrettably do not encourage postdivorce independence, they commendably ameliorate the decline in economic position which divorce inflicts on former dependents.

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