ALIMONY AND POSTSEPARATION SUPPORT--IN THE 21ST CENTURY

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I. INTRODUCTION

For almost thirty years North Carolina's alimony law has been "fault based." A dependent spouse was entitled to receive alimony in this state only if the spouse was able to show by the greater weight of the evidence that a need for alimony existed and that the supporting spouse had committed one of several "matrimonial offenses."

As of October 1, 1995, a dependent spouse's obligation to prove "marital fault" as a condition to recovering alimony or postseparation support was eliminated. This manuscript attempts to analyze this legislation in view of the long-standing policy that has traditionally imposed on a supporting spouse the greater financial burden on account of such spouse having "caused" the destruction of the marriage. Williams v. Williams. 299 N.C. 174, 261 S.E.2d 849 (1980) (holding that "the burden of contending with diminished assets should, in all fairness, fall on the party primarily responsible for the breakup of the economic unit."); Adams v. Adams. 92 N.C. App. 274, 374 S.E.2d 450 (1988).

For years, alimony has been viewed as purely punitive. A man (traditionally) who left his wife without good cause was shouldered with the responsibility of providing financial support because he had brought the marriage to an end without legal justification. While the state recognized that it was unable to continue the marriage from the personal perspective, it could regulate the economics of the dissolution by imposing a greater financial burden on the party that "caused" the marriage to dissolve.

Today, however, marriage is no longer viewed as necessarily lasting forever, and with the advent of "no fault divorce," the rationale for financially punishing the spouse that "caused" the destruction of the marriage has lost its credibility. Hence, the change was made toward a balancing of economics and a de-emphasis on "fault finding."

The question is now one of how to apply the economic model in administering justice.

II. SUBSTANTIVE ISSUES

A. "Fault Finding" Eliminated

1. Postseparation Support

Alimony pendente lite has been repealed! All statutory references to the former claim have been stricken, and in their place has been substituted "postseparation support." The change, however, has been more than a mere change in name.

Alimony pendente lite formerly was paid by a supporting spouse to a dependent spouse for the purpose of subsistence pending the final determination of alimony. Yearwood v. Yearwood, 287 N.C. 254, 214 S.E.2d 95 (1975). It was paid when a dependent spouse "appeared" to be entitled to the relief demanded. Cabe v. Cabe. 20 N.C. App. 273, 201 S.E.2d 203 (1973) (made out a prima facie showing of an entitlement to alimony); Wyatt v. Hollifield. 114 N.C. App. 352, 442 S.E.2d 149 (1994) (showed a "likelihood of success on the merits"). Across the state, such showings have been made by exhaustive hearings or by the simple introduction of verified pleadings. N.C. Gen. Stat. 50-16.8(f) (1979). Whether by hearing or affidavit, the court was required to look at the merits of the movant's case to determine whether "grounds" existed for the relief demanded. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964). In an alimony claim, this included an examination of the fault "grounds" alleged. N.C. Gen. Stat. 50-16.3 (1979).

Postseparation support, on the other hand, can be awarded "on a verified pleading, affidavit, or other competent evidence," (N.C. Gen. Stat. 50-16.8 (1995)) and may be awarded "until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." N.C. Gen. Stat. 50-16.1 A (4) (1995).

A party is required to set forth a factual basis for postseparation support (N.C. Gen. Stat. 50-16.2A(a) (1995)), and since the court may base its award on "a verified pleading, affidavit, or other competent evidence," the "exhaustive" hearings previously experienced at alimony pendente lite hearings may be eliminated. This is particularly true since the statutory entitlement to be heard "orally" has been eliminated. N.C. Gen. Stat. 50-16.8(f) (1979).

The "factual basis" required to be asserted relates to the following:

> (T)he financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

N.C. Gen. Stat. 50-16.2A(b) (1995).

No examination of the merits of any underlying claim is required. Review of the former fault grounds has been deleted in favor of an economic finding that "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat 50-16.2A(c) (1995).

"Marital misconduct" (former "grounds" for alimony pendente lite), appears to be relevant only when raised by the supporting spouse. Although the statute says, "a judge shall consider marital misconduct by the dependent spouse" at a hearing on postseparation support, it goes on to say that "when the judge considers the acts by the dependent spouse, the judge shall also consider the marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support." N.C. Gen. Stat. 50-16.2A(d) (1995). This language implies that acts of marital misconduct are not required to be considered at all in postseparation support claims. Otherwise, the statute would simply have said that the marital misconduct of either spouse shall be considered in passing on postseparation support.

Accordingly, a dependent spouse may well present a postseparation support claim without any reference to "marital misconduct" whatsoever. Indeed, a strict reading of the statute may lead one to the conclusion that a dependent spouse may not be able to initially raise the issue of marital misconduct. Only after a supporting spouse plays the misconduct card will misconduct become relevant.

It would, thus, behoove the dependent spouse not to initially raise marital misconduct. If not raised by the dependent spouse, marital misconduct may be considered only if raised by the supporting spouse. By doing so, however, the supporting spouse subjects him or herself to a reciprocal misconduct examination, because the statute requires a judge to consider the marital misconduct of the supporting spouse if the misconduct of the dependent spouse becomes relevant. N.C. Gen. Stat. 50-16.2A(d) (1995).

Interestingly in the postseparation support statute there is no an absolute bar to postseparation support for acts of marital misconduct similar to the "illicit sexual behavior" bar found in alimony claims. N.C. Gen. Stat. 50-16.3A(a) (1995).

Finally, it should be noted that only marital misconduct which occurred prior to the date of separation is to be considered. N.C. Gen. Stat. 50-16.2A(d) (1995) (a legislative repeal of the Adams v. Adams, supra, decision). The only exception being that incidents of postseparation misconduct are admissible in corroboration of misconduct which occurred during the marriage and prior to the date of separation. N.C. Gen. Stat. 50-16.2A(e) (1995).

2. Alimony

a. Marital Misconduct

The most significant change in the post-October, 1995 law of alimony is the elimination of "grounds" for alimony. No longer is a dependent spouse required to show an abandonment, indignity, mistreatment, or other form of misconduct as a condition precedent to receiving alimony. Marital misconduct is only relevant when raised by a party as a factor implicating the amount and duration of the alimony award. Moreover, as in postseparation support claims, only marital misconduct which occurred prior to the date of separation is to be factored. Again, the only caveat being that incidents of postseparation misconduct are admissible in corroboration of misconduct which occurred during the marriage and prior to the date of separation.

The marital misconduct which the court may consider in determining postseparation support and alimony is very similar to what was previously catalogued as "grounds" for alimony. Abandonment, indignities, maliciously turning out of doors, and excessive use of alcohol or drugs remain as marital misconduct, as does the failure to provide adequate support. N.C. Gen. Stat. 50-16.1A(3) (1995).

With the exception of "illicit sexual behavior," discussed in the succeeding section, all marital misconduct is to be considered only in determining the amount and duration of an alimony award. Accordingly, the former defenses of recrimination, condonation, connivance or collusion appear to remain available, but only in the subordinate position of discounting the marital misconduct of which the other party complains.

Since misconduct, however, is only one of a host of factors to be considered in determining alimony, these defenses may prove to be much less instructive than they once were. In other words, even if marital misconduct is shown, the brevity of a marriage, the relative earnings, or needs of the spouses may well pale into obscurity the misconduct. Thus it is envisioned that marital misconduct will assume a more subordinate position in determining alimony.

b. Illicit Sexual Behavior

Unlike postseparation support where no marital misconduct bar exists, one kind of marital misconduct remains as a bar to alimony: a pre-separation act of illicit sexual behavior by a dependent spouse. Quickly added, however, is a dependent spouse's absolute entitlement to alimony if the supporting spouse participated in a pre-separation act of illicit sexual behavior. Thus, if a dependent spouse has engaged in sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts of cunnilingus, fellatio, analingus or anal intercourse with someone other than his or her spouse, alimony is barred. If a supporting spouse has engaged in such behavior prior to the separation, "the court shall order that alimony be paid." N.C. Gen. Stat. 50-16.3A(a) (1995).

Thus the entitlement or bar exists regardless of what other marital misconduct may have occurred during the marriage. Only if the court finds that both spouses have participated in pre-separation acts of illicit sexual behavior is the court entitled to again award or deny alimony in its discretion.

Finally, it should be noted that any act of illicit sexual behavior that has been condoned by the other party is not actionable. Condonation remains an express defense to illicit sexual behavior. N.C. Gen. Stat. 50-16.3A(a) (1995). Connivance and collusion, while not expressly referenced, appear to remain viable defenses also.

Although illicit sexual behavior remains a bar to alimony and not postseparation support, from a practical point of view, it is hard to envision an instance when a judge will order postseparation support where illicit sexual behavior by a dependent spouse presents itself at the postseparation support hearing.

c. "Acts" v. "Act" of Illicit Sexual Behavior

The definition of illicit sexual behavior provides that such behavior "means acts of sexual or deviate sexual intercourse …" 50-16.1A(3)a. (1995). However, the bar referred to in the entitlement section of the statute (N.C. Gen. Stat. 50-16.3A(a) (1995)) provides that if the court finds "an act of illicit sexual behavior" has occurred, then the court shall deny or allow alimony depending on whether the dependent or supporting spouse participated in such act. It appears thus that a singular act of illicit sexual behavior is all that is required.

C. "Estates" Elimination

Although the statute eliminates any direct reference to the consideration of "the estates" of the parties in determining alimony, (N.C. Gen. Stat. 50-16.5(a) (1967)), sufficient reference is made to "earned and unearned income" (N.C. Gen. Stat. 50-16.3A(b)(4) (1995)), "the relative assets and liabilities of the spouses" (N.C. Gen. Stat. 50-16.3A(b)(10) (1995)), "the property brought into the marriage

by either spouse" (N.C. Gen. Stat. 50-16.3A(b)(ll) (1995)), and "any other factor relating to the economic circumstances of the parties that the court finds to be just and proper" (N.C. Gen. Stat. 50-16.3A(b)(15) (1995)), that the relative "estates" of the parties is still a factor in detemining the amount and duration of alimony.

However, the direct elimination of the "estates" factor underscores the fact that estates depletion is still not required by a dependent spouse in order to meet subsistence needs. See. Williams v. Williams. 299 N.C. 174, 261 S.E.2d 849 (1980); Talent v. Talent 76 N.C. App. 545, 334 S.E.2d 256 (1985); and Patterson v. Patterson. 81 N.C. App. 255, 343 S.E.2d 595 (1986). This is particularly true in postseparation support instances where specific reference is made to "the present employment income and other recurring earnings of each party from any source," in ordering postseparation support. N.C. Gen. Stat. 50-16.2A(b) (1995).

In Swain v. Swain, the Court of Appeals acknowledged that estate depletion is not favored in requiring continued compliance with alimony orders, but affirmed a result that would have such an effect, reasoning that both parties were required to deplete their estates in order to maintain their accustomed standard of living. Swain v. Swain, 179 N.C. App. 795, 635 S.E. 2d 504 (2006) disc. rev. denied, 649 S.E. 2d 897 (2007). The rationalization was that the award was "fair to all parties." Since the plaintiff's estate would not have been depleted for twelve years, the impact may have been too remote to give the court any major concern. This fact was borne out in an unpublished opinion where Swain was distinguished as the supporting spouse's depletion of his estate was immediate and the dependent spouse was employed and not wholly dependent on alimony or subsistence. Hudson v. Hudson, _____ N.C. App. _____ 867 S.E. 2 340 (2008).

D. Postseparation Support Requirements

G.S. 50-16.2A provides that (1) a dependent spouse is entitled to an award of postseparation support from (2) a supporting spouse (3) where the resources of the dependent spouse are not adequate to meet his or her reasonable needs (4) after considering the financial needs of the parties, and (5) the supporting spouse has the ability to pay. N.C. Gen. Stat. 50-16.2A(c) (1995).

1. "Dependent Spouse"

The dependent spouse definition has not materially changed. It still requires actual substantial dependence or substantial need. Under the first clause, a dependent spouse must still be "actually without means of providing for his or her accustomed standard of living." Williams v. Williams, supra. Under the second clause, the requirement remains that a dependent spouse qualifies if he or she would be unable to maintain his or her accustomed standard of living as established

prior to separation without financial contribution from the supporting spouse. Accordingly, the new act changes little in this regard.

2. "Supporting Spouse"

Similarly, the definition of a supporting spouse has not changed. The court is still required to determine whether the opposing party is able to pay. Long v. Long. 71 N.C. App. 405, 322 S.E.2d 427 (1985). A court must continue to make an allowance for the living expenses of the supporting spouse in determining his or her ability to pay. Fuchs v. Fuchs. 260 N.C. 635, 133 S.E.2d 487 (1963).

3. Inadequate Resources of Dependent Spouse

While postseparation support may not require the "urgency" or "emergency situation" as once did alimony pendente lite (Schloss v. Schloss. 273 N.C. 266, 160 S.E.2d 5 (1968); Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964)), it is clear that the intent of postseparation support is to limit the duration of the award. By definition, postseparation support is to be paid only until the earlier of either the date specified by the court or an award awarding or denying alimony. N.C. Gen. Stat. 50-16.1A(4) (1995).

Accordingly, the purpose of postseparation support may not be too far from temporary alimony: to enable the dependent spouse to maintain the accustomed station in life pending a final determination of alimony. Gardner v. Gardner. 40 N.C. App. 334, 252 S.E.2d 867 (1979), Cornelison v. Cornelison. 47 N.C. App. 91, 266 S.E.2d 707 (1980).

If the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs, an award of postseparation support may be made. It is clear from the context of the legislation that "the resources" to which reference is made are the financial resources of the respective parties. The statute specifically references "the present employment income and other recurring earnings of each party from any source." N.C. Gen. Stat. 50-16.2A(b) (1995). As to his or her "reasonable needs," the accustomed standard of living of the parties still must be considered, as do the "debt service obligations and obligations to support other persons." Id.

4. Considering the Financial Needs

Where the earnings of the spouses are equal (Oliver v. Oliver, 219 N.C. 299, 13 S.E.2d 549 (1991)), or where the claimant spouse has a greater income than the other spouse (Davis v. Davis. 11 N.C. App. 115, 180 S.E.2d 374 (1971)), postseparation support, like alimony pendente lite, may not be appropriate.

Similarly, waiting a substantial period after separation before proceeding on a postseparation support claim may result in the denial of the claim as it did in the case of alimony pendente lite. Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798, cert, denied. 325 N.C. 706, 388 S.E.2d 454 (1989) (3 year wait demonstrated total lack of need).

5. Ability to Pay

Due regard must still be given to the ability of a supporting spouse to pay support. Gardner v. Gardner, supra. The award must be fair and just to both parties. Quick v. Quick. 305 N.C. 446, 290 S.E.2d 653 (1982). The requirement, therefore, that the supporting spouse have the ability to pay support does not represent a radical departure from existing law.

Similarly, consideration of the "income-earning abilities" appears to invoke the earning capacity rule developed in previous alimony cases. Where there is a failure to exercise one's capacity to earn an income because of a disregard of the marital obligation to provide reasonable support, the amount of support may be awarded based on such capacity. Gobble v. Gobble. 35 N.C. App. 765, 242 S.E.2d 516 (1978). Again, this does not appear to represent a departure from prior case law.

However, the court may not impute income to a party without first finding that there is a deliberate suppression of income or excessive spending in disregard of the support obligation. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E. 2d 636 (1984). In essence, the court must find some improper motivation or bad faith action in avoiding the support obligation. In short, any voluntary action that reflects a deliberate disregard of a financial responsibility for the other spouse may be sufficient to support a “bad faith” finding. Wolfe v. Wolfe, 151 N.C. App. 523, 566 S.E. 2d 516 (2002).

E. Alimony Requirements

G.S. 50-16.3A provides that the court shall award alimony to (1) a dependent spouse, (2) from a supporting spouse, (3) if an award of alimony is equitable, (4) after considering all relevant factors including the fifteen factors specified by the statute.

1. Dependent Spouse/Supporting Spouse

The definition of dependent and supporting spouses are no different for alimony than for postseparation support. Therefore, the prior discussion of these definitions is equally here applicable.

It should be noted that in the case of Fink v. Fink. 120 N.C. App. 412, 462 S.E.2d 844 (1995), a divided Court of Appeals held that a custodial parent's financial obligation to a minor child in her custody could be considered in determining "dependency," provided that the noncustodial parent's financial contribution is also considered. Quickly added was the recognition that the court's prior determination of a child's needs (whether under the guidelines or by deviation therefrom) is the amount that must be considered as being the financial obligation for the minor child absent a showing that there has been a material or substantial change in the circumstances existing at the time the prior obligation was determined.

Judge Wynn, in dissenting, noted that the majority opinion requires the payment of child expenses under both child support and alimony orders, and concludes that this is an unfair result since it may require the payment of child related expenses beyond emancipation.

In Harris v. Harris, 188 N.C. App. 477, 656 S.E. 2d 316 (2008), a child's emancipation resulted in foreseeable increased expenses which justified an increase in an alimony award.

2. The Award Must Be "Equitable"

While the court has always been required to exercise its discretion in awarding alimony, the new Act's direct statement that an award should be "equitable" underscores the fact that the economic circumstances of the parties assume a greater role than do actsof marital misconduct. Quick v. Quick. 305 N.C. 446, 290 S.E.2d 653 (1982) (An award must be fair and just to both parties).

3. The Relevant Factors

It is interesting to note that even in determining entitlement to alimony, the court is to consider the factors bearing upon the amount and duration of the award. N.C. Gen. Stat. 50-16.3A(a) (1995). Implicit in this framework is the fact that a finding of one or more of the listed factors could support a total denial of alimony. In other words, if the court determines that a dependent spouse has the capacity of maintaining the accustomed standard of living or that the supporting spouse does not have the means to maintain the dependent spouse's accustomed standard of living, alimony may be denied. Conversely, if the supporting spouse is underemployed or voluntarily suppressing income, an award may be made in excess of the amount the supporting spouse is able to pay after considering his or her own needs.

What is also noteworthy in the statute is that the fifteen factors listed in the statute are not exclusive. "All relevant factors, including those set out in

subsection (b) of this section" are to be considered in determining an entitlement to an award of alimony. Id. What other "relevant factors" the court may consider in determining an entitlement is uncertain. What is hoped, however, is that these relevant factors will relate to the economic circumstances of the parties rather than the parties recriminatory marital misconduct. For instance, if a spouse has otherwise shown an entitlement to alimony, but the economic conditions of the parties do not warrant a present award, this "relevant factor" will allow a "denial" of alimony for now. The court may, for instance, determine that dependency existed prior to the date of separation and find that the economic circumstances at the time of the hearing do not warrant an award, so that the court could "permanently adjudicate dependency" and leave for subsequent modification only the amount of alimony. Cunningham v. Cunningham. 121 N.C. App. 771, 468 S.E.2d 466 (1996); Rowe v. Rowe. 52 N.C. App. 646, 280 S.E.2d 840 (1982) aff'd in part and rev'd in part, 305 N.C. 177, 287 S.E.2d 840 (1982) (holding after entitlement is shown, dependency may come and go).

But what of the statutory provision called for an order of alimony to be "vacated" or "terminated?" N.C. Gen. Stat. 50-16.9(a) (1995). In fact, it has been held that the power to modify alimony includes the power to terminate it altogether. Self v. Self, 93 N.C. App. 323, 377 S.E. 2d 800 (1989). So after a court "terminates" alimony, can a dependent spouse thereafter resurrect it since a modification can be made "at any time?" N.C. Gen. Stat. 50-16.9(a) (1995).

F. Amount and Duration

1. Postseparation Support

By definition, postseparation support is payable until: (1) the date specified in the order of postseparation support, (2) the entry of an order awarding or denying alimony, (3) dismissal of the alimony claim, (4) the entry of a absolute divorce judgment where no claim for alimony is pending at the time of divorce. N.C. Gen. Stat. 50-16.1A(4) (2005). Postseparation support is therefore payable like alimony pendente lite, until the sooner of an award of permanent alimony or the time specified by the court order. Harris v. Harris. 258 N.C. 121, 128 S.E.2d 123 (1962) (an order of alimony terminates order for subsistence pendente lite).

Unlike the alimony statute, no factors governing the amount and duration of postseparation support are statutorily set forth. The fifteen factors applicable in alimony consideration are not incorporated in the postseparation support equation. Although required to specify its "reasons" (findings of fact) for the amount, duration, and manner of payment (N.C. Gen. Stat. 50-16.8 (1995)), no listing of factors is provided from which the court may choose in specifying its "reasons" for awarding postseparation support.

Accordingly, the amount and duration of postseparation support will, like alimony pendente lite, likely be left to the discretion of the trial court and not be reviewable except in case of an abuse of discretion. Fogartie v. Fogartie. 236 N.C. 188, 72 S.E.2d 226 (1952).

2. Alimony

Once an entitlement to alimony has been shown, the court must exercise its discretion in determining the amount and duration of the payment. The statute specifically authorizes the award to be for a "specified or for an indefinite term." N.C. Gen. Stat. 50-16.3A(b) (1995). Many of the most difficult alimony issues are not issues of entitlement, but how an award should be tailored. In any event, the court is required to give its reason for the amount of alimony awarded and its duration. Hartsell v. Hartsell, 189 N.C. App. 65, 657 S.E. 2d 724 (2008). The court's failure to explain its rationale for the award and duration constitutes reversible error.

Since the purpose of alimony is to minimize the disparity between the parties respective incomes, the model used in fashioning the award is thus fact dependent.

a. Rehabilitative Model

Rehabilitative alimony "is a way of supporting an economically dependent spouse through a limited period of educational training following divorce." In Re Farrell. 481 N.W. 2d 528, 530 (Iowa Ct. of App. 1991). The rehabilitative alimony model is time limited. Support is to continue until reasonable measures have been undertaken by the dependent spouse to become self-sufficient. Accordingly, the rehabilitative model is less modifiable than permanent periodic alimony.

A history of employment by both spouses may justify the rehabilitative model even though the marriage may have been one of longstanding. What is envisioned is that support be provided to cover reasonable expenses during retraining and readjustment. What is equally important is that the dependent spouse be able to acquire the skills needed for employment, and that such employment be reasonably available.

Rehabilitative alimony is most often appropriate in brief marriages. In brief marriages, the parties have no right to leave the marriage with reasonably comparable lifestyles. In Re Siddens. 225 111. App. 3d 496, 588 N.E. 2d 321 (1992) and appeal denied, 145 111. 2d 644, 173 111. Dec. 13, 596 N.E.2d 637 (1992); Turner, Refining Alimony in a Time of Transition: Recent Cases on the Law of Spousal Support 4 Divorce Litigation, 221 (1992). Where there are young children, however, rehabilitative alimony may continue during the child rearing years.

Similarly, rehabilitative alimony may be appropriate to cover the time necessary for a dependent spouse to find gainful employment, i.e. job hunting.

It should be noted that where the parties' respective incomes are low, proof that rehabilitation is possible should not be required as a condition to applying the rehabilitative model. The goal of rehabilitative alimony is to encourage the parties to raise their incomes to a level where continued alimony is unnecessary.

Finally, rehabilitative alimony may be appropriate regardless of any evidence of rehabilitation where there is a likelihood of increased future income such as when the recipient begins receiving his or her share of the other spouse's retirement benefits. McGraw v. McGraw, 186 W. Va. 113, 411 S.E.2d 256 (1991).

Perhaps, postseparation support will ultimately prove to be North Carolina's rehabilitative alimony model.

b. Standard of Living Model

The marital standard of living model is used to provide continuing support after a traditional type marriage. Whether the standard of living is measured by the expenses that have been incurred during the last years of the marriage or the income of the parties during the marriage, the model must recognize that two households cannot live as cheaply as one. In households of modest means, the parties will not be financially able to maintain their predivorce standard of living, but what should be required is the standard of living be as close as reasonably possible to the marital level. Bisone v. Bisone. 165 Wis. 2d 114, 477 N.W. 2d 59 (1991).

Thus, in long marriages, the standard of living model appears to be a more appropriate method of awarding alimony. Proponents analogize it to a contract, where one of the parties (usually the wife) attends to the home and children so that the other may spend more time at the work place. The implied agreement being that the homemaker sacrified economically on the expectation that she would share in the future income of the husband.

Since there are no child support-like guidelines for spousal support, and no general agreement on which spouses deserve support, how long the support should last, or what level of support is appropriate, the trial courts will continue to be asked to exercise their discretion, and all that can be offered is a model from which the court may choose in equitably awarding alimony.

G. Termination and Modification

1. Termination

Amended G.S. 50-16.9 codifies prior case law which terminated alimony on reconciliation, remarriage of the dependent spouse, or the death of either spouse. N.C. Gen. Stat. 50-16.9 (1995); Bland v. Bland. 21 N.C. App. 192, 203 S.E.2d 639 (1974). G.S. 50-16.6 dealing with bars, and G.S. 50-16.9 dealing with modifications are identically applicable to postseparation support and alimony.

Amended G.S. 50-16.6 provides:

> Alimony, postseparation support, and counsel fees may be barred by an express provision of a valid separation agreement or premarital agreement so long as the agreement is performed. N.C. Gen. Stat. 50-16.6 (1995).

Substantively, the amendment to the statute only added among the bars, "premarital agreements" that are performed.

Noteworthy here are two cases which have addressed the issues of support terminations. First, in Stegall v. Stegall. 334 N.C. 439, 433 S.E.2d 170 (1993), the wife was allowed to refile her claims for alimony and equitable distribution within a year of her having voluntarily dismissed the claims, notwithstanding the fact that the parties were divorced between the time of the voluntary dismissal and refiling. The key being that the claims for alimony and equitable distribution were pending when the parties absolute divorce was granted. The voluntary dismissal came after and not before the divorce was entered.

In Potts v. Tutterow. 340 N.C. 97, 455 S.E.2d 156 (1995), the delineation of alimony as "lump sum" payable periodically was not able to save the alimony award from termination on the wife's remarriage, although the total payments had not yet been made.

2. Cohabitation

Added also to these traditional termination provisions is a new character, "cohabitation." Engaging in cohabitation terminates both postseparation support and alimony. The statute defines "cohabitation" as follows:

> (C)ohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary

> mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

N.C. Gen. Stat. 50-16.9(b) (1995).

Case law concerning "cohabitation," has heretofore related to provisions in separation agreements that prohibit such conduct. Rehm v. Rehm. 104 N.C. App. 490, 409 S.E.2d 723 (1991). Assuming "those marital rights, duties, and obligations which are usually manifested by married people," has, accordingly, been held to apply to a wife's boyfriend that maintained a separate residence, but stayed in the wife's home overnight five times per week and enjoyed an exclusive monogamous relationship with her. It appears that a continuous pattern of living together may not be required to constitute "cohabitation"; however, persons who occasionally "live together" and do engage in sexual relations but do not assume "those marital rights, duties, and obligations which are usually manifested by married people" may not meet the requirements of "cohabitation."

The supporting spouse must file a motion and obtain an order terminating the alimony obligation based on cohabitation. Williamson v. Williamson, 142 N.C. App. 702, 543 S.E. 2d 897 (2001). The existence of a monogamous dating and sexual relationship and being seen frequently in public did not rise to the level of cohabitation where the boyfriend maintained a separate residence, did not keep his toiletries or clothing in the home, did not receive mail there, did not pay the household expenses, and had no financial accounts together with the dependent spouse. Shaw v. Shaw, 182 N.C. App. 347, 641 S.E. 2d 867 (2007) (unpublished).

3. Modifications

a. Generally

A modification may be made “at any time” upon showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat, 50-16.9(a) (1995). Not just any change in circumstance is sufficient to justify a modification of an alimony award, but rather a material and substantial change of condition is required. Britt v. Britt, 49 N.C. App. 463, 271 S.E. 2d 921 (1980). The substantial change must relate to the health and/or financial condition of the parties bearing on the needs of the dependent spouse of the supporting spouse’s ability to pay. Peers v. Peers, _____ N.C. App. _____, 655 S.E. 2d 863 (2008).

The comparison to be made is that between the facts existing at the time of the original order and those prevalent at the time the modification is sought.

Marks v. Marks, 316 N.C. 447, 342 S.E. 2d 859 (1986). In deciding a modification motion, the court is to consider the same factors that were used in the initial award. Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E. 2d 671 (1998). The entire circumstances of the parties are required to be considered. Changes in income alone are not sufficient to establish a substantial change. Frey v. Best, 189 N.C. App. 622, 659 S.E. 2d 60 (2008).

Interestingly, the court may consider a new spouse's responsibility for that party's expenses and needs in determining needs as well as the ability to pay. Harris v. Harris, 188 N.C. App. 477, 656 S.E. 2d 316 (2008).

H. Counsel Fees in Support Actions

G.S. 50-16.4 succinctly provides:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. 50-16.4 (1995).

The principle behind an award counsel fees is to enable a dependent spouse, as a litigant, to meet the supporting spouse, as a litigant, on substantially equal terms as to their ability to employ adequate counsel. Clark v. Clark, 301 N.C. 123, 271 S.E. 2d 58 (1980). An award of counsel fees is available both at initial as well as modification hearings. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E. 2d 772, rev. denied, 307 N.C. 269, 299 S.E. 2d 214 (1982).

Finally, the court must determine that the dependent spouse is without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses before awarding counsel fees. Swain v. Swain, 179 N.C. App. 795, 635 S.E. 2d 504 (2006). A determination of insufficient means generally relates to a dependent spouse's income and estate. While there is no requirement that the parties' estate be compared, it is not error to do so. Bookholt v. Bookholt, 136 N.C. App. 247, 523 S.E. 2d 729 (1990). Accordingly, where the estates are essentially equal, there is no insufficiency of means.

III. PROCEDURAL ISSUES

A. Nature of the Action

1. Postseparation Support

G.S. 50-16.1A(4) provides that "postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce." N.C. Gen. Stat. 50-16.1A(4) (2005). Therefore, although 50-16.2A(a) implies that the action may be brought "pursuant to Chapter 50 of the General Statutes," a claim for postseparation support must still be brought with an action for divorce, absolute or from bed and board, annulment, or alimony. Neither an action for child custody, child support, nor equitable distribution will suffice, although all of these claims may be brought under Chapter 50.

It is not entirely clear whether a claim for postseparation support must be proven by the preponderance or greater weight of the evidence or some lesser standard. Since a claim for postseparation support, like alimony pendente lite, may be supported only by "verified pleadings or affidavits" without the presentation of testimonial evidence, the standard would appear to be a preliminary or threshold one, similar to the prima facie standard experienced in alimony pendente lite hearings. N.C. Gen. Stat. 50-16.8 (1995). It is hard to envision a court making findings by the greater weight of the evidence based on affidavits alone. Moreover, since "postseparation support" was routinely substituted for "alimony pendente lite" in the statutory amendments, it may be that the intent of the legislature was to allow the court to make its postseparation findings on the same interlocutory basis as was done in alimony pendente lite cases. This conclusion is further supported by G.S. 50-16.7(j) which implies that only alimony awards may be appealed to the appellate division. N.C. Gen. Stat. 50-16.7(j) (1999). This statute which allows for the enforcement of periodic payments of "alimony" during the pendency of an appeal, makes no reference to postseparation support.

Accordingly, when this is coupled with the fact that postseparation support terminates on the entry of a final alimony award (N.C. Gen. Stat. 50-16.1A(4) (2005)), and the fact that alimony may be heard prior to equitable distribution (N.C. Gen. Stat. 50-16.3A(a) (2008), it seems that the standard of proof in postseparation support cases may well tract the same standard of proof that as was required in alimony pendente lite cases.

2. Alimony

G.S. 50-16.3A provides that "in an action brought pursuant to Chapter 50 of the General Statutes either party may move for alimony." N.C. Gen. Stat. 50-16.3A (1998). However, G.S. 50-16.1A(1) refines this general statement by providing that alimony means payment of support and maintenance "ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce." N.C. Gen. Stat. 50-16.1A(l) (2005).

Thus, the action brought pursuant to Chapter 50 of the General Statutes must be an action for divorce, whether absolute or from bed and board, or an action for "alimony without divorce." A claim for alimony made in any other Chapter 50 action, such as child custody or support, or equitable distribution, would again not qualify.

Although it is interesting to note that in 1967, the legislature repealed the statutory cause of action of "alimony without divorce," reference to it continued in the definitions of alimony and alimony pendente lite. Accordingly, the current reference to this historical cause of action can legitimately be considered to mean an action filed under Chapter 50 for alimony alone. In other words, a claim can be brought for alimony alone, without any additional claims for divorce, custody, child support, or equitable distribution.

B. Pleadings

1. Postseparation Support

Just what is required to set forth a claim for postseparation support is again, not altogether clear. G.S. 50-16.2A requires that "the moving party shall set forth the factual basis for the relief requested." N.C. Gen. Stat. 50-16.2A(a) (1995). The statute goes on to say:

> (b) In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective obligations to support any other persons.

N.C. Gen. Stat. 50-16.2A(b) (1995).

It thus seems that the factual basis required to be pled relates primarily to the financial needs of the parties. The statute also says that after considering the financial needs of the parties, the court must find "that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat. 50-16.2A(c) (1995). Accordingly, these facts should also be pled to sustain an award of postseparation support.

Finally, if marital misconduct is pled, the same pleading parameters that are applicable to pleading marital misconduct in alimony cases are applicable here. See,

succeeding section.

2. Alimony

G.S. 50-16.3A appears to require no more than factual allegations supporting the conclusion that the claimant is a "dependent spouse," the other spouse is the "supporting spouse," and that an award of alimony is equitable. What precisely must be pled to make an award of alimony equitable after considering all relevant factors is also not clear. However, reference to the factors impinging on the amount and duration of alimony signals that allegations regarding (1) the earnings and earning capacities of the spouses (which allegations are also necessary to allow the conclusions of dependent and supporting spouses), (2) the ages and the physical conditions, (3) mental and emotional conditions of the spouses, (4) the duration of the marriage, and perhaps most importantly, (5) some indication of the standard of living of the parties (whether alleged in the rehabilitative model, or standard of living income or expense model) may be sufficient, even without reference to any "marital misconduct."

If counsel finds it important to focus the court's attention on any of other factors, whether listed by the statute or not, it would be prudent to allege such factor, as their absence may prohibit the presentation of evidence thereon when objection is interposed on the ground that the pleadings do not afford fair notice of such factor. N.C. Gen. Stat. A-l, Rule 15 (1967).

The degree of particularity to which an alimony claim must be pled also remains to be seen. However conclusory pleadings concerning the claimant's status as a "dependent spouse" and the responding party's status as a "supporting spouse" may not be sufficient. See, Shook v. Shook. 95 N.C. App. 578, 383 S.E.2d 405 (1989), appealed dismissed, rev. denied, 326 N.C. 50, 389 S.E.2d 94 (1990). Moreover, since the statute now requires an award of alimony be "equitable" after all relevant factors are considered, it would be prudent to plead, at least to some extent, the facts which would entitle the court to receive evidence regarding the relevant factors, and particularly, facts from which the court may be able to assess the standard of living of the parties. Similarly, an allegation that the supporting spouse has the ability to provide an equitable amount of support would be appropriate. Long v. Long. 71 N.C. App. 405, 322 S.E.2d 427 (1985).

To what extent any marital misconduct that is alleged is required to be pled with particularity is not known either since such misconduct (except acts of illicit sexual behavior) is no longer a condition precedent to an award of alimony. The former requirement that indignities be alleged with specificity is not nearly as compelling since it may not be a factor that the court finds ultimately determinative of the amount and duration of its award. See. Pruit v. Pruit. 247 N.C. 13, 100

S.E.2d 296 (1957). In other words, if the trial courts find that marital misconduct has been established by both spouses, or neither of them have carried their burden of proving by the greater weight of the evidence that marital misconduct exists (as opposed to "normal" differences inherent in most marital relationships), the "finger pointing and name calling" that was formerly required to be pled and shown as grounds for alimony may eventually become unnecessary. This is particularly true when it is noted that the fifteenth factor that the court may consider is "any other factor relating to economic circumstances of the parties that the court finds to be just and proper." N.C. Gen. Stat. 50-16.3A(b)(15) (1998). By implication, therefore, the prior listed factors should be viewed to have economic consequences rather than personal ones.

Finally, unlike postseparation support pleadings, there is no statutory authority for the court to base an award of alimony on the verified pleadings of a party alone. See. N.C. Gen. Stat. 50-16.8 (1995) ("When an application is made for postseparation support, the court may base its award on a verified pleading affidavit or other competent evidence . . . .").

C. Required Findings of Fact

1. Postseparation Support

In alimony pendente lite cases, the court has always been required to make detailed findings of fact. Quick v. Quick. 305 N.C. 446, 290 S.E.2d 653 (1982); N.C. Gen. Stat. 50-16.8(f) (1979). In new G.S. 50-16.8, it says that "the court shall set forth the reasons for its award or denial of postseparation support . . ."N.C. Gen. Stat. 50-16.8 (1995). Additionally, in G.S. 50-16.2A, it is provided that "the court shall base its award on the financial needs of the parties." N.C. Gen. Stat. 50-16.2A(b) (1995).

These provisions clearly carry forward the requirement that the court make specific findings of fact to support its order of postseparation support. G.S. 50-16.2A additionally directs the court to consider the "accustomed standard of living of the parties, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons." N.C. Gen. Stat. 50-16.2A(b) (1995). All these "considerations" inescapably point to findings that a court should make on any evidence presented. However, the mandatory finding appears to be that "the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." N.C. Gen. Stat. 50-16.2A(c) (1995). Without such finding, an award of postseparation support may likely not withstand challenge.

If evidence of marital misconduct is presented, the court will similarly be required to make findings in that regard.

2. Alimony

G.S. 50-16.3A(c) provides that the court shall set forth its reasons for awarding or denying alimony, and if making an award the reasons for the amount, duration, and manner of payment. N.C. Gen. Stat. 50-16.3A(c) (1998).

Since the statutory heading here is "findings of fact," it is assumed that the "reasons" the court is required to articulate are indeed findings of fact. Obviously, if an act of illicit sexual behavior bars or entitles a spouse to an alimony award, the "reason" would in large part be such a finding. Where an award is more discretionary, the reasons required to be found should relate to the statutory factors.

Although the statute states that in determining the amount, duration, and manner of payment, the court is to consider all relevant factors, including the fifteen statutory factors, the statute makes clear that specific findings of fact on each listed factor are required only if evidence is offered on such factor. N.C. Gen. Stat. 50-16.3A(c) (1998). However, it does not appear that the statute requires all evidentiary facts to be found. The traditional requirement that only ultimate facts are required to be found should continue. See, Robinson v. Robinson. 43 N.C. App. 488, 259 S.E.2d 353 (1979).

D. Alimony Claims May Be Determined Before Equitable Distribution

G.S. 50-16.3A(a) provides:

> The claim for alimony may be heard on the merits prior the entry of a judgment for equitable distribution, and if awarded, the issue of amount and whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim.

N.C. Gen. Stat. 50-16.3A(a) (1998).

No longer are the parties required to wait until after an equitable distribution of their marital property has been completed to dispose of any permanent alimony claim.

The interrelationship between equitable distribution and alimony is discussed below, but here it is significant to note that an alimony case may proceed regardless of the status of any equitable distribution claim.

E. Jury Trial Preserved

1. Alimony

G.S. 50-16.3A(d) provides:

> In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1 A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct.

N.C. Gen. Stat. 50-16.3A(d) (1998).

With marital misconduct assuming a subordinate position in the alimony equation, the utility of a jury trial is somewhat suspect. Since marital misconduct is only one factor to be considered by the judge in determining the amount and duration of alimony, whether or not a jury determines that marital misconduct has been established seems somewhat inconsequential where the remaining relevant factors may equally miliate in favor of or against such an award.

The same, however, cannot be said of the absolute misconduct defense or entitlement: "illicit sexual behavior." If counsel feels that this defense or entitlement will more likely be sustained by a jury than a judge, the advantage of a jury disposition is obvious.

In the instance where a jury finds that the supporting spouse has participated in an act of illicit sexual behavior and the dependent spouse has not (thus absolutely entitling the dependent spouse to an award of alimony), but the other relevant factors tip the scales in favor of equitably denying alimony, it will be the trial judge, and not the jury, that will ultimately determine whether the award will be nominal or of short duration, or both.

Therefore, recourse to jury dispositions in alimony cases may prove to be very circumspect.

2. Postseparation Support

First, G.S. 50-16.8 provides that "the court shall set forth the reasons for its award or denial of postseparation support." N.C. Gen. Stat. 50-16.8 (1995). Secondly, G.S. 50-16.2A provides that "the court shall base its award on the financial needs of the parties . . ." N.C. Gen. Stat. 50-16.2A(b) (1995). Similarly, in G.S. 50-16.2A(c) reference is again made to the court finding that the resources of the dependent spouse are not adequate and that the supporting spouse has the

ability to pay before an award of postseparation support may be made. N.C. Gen. Stat. 50-16.2A(c) (1995). However, G.S. 50-16.3A, dealing with marital misconduct issues in alimony cases (on which a right to a jury trial is provided) also refers to a court making findings on such misconduct. Therefore, this language alone may not be dispositive. But, on the issue of marital misconduct (which is the only issue on which a jury trial may be had in an alimony case) the statute repeatedly refers to the judge being required to consider the marital misconduct of the respective parties. N.C. Gen. Stat. 50-16.2A(d) (1995). Thus, the indication is that no entitlement to a jury trial exists in postseparation contexts.

From a practical point of view, since marital misconduct, specifically illicit sexual behavior, has not been set forth as an act of misconduct absolutely entitling or prohibiting an award of postseparation support, the intervention of a jury would serve little purpose as the court will ultimately be entitled to make a discretionary award regardless of what misconduct may otherwise be found.

Therefore, in postseparation support instances, recourse to a jury seems even more dubious than in alimony cases.

F. Appealabilitv of Postseparation Support

Since G.S. 50-16.7(j) provides that only "alimony" payments may be enforced during the pendency of an appeal, without referencing postseparation support, it appears that it was not envisioned that postseparation support awards be subject to appeal as a matter of right. N.C. Gen. Stat. 50-16.7(j) (1995). In alimony pendente lite cases, it had long been held that the awards were not appealable due to their interlocutory nature. Stevenson v. Stevenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981). Orders denying or terminating alimony pendente lite were, however, immediately appealable, because they effected a substantial right Brown v. Brown. 85 N.C. App. 602, 355 S.E.2d 525 (1987).

G.S. 50-16.2A(a) states that "either party may move for postseparation support" and that the "moving party" must set forth a factual basis for the relief requested." N.C. Gen. Stat. 50-16.2A(a) (1995). This language thus indicates that postseparation support claims, like alimony pendente lite claims, are to be heard by "motions in the cause," which formerly meant that the rulings were interlocutory. McCarley v. McCarley. 289 N.C. 109, 221 S.E.2d 490 (1976).

Indeed, the Court of Appeals has held that awards of postseparation support are interlocutory and do not effect a substantial right, and therefore, not appealable. Langdon v. Langdon, 183 N.C. App. 471, 644 S.E. 2d 600 (2007). But, orders denying postseparation support should, by the same token, be appealable.

IV. THE POSTSEPARATION SUPPORT/ALIMONY AND EQUITABLE

DISTRIBUTION INTERPLAY

Because of the interplay between equitable distribution and postseparation support/alimony, no discussion of postseparation support/alimony would be complete without some reference to the equitable distribution impact. Even though equitable distribution applies retrospectively and postseparation support/alimony prospectively, the two are inextricably interrelated.

A. Spousal Support and Partial Equitable Distribution

When an action is brought under Chapter 50 (divorce, whether absolute or from bed and board, annulment, or alimony without divorce) a claim for postseparation support may be heard. N.C. Gen. Stat. 50-16.2A(a) (1995). It is therefore assumed that a postseparation support claim may be heard at any time prior to an alimony determination. N.C. Gen. Stat. 50-16.1A(4) (2005). (alimony terminates postseparation support).

G.S. 50-16.3A specifically provides that an alimony claim may be heard on its merits prior to the entry of a judgment for equitable distribution. N.C. Gen. Stat. 50-16.3A(a) (1998). G.S. 50-20(i1), authorizes the court to make a distributive award as a partial distribution pending the final equitable distribution judgment. N.C. Gen. Stat. 50-20(i1) (2005). The distributive award may be based on financial need. The statute specifically says that "for good cause shown, including but not limited to, providing for the subsistence of a spouse …" the court may make a partial distribution in the form of a distributive award. Accordingly, the relationship between equitable distribution and support is manifest.

Because the legislature additionally struck the provisions of G.S. 50-21 (a) that an equitable distribution judgment could not precede the decree of absolute divorce (N.C. Gen. Stat. 50-21 (a) (1995)), alimony may now not only precede equitable distribution, but alimony may be heard regardless of when the decree of absolute divorce is entered.

Moreover, since G.S. 50-16.7 provides that postseparation support may be paid to meet the subsistence needs of a dependent spouse (N.C. Gen. Stat. 50-16.7 (1999)), and G.S. 50-20(i1) allows a court to make a "partial distribution" for the subsistence of a spouse, arguably, payment of one may eliminate or reduce entitlement to the other, and these claims may be heard at any time.

The net result is that a court in an equitable distribution proceeding may provide for the same relief that a court could extend in an alimony case. Thus, proceeding with one claim rather than the other may become largely a matter of tactics, and the best that can be said at this point is that when both claims are pending, it may be better to have them heard simultaneously to prevent any

potential double recovery.

B. Equitable Distribution Preceding Alimony or Alimony Preceding Equitable Distribution

If the claim for alimony is heard prior to equitable distribution, "the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." N.C. Gen. Stat. 50-16.3A(a) (1998). (emphasis added). If alimony follows equitable distribution, the court is authorized to consider the relevant assets and liabilities of the spouses and their respective debt service requirements. N.C. Gen. Stat. 50-16.3A(b)(10) (1998).

While the equitable distribution statute has retained the prohibition against considering alimony in determining what property division will be equitable between the parties, the prohibition is followed with the same reconsideration of alimony after equitable distribution language that appears in the alimony statute. N.C. Gen. Stat. 50-20(f) (2005). The subtle difference between the reconsideration provisions of the alimony and equitable distribution statutes, however, may prove to be significant.

If alimony is reviewed under the provisions of the alimony statute, only the issues of amount or whether a spouse is a dependent or supporting spouse may be reconsidered. The entitlement to alimony nor its duration are expressly addressed. The reconsideration provisions of the equitable distribution statute, however, provide that the alimony award may be modified or vacated pursuant to G.S. 50-16.9.

What effect the new statute has on Cunningham v. Cunningham. 121 N.C. App. 771, 468 S.E.2d 466 (1996) (holding that once an entitlement to alimony is adjudicated, entitlement cannot be lost on the grounds that a dependent spouse is no longer dependent) is unclear. However, the specific reference to dependency reconsideration in the new statute, indicates that the legislature may have envisioned a different result.

In any event, either statute provides for the modification of an alimony award. However, to "terminate" alimony after equitable distribution, a showing of a material change in circumstance is required; whereas the "review" authorized by the reconsideration provisions of the alimony statute does not require any showing of a material or substantial change in circumstance. However, such "review" does not provide for the vacation of an alimony award (unless one of the spouses no longer qualify as a supporting or dependent spouse).

Whether a "review" or "modification" is selected by the practitioner, will

accordingly be dependent upon whether the equitable distribution is viewed as having resulted in a sufficiently material and substantial change in the economic circumstances of the parties as to allow for a termination of the award. Thus, if a termination of alimony is sought after equitable distribution, the provisions of the equitable distribution statute should be cited. Otherwise, alimony can be terminated under the "review" provisions of the alimony statute only if the dependent or supporting spouse determinations fail to abide after equitable distribution.

Since spousal support may essentially be provided by a distributive award during the pendency of an equitable distribution claim, the whole question of whether to prosecute the alimony claim (as opposed to the postseparation support claim) at all is one that can only be answered after considering all of the factors in the rubic of the alimony and equitable distribution interplay. What is seen, however, is that alimony may well become a less, rather than more, common form of relief in domestic cases.

C. Property Impacts on Support

The strain that is sometimes perceived by the same property being treated in equitable distribution and support contexts, has been recognized in North Carolina.

In a retirement pension situation, for instance, the same pension should not be treated in property divisions as an asset, and in support cases as income. Neither, however, should it be ignored.

A pension may be considered as a source for both property division and support, but it must be treated as either property or income. Once classified as either property or income, the classification should be consistently applied throughout the duration of the case. This does not mean that if the pension is considered an asset in the equitable distribution case, it must be ignored in setting support simply because it is not income. It is horn book support law that the payers assets as well as income may be considered in determining support.

Because of North Carolina's aversion to estate depletion for the purpose of maintenance, an asset distributed as property in equitable distribution should not require invasion to pay support. Just as a dependent spouse is not required to deplete his or her estate to pay living expenses, the supporting spouse should not be required to deplete his or her estate to pay support. See. Quick v. Quick. 305 N.C. 446, 290 S.E.2d 653 (1982).

An illustration of the issue is found in Lamb v. Lamb. 103 N.C. App. 541, 406 S.E.2d 622 (1991). In Lamb, the parties equitable distribution resulted in the husband giving a promissory note to the wife. At the time of the alimony hearing, the balance on the note was $87,326.39 payable monthly in principal and interest

payments of $2,441.29. The trial court considered the principal balance of the note as the wife's asset and the husband's debt in setting alimony. It also considered the $300.00 per month interest portion of the monthly payment as income to the wife.

On appeal, the husband argued that the total note payment should be considered in calculating the wife's total monthly income which would then be sufficient to meet her needs. The Court of Appeals rejected this argument finding that the principal in the equitable distribution note was an asset owned by the wife which she was not required to deplete to maintain her standard of living. The interest payment, however, was income and was properly so considered.

The "obvious relationship" between the property received in an equitable distribution and his or her need for support or ability to provide it has also been recognized. In Capps v. Capps. 69 N.C. App. 755, 318 S.E.2d 346 (1984), the court specifically held that property received in equitable distribution must be taken into account in setting alimony.

> (I)f alimony or child support has already been awarded, the awards must be reconsidered upon request after the marital property has been equitably distributed. This order of events is required, no doubt, because of the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it. Id., at 757, 348.

Therefore, consistent treatment of an asset as either property or income throughout the pendency of the case can, in large measure, avoid the dual treatment trap that other states have experienced in equitable distribution and alimony interplays.

D. Strategies

Since alimony may precede equitable distribution, and partial distributions made to provide for the subsistence, counsel have available a variety of methods by which to obtain support benefits. Shifting income producing properties to dependent spouses may result in the elimination of dependency. Similarly, retaining control of the revenue producing marital assets by paying a partial distributive award to meet subsistence needs may avoid support claims.

On the other hand, taking advantage of the tax benefits that accompany alimony payments may prove to be more advantageous than nontaxable property divisions, particularly if the alimony arrangements are made solely on economic principles and avoid embarrassing marital misconduct allegations.

Finally, remaining as an alternative voluntary support made from marital

funds during the period of separation. Cobb v. Cobb. 107 N.C. App. 382, 420 S.E.2d 212 (1992). In Cobb. the voluntary payments were found to be a distributional factor properly credited against the recipient's assets. Thus where support is paid from marital funds rather than postseparation earnings, the question becomes whether the support payments rather than distributional payments are more valuable.

VI. KEY REFERENCES

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