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# Dissolution of Marriage: California Spousal Support

*Of major importance in any dissolution action is the issue of spousal support. Since the number of family law filings in California has greatly risen, the body of interpretive law has likewise expanded. The result is a determination by the courts of the relative importance to be accorded to statutory and equitable factors considered in awarding spousal support. The development of a recent trend indicating that the legislature and the courts are recognizing the ability of a divorced individual to become self-supporting has impacted support awards. The author provides a current summary of California law on the issue of spousal support including factors important to the judicial determination of the need for and duration of temporary and permanent spousal support.*

## I. INTRODUCTION

The traditional rationale for alimony<sup>1</sup> was to affirm a husband's obligation to support the family and to provide punishment for wrongdoing by "reward[ing] virtue and punish[ing] sin."<sup>2</sup> A wife found guilty of marital misconduct such as cruelty, desertion, or adultery could not, however, receive support, and a husband committing similar "wrongs" could be ordered to pay alimony in retribution. This rationale was purportedly rooted in the state's interest in family support and providing justice for spouses who had fulfilled the obligations of marriage.<sup>3</sup>

With the passage of the Family Law Act<sup>4</sup> in 1969, California elimi-

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1. Alimony has been defined as "a traditional allotment for the wife's support." Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141, 146 (1980) [hereinafter cited as *The Alimony Myth*]. The word stems from the Latin phrase "to nourish." At common law, while divorce was prohibited, husbands were allowed a kind of legal separation, but were required to provide economic support for their estranged wives. "Thus, the first rationale for traditional alimony was to enforce the husband's continuing obligation for support." *Id.*

2. *Id.* A third possible rationale was to compensate a wife for labor performed by her during the marriage. H. CLARK, LAW OF DOMESTIC RELATIONS 442 (1968). Several estimates of the cash value of a homemaker's services have been advanced in recent years. See generally S. WEITZMAN, THE MARRIAGE CONTRACT: COUPLES, LOVERS AND THE LAW (1981), and Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976).

3. *The Alimony Myth*, *supra* note 1, at 146-47.

4. CAL. CIV. CODE §§ 4000-5138 (West 1983). Governor Brown's Commission on the Family, created in 1966, was determined to eliminate fault as a factor in the determination of alimony, support, and the division of community property. REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 5-6 (1966).

nated the fault theory of divorce.<sup>5</sup> The Act, a response to general dissatisfaction with the social and legal procedures affecting divorce actions in California, effected substantial changes in the substantive law and procedure in proceedings for dissolution of marriage.<sup>6</sup> The Family Law Act does not use the word "alimony" to describe the payment from one spouse to another for amounts necessary for support and maintenance.<sup>7</sup> Instead, the term "spousal support" is employed to describe these payments, which are conditioned upon such factors as the duration of the marriage and the ability of the recipient to earn income.<sup>8</sup> Pragmatically, spousal support now serves to deliver economic justice based on the financial needs of the specific parties involved in a dissolution proceeding.<sup>9</sup> New justifications for awards of spousal support include: "to provide support for the long-married housewife with impaired earning capacity, to provide transitional support for education and retraining, to provide support for the mothers of young children, and to provide compensation for the wife as a partner in her husband's work."<sup>10</sup>

With this rationale for the continued existence and vitality of spousal support awards in mind, this comment will explore the factors taken into consideration by the California courts in determining the amount of, need for, and duration of spousal support. The courts have commenced the development of firm answers as to the weight to be accorded to the factors mandated by statute and to other factors deemed just and equitable under the circumstances of each particular case.<sup>11</sup> The difference in function and purpose between pendente

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5. "Irreconcilable differences" and incurable insanity are now the sole grounds for a dissolution of marriage in California. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, HUSBAND AND WIFE §§ 64, 67 (8th ed. 1974) [hereinafter cited as B. WITKIN].

6. The reasoning behind these changes, which include the elimination of fault grounds for divorce, a reduced residency requirement, and general inadmissibility of evidence of particular acts of misconduct against either party, is analyzed in Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156 (1970).

7. "This word evoked an almost automatic glandular reaction, and the resulting accumulations of bile did nothing to ease the unhappy lot of counsel and court." *In re Marriage of Morrison*, 20 Cal. 3d 437, 449 n.7, 573 P.2d 41, 49 n.7, 143 Cal. Rptr. 139, 147 n.7 (1978) (quoting ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 138 § 3.1 (C.E.B. 1970)).

8. The new terminology of the Family Law Act includes the following: "divorce" was changed to "dissolution of marriage;" "action" was changed to "proceeding;" "petition" was substituted for "complaint;" the "plaintiff" is now the "petitioner," and the "defendant" the "respondent;" and the proceeding is entitled "*In re Marriage of* \_\_\_\_\_" instead of "\_\_\_\_\_ v. \_\_\_\_\_." B. WITKIN, *supra* note 5, at § 16.

9. *The Alimony Myth*, *supra* note 1, at 150.

10. *Id.* Two early family law bills provided that "support payments were to be based solely on the dependent spouse's need and ability to engage in gainful employment, with due regard to the duration of marriage." Krom, *supra* note 6, at 177.

11. See *infra* note 79 and accompanying text. Although a prior commentator on this subject has noted that "it is extremely difficult to determine how California courts might utilize the factors enumerated in Civil Code section 4801 to assess an individual's potential or ability to become self-sustaining," recent case law does suggest the weight

lite, or temporary, spousal support and permanent spousal support must be recognized as affecting the propriety of any award. The recent reformulation of support concepts in the Family Law Act and recent cases seems to indicate that the law is currently recognizing the increasing ability of divorcees to become self-supporting.<sup>12</sup>

Issues relating to modification of spousal support orders also relate to the basic support factors to be discussed herein, and are being increasingly litigated. Accordingly, this comment will explore the recent California decisions pertaining to modification and the issues raised therein. It appears that California courts favor modification of support orders despite the desire to promote self-sufficiency. This favoritism is evidenced by the gradually decreasing amounts of support actually awarded. Spousal support is a necessary and proper means to achieve the goal of a self-supporting society.

## II. PENDENTE LITE SPOUSAL SUPPORT

### A. Introduction

Jurisdiction to award spousal support during the pendency of a proceeding for dissolution of marriage is expressly conferred upon the superior courts of the state of California.<sup>13</sup> A family law action is regarded as "pending" from the time of its commencement by filing the petition until its final determination on appeal or until the time for appeal has expired.<sup>14</sup> In addition, the existence of a valid, void, or voidable marriage, which is a prerequisite to dissolution proceedings, is assumed under the Family Law Act, unless that fact is challenged.<sup>15</sup> The party seeking support must show the requisite marital

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to be accorded to certain factors. Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493, 493 (1978).

12. *The Alimony Myth*, *supra* note 1, at 148. Some proponents of no-fault divorce assumed that all women are capable of supporting themselves adequately. See generally Brody, *California's Divorce Reform: Its Sociological Implications*, 1 PAC. L.J. 223 (1970).

13. Civil Code § 4357 provides, in pertinent part: "During the pendency of any proceeding . . . the superior court may order the husband or wife . . . to pay any amount that is necessary for the support and maintenance of the wife or husband . . ." CAL. CIV. CODE § 4357 (West 1983). For convenience, the author will assume throughout this comment that the party seeking support is the wife.

14. See CAL. CIV. CODE §§ 4450, 4503 (West 1983).

15. 2 C. MARKEY, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE § 21.11 at 21-24 (1984) [hereinafter cited as C. MARKEY]. For the rules governing the existence of a marriage for the purpose of awarding temporary support prior to the Family Law Act, see *id.* at §§ 21-25 to 21-27. In *Gromeeko v. Gromeeko*, 110 Cal. App. 2d 117, 123,

status to achieve standing, usually via affidavit. Because the award for support imposes a personal obligation on the party ordered to pay it, the court must have in personam jurisdiction over that spouse to make an order.<sup>16</sup>

Originally, an award of temporary alimony could only be made to a wife.<sup>17</sup> Although the California statutes concerning support awards were made gender-neutral in 1927,<sup>18</sup> it was not until 1979 that the United States Supreme Court invalidated a sex-based alimony statute in the case entitled *Orr v. Orr*.<sup>19</sup> Many states now have statutes which expressly provide for a spousal support award to either spouse, regardless of sex.<sup>20</sup> Hence, a husband generally has an equal right to both seek and receive spousal support; a denial of such right would appear to violate the United States Constitution.

The purposes of temporary support orders are to maintain the status quo of the parties until trial, in order to enable a spouse to live in the same manner to which she has been accustomed until final disposition of the case, and to prevent creditor problems.<sup>21</sup> Other justifications for allowing temporary support have been advanced, which include: to preserve the family unit, to prevent diminution of the

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242 P.2d 41, 45 (1952), more than prima facie proof was required where the fact of the marriage, or its validity, was challenged.

16. All recognized bases of judicial jurisdiction in the case of natural persons are acceptable under this requirement. LI, ATTORNEY'S GUIDE TO CALIFORNIA JURISDICTION AND PROCESS § 1.7 (Cal. C.E.B. 1970). Additionally, these bases are identical to those listed in 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 27 (1971). See also *Judd v. Superior Court*, 60 Cal. App. 3d 38, 131 Cal. Rptr. 246 (1976) (non-resident father's infrequent visits insufficient to support in personam jurisdiction in marriage dissolution proceeding seeking support); *Titus v. Superior Court*, 23 Cal. App. 3d 792, 100 Cal. Rptr. 477 (1972) (mere sending by non-resident father of an agreement concerning visitation rights insufficient basis for in personam jurisdiction).

17. B. WITKIN, *supra* note 5, at § 131

18. See 1927 Cal. Stat. ch. 249, p. 441, § 1. See also CAL. CIV. CODE § 4801 (West Supp. 1985).

19. 440 U.S. 268 (1979).

20. Among these statutes are the following: ALASKA STAT. § 25.24.160 (1983); ARIZ. REV. STAT. ANN. § 25-319 (1976); COLO. REV. STAT. § 14-10-114 (1973); CONN. GEN. STAT. ANN. § 46(b)-82 (West Supp. 1984); DEL. CODE ANN. tit. 13, § 1512 (1981); FLA. STAT. § 61.08 (Supp. 1976); HAWAII REV. STAT. § 580-47 (Supp. 1983); ILL. ANN. STAT. ch. 40, § 9 (Smith-Hurd 1976); IND. CODE ANN. § 31-1-11.5-9 (Burns Supp. 1984); IOWA CODE ANN. § 598.21 (West Supp. 1984); KAN. STAT. ANN. § 60-1610(b)(2) (1976); KY. REV. STAT. § 403.200(1) (1984); MD. ANN. CODE art. 16, § 3 (1981); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1977); MO. REV. STAT. § 452.335 (1977); NEB. REV. STAT. § 42.365 (1978); N.M. STAT. ANN. § 40-4-7 (1983); N.C. GEN. STAT. § 50-16.1 (1981); OHIO REV. CODE ANN. § 3105.18 (Page 1980); OR. REV. STAT. § 107.105 (1983); UTAH CODE ANN. § 30-3-5 (Supp. 1983); VT. STAT. ANN. tit. 15, § 752 (Supp. 1984); VA. CODE § 20-107.1 (Supp. 1984); WASH. REV. CODE ANN. § 26.09.090 (Supp. 1984); WIS. STAT. ANN. § 767.26 (West 1981).

21. See, e.g., *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 849-50, 194 Cal. Rptr. 176, 177-78 (1983), where the court stated: "The temporary support award is usually obtained soon after the filing of the petition. . . . Its purpose is to maintain the living conditions of the parties as closely as possible to the status quo, pending trial and the division of the assets and obligations of the parties."

wife's separate estate,<sup>22</sup> and necessity.<sup>23</sup> Hence, a supported spouse should not be required to significantly impair or deplete his or her separate estate pending the outcome of a dissolution of marriage. The policy and statutory mandate requiring the parties to maintain the status quo is based upon equitable principles, and serves to remind us that a "[h]usband is not entitled to a disproportionately higher standard of living than [a] [w]ife."<sup>24</sup>

An award of temporary support must be based upon a showing of two conditions: the need of the supported spouse or moving party; and the ability of the supporting spouse to pay.<sup>25</sup> California Civil Code section 4357, governing pendente lite spousal support, expressly refers only to the first condition—the spouse's needs—and case law has established that the husband's ability to pay is a necessary condition to an award of temporary support.<sup>26</sup>

When seeking support, one must therefore look to the statutory authority for support pendente lite (including child and spousal support).<sup>27</sup> The court's power in matters of temporary support is thus not within the court's general equity powers, but is conferred by statute.<sup>28</sup> Furthermore, because the state expressly provides that pendente lite support may be awarded during the pendency of any

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22. *Spreckels v. Spreckels*, 111 Cal. App. 2d 529, 534, 244 P.2d 917, 920 (1952). "Temporary awards are made solely for the purpose of preserving intact the family and to prevent diminution of the wife's separate estate as nearly as practicable, until the chancellor shall finally determine whether either party be entitled to any relief in equity." *Id.*

23. *Loeb v. Loeb*, 84 Cal. App. 2d 141, 146, 190 P.2d 246, 249 (1948) (necessity is a necessary basis for both a temporary and permanent allowance).

24. *In re Marriage of McNaughton*, 145 Cal. App. 3d at 852, 194 Cal. Rptr. at 179. See also *Mauldin v. Mauldin*, 275 P.2d 113 (Cal. Dist. Ct. App. 1954) (wife not required to drain her separate estate to live in accustomed style, or to exhaust community funds in her possession before demanding support from her husband); *Larsen v. Larsen*, 101 Cal. App. 2d 862, 226 P.2d 650 (1951) (wife is entitled to live in customary manner per her station in life); *Whelan v. Whelan*, 87 Cal. App. 2d 690, 197 P.2d 361 (1948) (wife not required first to impair separate estate capital before she is entitled to alimony pendente lite); and *Falk v. Falk*, 48 Cal. App. 2d 780, 120 P.2d 724 (1941) (wife should not have to unduly curtail expenses or to deprive herself of the necessities of life pending divorce).

25. B. WITKIN, *supra* note 5, at § 139. The court will, therefore, examine all of the circumstances of the parties when deciding temporary spousal support issues. *Id.*

26. *Arnold v. Arnold*, 215 Cal. 613, 12 P.2d 435 (1932) (award made without consideration of the financial ability of the husband is improper); *Wilder v. Wilder*, 214 Cal. 783, 7 P.2d 1032 (1932) (award denied to wife whose husband was insolvent and wife had adequate resources for support).

27. See *supra* note 12 and accompanying text.

28. The language of the statute indicates that the temporary support award is clearly discretionary. See *supra* note 13.

proceeding under the Family Law Act, a spouse may be entitled to such support on an appeal from a dissolution proceeding.<sup>29</sup>

Generally, temporary spousal support is sought by the moving party soon after the filing of the Petition for Dissolution of Marriage.<sup>30</sup> Although earlier opinions suggest that an award of temporary "alimony" could be made ex parte, the modern practice is to seek the award of support only on noticed motion or in an Order to Show Cause hearing. The application for temporary support is, however, an independent collateral proceeding. Therefore, an order granting or denying support is appealable.<sup>31</sup>

### *B. The Supported Spouse's Needs*

The propriety of pendente lite support awards to a spouse turns primarily upon that spouse's sufficient showing of need.<sup>32</sup> The question of the propriety of pendente lite support is a matter which rests in the sound discretion of the trial court.<sup>33</sup> This discretion is subject to the caveat that it cannot be exercised in an arbitrary manner.<sup>34</sup> An abuse of discretion will be found where, all circumstances being considered, the court's order exceeds the bounds of reason.<sup>35</sup> Each case turns upon its own facts, and the trial court must have detailed information as to both the needs of the spouse requesting support and the available resources and cash of the other spouse.

In assessing the needs of the supported spouse, the court must judge *reasonable* needs in terms of the parties' standard of living prior to separation.<sup>36</sup> The context thus becomes an important consideration. Evidence of a spouse's personal expenses is generally used to demonstrate need;<sup>37</sup> however, a comparison to that spouse's income

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29. See *Bain v. Superior Court*, 36 Cal. App. 3d 804, 111 Cal. Rptr. 848 (1974) (wife entitled to temporary support pending appeal, regardless of issues appealed, where she could be deprived of the benefits of the trial court's judgment).

30. B. WITKIN, *supra* note 5, at § 133. The typical award is made on an order to show cause hearing. *Id.* A Form 1285.50 (Income and Expense Declaration) must be filed in the superior court for this purpose in order to define what the needs and ability to pay of the respective spouses are. See CAL. CT. R., tit. 4, Div. I, Rule 1285.50.

31. *In re Marriage of Skelley*, 18 Cal. 3d 365, 368, 556 P.2d 297, 299, 134 Cal. Rptr. 197, 199 (1976). See also *Lincoln v. Superior Court*, 22 Cal. 2d 304, 139 P.2d 13 (1943) (order denying support appealed); *Robbins v. Mulcrevy*, 101 Cal. App. 300, 281 P. 668 (1929) (order granting temporary alimony appealed).

32. *Loeb v. Loeb*, 84 Cal. App. 2d 141, 146, 190 P.2d 246, 249 (1948).

33. *Id.* at 148, 190 P.2d at 250.

34. *Avnet v. Bank of America*, 232 Cal. App. 2d 191, 200, 42 Cal. Rptr. 616, 622 (1965) (award to wife affirmed on the basis that issue of validity of marriage is not to be determined finally in pendente lite hearing).

35. *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 114, 113 Cal. Rptr. 58, 72 (1974).

36. *In re Marriage of Siegel*, 26 Cal. App. 3d 88, 92, 102 Cal. Rptr. 613, 615 (1972). Reasonable needs must, however, include more than "bare necessities." *Id.*

37. Monetary figures of claimed needs will be presented to the court in the financial declarations filed by the parties pursuant to the California Rules of Court, Rule 1285.50. See *supra* note 30. Counsel should also obtain and make available to the court

must be made to insure that there truly is a need for spousal support. The burden of showing need is, of course, on the party seeking support. Exact monetary accuracy as to need is not required at this stage in the proceedings. A party must only make a showing of reasonable need on which the court can determine approximately what the needs of the spouse are.<sup>38</sup>

Reasonable needs include, but are not limited to: "rent or mortgage payments, real property taxes and insurance, food, household supplies, utilities, medical and dental care, clothing, [and] entertainment."<sup>39</sup> Typically, the client is asked to fill out a worksheet based on check registers, bills and receipts detailing his or her actual expenses. Receipts and other documents reflecting actual expenses are generally necessary in court only if the alleged expenses are challenged by the party opposing support, or if there is insufficient money available to cover the alleged needs of a spouse so that the amount of support requested simply cannot be awarded.<sup>40</sup> Often a couple, upon separation, cannot maintain *two* households in the same style of living as they maintained only one household in the past. Practical considerations such as this will be taken into account by the court in determining the amount of a temporary support award.

The spouse seeking support must also demonstrate that his or her income is insufficient to cover the expenses listed on the financial declaration. Only then will there be a genuine need for supplemental monies for support and maintenance. Income will include money from all sources, whether from employment, separate property, gift or inheritance. If the party seeking support does not have income adequate for her reasonable needs, she may be and probably will be entitled to an award—even though she may possess substantial non-income-producing separate property.<sup>41</sup> This concept of allowing a wife to receive support notwithstanding the possession of valuable property has been entitled the "rule of no impairment:" the spouse need not impair or dispose of capital in order to live in her accus-

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any and all documents such as bills and receipts to substantiate the claim of need and/or inability to pay. Discovery proceedings in the family law are now covered by the civil law and motion rules. CAL. CT. R., tit. 2, div. II, rule 301.

38. *Zinke v. Zinke*, 212 Cal. App. 2d 379, 385, 28 Cal. Rptr. 7, 11 (1963).

39. C. MARKEY, *supra* note 15, at § 21.15[1], 21-30.

40. *Id.*

41. See *Whelan v. Whelan*, 87 Cal. App. 2d 690, 197 P.2d 361 (1948) (wife had property worth \$6,170.00 and received support); *Westphal v. Westphal*, 122 Cal. App. 379, 10 P.2d 119 (1932) (wife with separate property valued at \$15,000.00 awarded alimony).



tomed manner pending resolution of the action.<sup>42</sup> The rule does not, however, apply in all situations. Where the spouse seeking support does not demonstrate the requisite need, she will not be entitled to support. As a result, she must dip into separate property income or earnings to maintain self-sufficiency during the pendency of the divorce action. In *Loeb v. Loeb*,<sup>43</sup> for example, the wife had a separate estate worth over \$200,000.00, a separate income of over \$9,000.00 per year, and annual living expenses under \$8,000.00. There, the court held that an award of \$500.00 per month temporary alimony was an abuse of discretion, as the wife had income sufficient to provide for her needs.<sup>44</sup> As discussed below, the distinction between income-producing and non-income-producing assets and/or property is one which must be made in a support proceeding.

The “need” test for temporary support is that the spouse seeking support must have expenses which exceed her income, her expenses must be reasonable, and income from all sources must be provided. From this information, the court will make a factual determination of practical necessity and award support accordingly. The order will attempt to maintain the status quo to alleviate the possible economic trauma of legal separation, and should provide the needy spouse with enough money to cover more than the “bare necessities” of life. The cases cited herein indicate that the courts are closely scrutinizing the claimed needs of the spouse seeking support, and one should therefore prepare the financial declarations by using receipts, and other documents directly evidencing the income and expenses of the client.

### C. *Ability to Pay*

The other prong of the test for temporary spousal support is that the court must find that the party from whom support is sought has the ability to pay the requested and/or proper support. This condition is judicially created, and is well-established by the case law on the subject.<sup>45</sup> Although support orders are usually based on a party's present income, a determination of a spouse's ability to earn income may be made. This is especially true where a spouse deliberately attempts to avoid his familial support obligations by intentionally suppressing income.<sup>46</sup> The rule allowing consideration of ability to earn rather than actual present earnings will thus be applied only “when there is a deliberate attempt to avoid responsibilities by refusing to

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42. 87 Cal. App. 2d at 692, 197 P.2d at 362-63.

43. 84 Cal. App. 2d 141, 190 P.2d 246 (1948).

44. *Id.* at 149-50, 190 P.2d at 251. The court also found that the rule of no impairment was inapplicable, as the wife had income-producing separate property. *Id.*

45. W. HOGOBOOM, CALIFORNIA PRACTICE GUIDE, FAMILY LAW I § 6:89 (1984) [hereinafter cited as W. HOGOBOOM].

46. C. MARKEY, *supra* note 15, at § 21.15[2], 21-31.

seek or accept gainful employment, deliberately not applying oneself to business, intentionally depressing income to an artificial level, or intentionally leaving employment to go into another business."<sup>47</sup>

In the case of *Meagher v. Meagher*,<sup>48</sup> the court upheld an award of \$750.00 per month for alimony and child support where the husband terminated his employment with earnings of \$2,083.00 per month immediately after leaving his family, and went to work elsewhere for \$624.05 per month.<sup>49</sup> The trial court's rejection of evidence offered to show a lack of financial ability has also been held to constitute reversible error.<sup>50</sup> Hence, a practicing attorney should not only look for signs of deliberate avoidance of support duties, but must also consider the increased costs of maintaining two households on a salary that once maintained only one family residence. Furthermore, the burden of showing such avoidance, or rather bad faith, is borne by the moving party, and has been deemed a difficult burden to carry in everyday practice.

However, if the spouse seeking support meets the burden of showing intentional reduction of income to avoid support, the ability to pay determination must be made on the basis of ability to earn income. The court may order support exceeding actual income of the supporting spouse in this situation.<sup>51</sup>

Pendente lite (and permanent) spousal support awards are thus proper only where the payor spouse has the financial ability to provide for the needs of the spouse requesting support.<sup>52</sup> The court will not focus solely on the earning ability of the supporting spouse in terms of gross income, but will consider the effect of that spouse's expenses for insurance premiums, social security deductions, retirement contributions, and tax payments on his income potential.<sup>53</sup>

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47. *Id.* The "proper procedure is to hold a so-called 'Philbin hearing,' where evidence is taken on the issues of deliberate avoidance of financial responsibilities vs. economic (or other) circumstances beyond the obligor-spouse's control." W. HOGBOOM, *supra* note 45, at § 6:90.1.

48. 190 Cal. App. 2d 62, 11 Cal. Rptr. 650 (1961).

49. *Id.* at 63-65, 11 Cal. Rptr. at 651-52.

50. *Arnold v. Arnold*, 215 Cal. 613, 614-15, 12 P.2d 435, 436 (1932).

51. *But see In re Jennings*, 133 Cal. App. 3d 373, 383, 184 Cal. Rptr. 53, 59 (1982) (criminal contempt for failure to pay spousal support must be based on "ability to pay" rather than "capacity to earn"); *In re Marriage of Rome*, 109 Cal. App. 3d 961, 167 Cal. Rptr. 351 (1980) (trial court reversed for awarding support against non-working husband based on a proven ability to earn and speculation of re-employment in the near future).

52. *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 117, 113 Cal. Rptr. 58, 73 (1974).

53. *Id.*

#### D. *Agreements Between the Parties*

Temporary support may be barred by an agreement between the parties, thus divesting the court of the authority to make an award. Provided that the agreement is fair, contains an express waiver of any claim for temporary support, and is accepted by the court, pendente lite support cannot be ordered.<sup>54</sup> However, where an agreement between the parties is attacked for invalidity, or is not judicially approved, an award of temporary support will not be invalidated on appeal.<sup>55</sup> Courts are wary of agreements purporting to abrogate certain rights of the parties (e.g., waiver of spousal support), and will approve them only if they appear fair and clearly set forth the rights which a spouse may be giving up. The possibility of duress or coercion is real in this situation, as one party may have stronger bargaining power than the other due to financial position or other such factors. Independent legal advice should be sought by a party who has been asked to sign such an antenuptial agreement. This judicial insistence upon clarity and an express waiver of a statutorily protected right (such as the right to spousal support) is consistent with and firmly imbedded in the law of California. A court will not hesitate to invalidate such agreements on equitable grounds such as fraud where it appears that one spouse was "forced" into signing the waiver of spousal support.<sup>56</sup>

In addition to agreements waiving spousal support entirely, the parties may stipulate as to a definite amount of pendente lite spousal support, and may enter into this stipulation orally in open court.<sup>57</sup> By allowing oral stipulations in court, the judicial system undoubtedly encourages parties to settle their disputes amicably, thereby reducing the cost of trying the matter before the court. This procedure would seem to alleviate the need for proof of the supported spouse's need and of the ability of the payor spouse to provide the support. Stipulation is therefore a cost-saving measure to be encouraged in clear-cut cases such as where the spouse seeking support has insufficient money for even the bare essentials of life.

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54. *Newhall v. Newhall*, 157 Cal. App. 2d 786, 796, 321 P.2d 818, 824 (1958). There, the court stated that the waiver in an agreement between husband and wife precludes the wife from receiving temporary support, but child support would always be available to her. *Id.* See also *Patton v. Patton*, 32 Cal. 2d 520, 196 P.2d 909 (1948) (reversible error to grant award of temporary alimony without considering the validity of the property settlement agreement).

55. *Spreckels v. Spreckels*, 111 Cal. App. 2d 529, 533, 244 P.2d 917, 919 (1952). See also *Klemm v. Superior Court*, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977) (agreement to waive child support not binding on the court).

56. See, e.g., *In re Marriage of Moore*, 113 Cal. App. 3d 22, 169 Cal. Rptr. 619 (1980) (agreement containing waiver of wife's right to spousal support set aside where evidence that waiver was knowingly and intelligently made was lacking).

57. *In re Marriage of Borson*, 37 Cal. App. 3d 632, 635, 112 Cal. Rptr. 432, 434 (1974).

*E. Termination of Pendente Lite Support*

Prior to July 1, 1984, temporary support terminated with the granting of the Interlocutory Judgment of Dissolution of Marriage. Thus, "[u]pon the interlocutory judgment becoming final, in the absence of appeal, the right to *temporary support* is terminated. At that time there must be an award of permanent support or the liability ceases."<sup>58</sup> However, effective July 1, 1984, there is no longer an interlocutory judgment of dissolution.<sup>59</sup> Instead, there is only a single judgment in a divorce action, and that judgment operates to terminate the obligation for pendente lite support. The single judgment must set forth the obligations of the parties with regard to "permanent" spousal support, or the court will be without jurisdiction to award any support at a later time. Basically, the new single judgment of dissolution replaces both the functions and effect of the interlocutory judgment.<sup>60</sup> Orders for support must be clearly and specifically set forth in the judgment to also allow for effective enforcement of any such support order contained therein.

Obviously, a single judgment saves the parties, court, and attorneys both time and money. The primary difference between the two methods (interlocutory and single judgment) is that the former process mandated that a formal "request to enter final judgment" be filed after the interlocutory judgment and the six-month waiting period, dating from the earliest of (1) the service of the initial papers in the dissolution action or (2) the first appearance by the respondent.<sup>61</sup> Such a "request" is no longer necessary in California. However, the judgment is exactly the same in effect—it merely declares that the parties are entitled to have their marriage dissolved. The exact date (after the six-month waiting period) on which the judgment will become "finally effective" must be specified in the judgment, otherwise the parties will retain their pre-dissolution marital status for income

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58. B. WITKIN, *supra* note 5, at § 135.

59. CAL. CIV. CODE §§ 4512, 4514 (West Supp. 1984).

60. W. HOGOBOOM, *supra* note 45, at § 15:57. The single judgment of dissolution is a final and binding adjudication of the parties' property, custody, attorney's fees and support rights. *Id.*

61. A judgment is deemed final if and when "six months have expired from the date of service of a copy of summons and petition or the date of appearance by the respondent, whichever occurs first." CAL. CIV. CODE § 4514(a) (West 1983). *But see* CAL. CIV. CODE § 4514(e) (West 1983) ("court may . . . retain jurisdiction over the date of termination . . . or may order . . . [the marriage] terminated at a future specified date").

taxes, etc.<sup>62</sup> Because this single judgment procedure eliminates the "step" of having to file a request to enter the final judgment, there will undoubtedly be some benefits to be gleaned therefrom. However, just how much time and/or money will actually be saved by the parties and the courts cannot yet be determined.

Accordingly, pendente lite spousal support obligations terminate upon the entry of the new final judgment. As previously stated, it is vital to ensure that the judgment itself specifically disposes of all matters before the court unless jurisdiction over some matters has been bifurcated or reserved at a prior time.

#### *F. Modification of Temporary Support*

The power of the court to modify a temporary support order on a showing of changed circumstances or subsequent events disclosing excessiveness or inadequacy of the award is well established by case law.<sup>63</sup> The rule allowing modification of pendente lite spousal support is codified in Civil Code section 4357, which expressly prohibits modification as to amounts already accrued.<sup>64</sup> A modification may thus only be made retroactive to the date of filing of the notice of motion or order to show cause for modification. Once liable for past due amounts, a party cannot exculpate himself by claiming that he does not have the ability to pay amounts that have already become due. Generally, the trial court, when making the original award, has found that the spouse ordered to pay has the ability to pay the court-ordered sums.

The California statute should serve as a model for other states to follow. Its clarity and purpose are evident—only a spouse who has duly applied to the court for modification and who can prove a marked change in the circumstances of either party will be permitted to have the original temporary support order modified.

The standard applied by the court in determining whether to modify or revoke a pendente lite spousal support order is identical to that of the original or initial application for such order.<sup>65</sup> Without a show-

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62. W. HOGBOOM, *supra* note 45, at 15:61-64. The date must, of course, conform with the six month waiting period required by CAL. CIV. CODE § 4514(a) (West 1983).

63. See *Schwartz v. Schwartz*, 173 Cal. App. 2d 455, 343 P.2d 299 (1959) (reduction to amounts already paid); *Howard v. Howard*, 141 Cal. App. 2d 233, 296 P.2d 592 (1956) (reduction by appellate court).

64. Civil Code section 4357 (effective July 6, 1970) provides in pertinent part: "Any such order may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke." CAL. CIV. CODE § 4357 (West 1980).

65. Where the original order calls for payments on the first day of the month, the monthly payments accrue on the first day, and a later order of modification cannot affect any such payment or lack thereof. *Hangen v. Hangen*, 241 Cal. App. 2d 11, 13-14, 50 Cal. Rptr. 203, 205 (1966).

ing of need and/or inability to pay the court-ordered amount, a party cannot seek to modify the prior order for temporary spousal support.<sup>66</sup> At this point, it should be noted that problems arise where one party has appealed the original award of temporary support and the other wishes to modify that same award during the pendency of an appeal. This and other modification issue complexities will be considered below in relation to "permanent" spousal support.<sup>67</sup>

### *G. Enforcement of Temporary Support Orders*

Finally, enforcement of the temporary support order is governed by California Civil Code section 4380.<sup>68</sup> Former Civil Code section 140 expressly authorized the court to order the party required to pay temporary spousal support to give security therefor.<sup>69</sup> The Family Law Act authorizes the court to order a party to post security for payment only for permanent spousal and child support.<sup>70</sup> Accordingly, enforcement procedures must often be consulted to compel compliance with temporary support orders.

Modernly, contempt for disobedience of a valid court order is the remedy most often invoked to compel a spouse to pay spousal support to the other. If the order could have been obeyed when made and the spouse ordered to pay had knowledge of the order, disobedience is punishable as contempt even though the party may subsequently become unable to comply.<sup>71</sup> The duty to pay support is not regarded as a debt, therefore the spouse that is in willful disobedience of a valid court order may be jailed until compliance is secured. This provides incentive for the spouse who has not been receiving court-ordered support to utilize the contempt procedure for enforcement. Furthermore, the bitterness inherent in most dissolution proceedings between the parties is satisfied by the knowledge that one party may be put in jail until he satisfies the obligations he owes to the other. It should be remembered, however, that a frivolous contempt action

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66. C. MARKEY, *supra* note 15, at § 21.22.

67. See *infra* note 159 and accompanying text.

68. That section provides as follows: "Any judgment, order, or decree of the court made or entered pursuant to this part may be enforced by the court by execution, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary." CAL. CIV. CODE § 4380 (West 1983).

69. Repealed by 1969 Cal. Stat. ch. 1608, p. 3313 § 3 (operative January 1, 1970).

70. CAL. CIV. CODE § 4801(a) (West Supp. 1985). The language of Civil Code section 4380, however, appears to allow a court to order the posting of security for the support order in its discretion. See *supra* note 68.

71. *Sorell v. Superior Court*, 248 Cal. App. 2d 157, 161, 56 Cal. Rptr. 222, 225 (1967).

could bring with it a motion by the party opposing contempt for sanctions.

In short, "[t]he temporary spousal support award is an attempt, pending trial, to allocate the family income equitably between the parties, considering their individual incomes and expenses."<sup>72</sup> A spouse will be entitled to temporary spousal support pending the outcome of the litigation if he or she can demonstrate a reasonable need for support and that the other party has the ability to make payments. Although case-by-case determinations are costly and time consuming for the parties, their attorneys, and the court, there is no other "fair" way to determine the needs and abilities of the parties to a divorce action.

The advent of a new single judgment in dissolution proceedings should alleviate the duplicative nature of having both an interlocutory and final judgment of dissolution. One must, however, provide for support in the judgment, or face foreclosure upon subsequent application therefor. The fact that courts are willing to allow and recognize stipulations as to temporary support between the parties is indicative of the Family Law Act policy of reducing court time and of allowing the parties to rationally and amicably resolve support issues. California is clearly in the process of simplifying its domestic relations procedures, and the new amendments to the Civil Code are defining the relevant issues to be determined in support proceedings.

### III. "PERMANENT" SPOUSAL SUPPORT

#### A. Introduction

The grant or denial of permanent spousal support and its amount and duration are matters that rest in the sound discretion of the trial court.<sup>73</sup> The word "permanent," in this context, means only that support is a result of the adjudication of the rights of the parties, and serves to distinguish the "final," or permanent award of support, from the pendente lite, or temporary award. Under former divorce law in this state, permanent alimony was awarded to the wife for an offense of the husband, as a substitute for the marital support she lost through his fault.<sup>74</sup> However, as stated in *In re Rosan*:<sup>75</sup>

[i]n determining the need for, the amount of and the duration of spousal support under The [sic] Family Law Act the court is to ignore marital fault and is to base its determination solely on the circumstances of the parties, including

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72. *In re Marriage of Burlini*, 143 Cal. App. 3d 65, 69, 191 Cal. Rptr. 541, 543 (1983).

73. The trial court's discretion in ruling on these issues, although not unlimited, is broad. *In re Marriage of Morrison*, 20 Cal. 3d 437, 454, 573 P.2d 41, 52-53, 143 Cal. Rptr. 139, 150-51 (1978).

74. See *Miller v. Superior Court*, 9 Cal. 2d 733, 72 P.2d 868 (1937); *Scheibe v. Scheibe*, 57 Cal. App. 2d 336, 134 P.2d 835 (1943).

75. 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972).

the duration of their marriage and the ability of the supported spouse to engage in gainful employment.<sup>76</sup>

Instead of considering fault, the courts must focus on more pragmatic factors relating to these elusive "circumstances of the parties."

Thus, the enactment of the Family Law Act in 1969 did not change the requirement that a court is to be guided by the circumstances of the individual parties in resolving spousal support issues at trial.<sup>77</sup> It is submitted that the Act and subsequent amendments to applicable sections of the California Civil Code merely serve to more sharply define what circumstances of the parties are deserving of consideration, and which will be given weight.

The purpose of permanent spousal support in modern cases is not to preserve the pre-separation status quo of the parties, but to provide financial assistance to the spouse in need of support.<sup>78</sup> By providing financial aid to a spouse who has been supported in the past for a period of time during the marriage, permanent spousal support serves as a means to enable a spouse to become self-supporting. The goal of eventual self-support for divorced spouses is presently being judicially enforced through lower support awards for shorter durations.

Fundamental differences exist between the functions and purposes of pendente lite support and permanent support orders. First, the court is governed by different statutory authority in making each award.<sup>79</sup> Second, the determination of permanent spousal support at trial must be de novo, since only at trial is all the evidence presented

76. *Id.* at 892, 101 Cal. Rptr. at 300.

77. *In re Marriage of Morrison*, 20 Cal. 3d 437, 449, 573 P.2d 41, 49, 143 Cal. Rptr. 139, 147 (1978).

78. *In re Marriage of Burlini*, 143 Cal. App. 3d 65, 69, 191 Cal. Rptr. 541, 543 (1983).

79. Civil Code § 4357 governs pendente lite support only. Civil Code § 4801(a), governing permanent support, provides as follows:

(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable. In making the award, the court shall consider all of the following circumstances of the respective parties:

(1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties and the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse.

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

(4) The duration of the marriage.

(5) The ability of the supported spouse to engage in gainful employment with-



as to what the circumstances of the parties will be after the dissolution.<sup>80</sup> Because the statute<sup>81</sup> expressly provides that the permanent order is to be based upon circumstances existing at the date of trial, a change of circumstances from the time the pendente lite order was made is irrelevant to a determination of "just and reasonable" support at trial.<sup>82</sup> Hence, courts do not and should not use the pendente lite award as a standard in determining the amount of support to be awarded at trial and to be set forth in the final judgment of dissolution.

Prior to 1951, the husband could not receive permanent alimony in a divorce action.<sup>83</sup> The Family Law Act, however, does not distinguish between the spouses for purposes of deciding who is entitled to an award of spousal support. Provided that a spouse definitely proves a need for support, and that there are monies available to provide for such support, it does not matter what the sex of the spouse seeking support is.

In determining whether to award permanent support, and if so, how much support and for how long, the court must consider all of the statutory factors listed in California Civil Code section 4801(a).<sup>84</sup>

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out interfering with the interest of dependent children in the custody of the spouse.

(6) The time required for the supported spouse to acquire appropriate education, training, and employment.

(7) The age and health of the parties.

(8) The standard of living of the parties.

(9) Any other factors which it deems just and equitable.

At the request of either party, the court shall make appropriate factual determinations with respect to the circumstances. The court may order the party required to make the payment of support to give reasonable security therefor. Any order for support of the other party may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. At the request of either party, the order of modification or revocation shall include a statement of decision and may be made retroactive to the date of filing of the notice of motion or order to show cause to modify or revoke, or to any date subsequent thereto.

CAL. CIV. CODE § 4801(a) (West Supp. 1985).

80. For a brief discussion of the fundamental differences between pendente lite and permanent spousal support awards, see *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 194 Cal. Rptr. 176 (1983).

81. CAL. CIV. CODE § 4801(a) (West Supp. 1985). See *supra* note 79.

82. The former standard for the amount of spousal support under section 139 was a "suitable allowance." The "just and reasonable" modern standard is equitably based on the circumstances of the parties.

83. In that year, former Civil Code § 139 was amended to provide that the court could compel an unsuccessful party to pay permanent alimony. See B. WITKIN, *supra* note 5, at § 158. See also *Kerr v. Kerr*, 182 Cal. App. 2d 12, 5 Cal. Rptr. 630 (1960) (husband granted divorce on extreme cruelty grounds awarded permanent support of \$65.00 per month).

84. *Franson v. Franson*, 142 Cal. App. 3d 419, 190 Cal. Rptr. 885 (1983) (abuse of discretion to base support award solely on difference between expenses and income without considering statutory standards). Section 4801(a) expressly provides that the

In addition, the award must be based upon a review of all factors collectively. Only after examining the factors as a whole can the court order the "just and reasonable" support.

### B. *Earning Capacity*

The first factor which must be considered by the court is the earning capacity of *each* spouse. As with temporary support, the inquiry here will focus upon actual earnings, absent bad faith in the form of intentional avoidance of support obligations, such as termination of gainful employment. In that case, the court will consider the ability of a party to earn income.<sup>85</sup> The court must examine the earning capacities of both spouses in order to make an equitable finding of need for support in order to comply with the statutory mandate.

The earning capacity of the spouse seeking support, as affected by time devoted during the marriage to homemaking services, is discussed in two comparatively recent California cases.<sup>86</sup> Terminating support at a fixed date after a lengthy marriage, where one spouse stayed home to raise children and was not employed outside of the home, would appear to be a clear abuse of discretion. A spouse who has not had the opportunity to develop her earning capacity over a period of years should not be "relegated to a standard of living substantially below that enjoyed by the parties during the marriage or to subsistence from public welfare."<sup>87</sup> Status quo considerations will thus enter into the court's determination of the propriety of a support order on an informal, equitable level. When a dependent spouse (i.e., a homemaker with some earning capacity) who might be capable of earning income seeks spousal support, some courts tend to award "step-down" spousal support.<sup>88</sup> Such an award is one in which the amount of the award is automatically reduced over the limited period of time for which it is to be received. Step-down support orders provide valuable incentives for the supported spouse to become economi-

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parties may request findings from the trial court. CAL. CIV. CODE § 4801(a) (West Supp. 1985).

85. *In re Marriage of Reese*, 73 Cal. App. 3d 120, 125, 140 Cal. Rptr. 589, 592 (1977).

86. *In re Marriage of Morrison*, 20 Cal. 3d 437, 451, 573 P.2d 41, 50, 143 Cal. Rptr. 139, 148 (1978); *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 421, 136 Cal. Rptr. 635, 638 (1977).

87. *In re Marriage of Rosan*, 24 Cal. App. 3d 885, 897, 101 Cal. Rptr. 295, 304 (1972).

88. See, e.g., *In re Marriage of Andreen*, 76 Cal. App. 3d 667, 672-73, 143 Cal. Rptr. 94, 97 (1978); *In re Marriage of Kelley*, 64 Cal. App. 3d 82, 95, 134 Cal. Rptr. 259, 266 (1976). But see *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 423, 136 Cal. Rptr. 635, 639 (1977).

cally self-supporting and an increase in the use by the superior court of this type of order should be expected.

California courts have examined several factors which affect the earning capacity of the supporting spouse, including tax obligations, insurance premiums, and retirement contributions.<sup>89</sup> Absent bad faith, the court will base the spousal support award on the husband's actual income as of the date of trial.<sup>90</sup> The action of *In re Marriage of Sullivan*,<sup>91</sup> recently decided by the California Supreme Court, may have a bearing on the earning capacity factor. A spouse's education and training have been deemed relevant in ascertaining a person's capability for generating income for spousal support purposes in another jurisdiction.<sup>92</sup> In addition, a California court has recognized that the ability of each spouse to earn is relevant in Civil Code section 4801(a) proceedings.<sup>93</sup> However, because the California courts appear to scrutinize earning capacity instead of actual earnings at time of trial only where bad faith or fraud appears, and are mandated by the Family Law Act to ignore fault, the education and professional degree of the husband may not be considered a valuable asset bearing on the issue of need for spousal support in this state.

Finally, the Governor recently signed a bill which requires the court to consider the need to reimburse a spouse for community contributions to a spouse's education and training, and also mandates that the extent to which a party contributed to the other's education and training must be considered in awarding spousal support.<sup>94</sup> This law became effective on January 1, 1985, and applies to all cases in which the final judgment for support has not been entered at that time.<sup>95</sup>

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89. See, e.g., *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 116-17, 113 Cal. Rptr. 58, 73 (1974), *disapproved in In re Marriage of Morrison*, 20 Cal. 3d 120, 573 P.2d 41, 143 Cal. Rptr. 139 (1978).

90. *Philbin v. Philbin*, 19 Cal. App. 3d 115, 121, 96 Cal. Rptr. 408, 411-12 (1971). See *supra* note 47 and accompanying text.

91. *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). The court in *Sullivan* remanded to the trial court in order to make findings necessary to determine reimbursement and/or support in accordance with a new California statute, Civil Code section 4800.3. See *infra* note 95 for the text of section 4800.3.

92. *Carlson v. Carlson*, 178 Colo. 283, 289, 497 P.2d 1006, 1009-10 (1972).

93. *In re Marriage of Norton*, 71 Cal. App. 3d 537, 541, 139 Cal. Rptr. 728, 730 (1976).

94. A.B. 3000 has been called the "Sullivan" Measure. L.A. Daily J., Oct. 2, 1984, at 1, col. 2.

95. Section 4800.3 provides:

(a) As used in this section, "community contributions to education or training" means payments made with community property for education or training or for the repayment of a loan incurred for education or training.

(b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

(1) The community shall be reimbursed for community contributions to ed-

In *Philbin v. Philbin*,<sup>96</sup> a modification case, the court noted that the rule requiring the court to inquire into the earning capacity of the payor spouse is recognized only where no genuine effort to earn income has been shown.<sup>97</sup> It is therefore invalid for the spouse who has stayed at home unemployed during the marriage to rest upon the fact that he or she should not have to obtain employment or is unwilling to enter the job market. Because the policy in California is to promote self-sufficiency, unwillingness to earn income will be damag-

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ucation or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.

(2) A loan incurred during the marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to Section 4800 but shall be assigned for payment by the party.

(c) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including but not limited to any of the following:

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, nothing in this subdivision shall limit consideration of the effect of the education, training, or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to Section 4801.

(e) This section is subject to an express written agreement of the parties to the contrary.

CAL. CIV. CODE § 4800.3 (West Supp. 1985).

96. 19 Cal. App. 3d 115, 96 Cal. Rptr. 408 (1971). See *supra* note 47 and accompanying text.

97. The *Philbin* court stated:

While it is true that an award of alimony and child support may be based upon the husband's ability to earn as distinguished from his actual income, the rule seems to be applied only when it appears from the record that there is a deliberate attempt on the part of the husband to avoid his financial family responsibilities by refusing to seek or accept gainful employment. . . .

*Id.* at 121, 96 Cal. Rptr. at 411-12 (citation omitted).

ing to a party's case.<sup>98</sup>

In the future, state income tax returns may be required to be submitted to the *court* (not the opposing party), presumably to assist the court in the determination of earning capacity as based on present income. This requirement would be a novel one in family law proceedings, but would result in more accurate orders.<sup>99</sup>

### C. Reasonable Needs

The second determination to be made by the court is that of the reasonable needs of each party.<sup>100</sup> Again, the needs of both spouses must be considered, not just that of the party seeking a permanent support award. *Pope v. Pope*<sup>101</sup> is an excellent illustration of the court's discretionary bounds in determining what the actual needs of the parties are. Although the general rule is to the contrary, there is authority which states that the spouse's ability to live on the previously ordered pendente lite allowances may be considered by the court when determining the amount of "permanent" support required by the moving party.<sup>102</sup> "Need" should not be examined in a vacuum, but must be analyzed in conjunction with the other relevant circumstances and factors affecting the parties.<sup>103</sup> If a spouse is capable of self-support sufficient to provide for her needs, support orders are inappropriate. The wife's ability to work, including good faith efforts to procure gainful employment after separation, are factors deserving consideration by the court in determining her need for

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98. Civil Code section 4801(a) should, perhaps, provide that a spouse's unwillingness to become self-supporting should be considered by the court. However, in view of the ability of a spouse to request that the other undergo an examination by the vocational training consultant, such a provision would merely serve to clarify what is already being considered by the courts of this state. CAL. CIV. CODE § 4801(a) (West Supp. 1985).

99. "In any proceeding involving child support or spousal support, no *party* thereto *may refuse* to submit . . . state income tax returns to the court . . ." CAL. CIV. CODE § 4700.7 (West Supp. 1984), added by 1983 Cal. Stat. ch. 1304 (operative July 1, 1984) (emphasis added).

100. CAL. CIV. CODE § 4801(a)(2) (West Supp. 1985). See *supra* note 79 and accompanying text.

101. 102 Cal. App. 2d 353, 227 P.2d 867 (1951). There, the wife had neither income nor skills and alimony of \$2,000.00 per month was upheld. *Id.* at 370-71, 227 P.2d at 878-79.

102. See *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 458-59, 152 Cal. Rptr. 668, 676 (1979), *disapproved in* *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 858 (1980); *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 102-03, 147 Cal. Rptr. 586, 590 (1978), *cert. denied*, 440 U.S. 915 (1979). One commentator has called the non-permanent award of spousal support "rehabilitative," taking notice of the fact that "the focal point of spousal support determinations has shifted from the sex of the recipient to the individual's ability to become financially independent." Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493, 495 (1978).

103. W. HOGOBOOM, *supra* note 45, at § 6:93.

support.<sup>104</sup> In addition, need must be considered in relation to the parties' post-separation situation, taking into consideration the practical problems such as maintaining more than one "family" household.<sup>105</sup>

As in temporary support proceedings, the needs of each party must amount to more than just the bare necessities, and generally entail a comparison to the pre-separation status (social) of the parties.<sup>106</sup> Living expenses and amounts sufficient to enable a spouse seeking support to become financially self-sufficient in relation to her position in society, will thus be the key concerns in determining need.

#### *D. Obligations and Assets*

The third factor under Civil Code section 4801(a), the obligations and assets, including the separate property, of each spouse, involves an analysis of another statute—Civil Code section 4806.<sup>107</sup> The language of this latter statute is both discretionary and mandatory: if the separate estate of the spouse seeking support is sufficient to provide proper support, the court *cannot* make a support award where there are no children of the marriage.

Fundamental fairness requires that a spouse should not receive support unless there is a real, actual, and present need for financial assistance. Case law interpreting the provisions of section 4806 is sparse. Earlier cases, such as *Dallman v. Dallman*,<sup>108</sup> hold that, in the absence of the requisite demonstration of need, a spouse's in-

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104. See, e.g., *In re Marriage of Dennis*, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973). There, the marriage had lasted 25 years, and the controlling factor in the court's award decreasing support on an annual basis was the wife's unwillingness to work. *Id.* at 282, 110 Cal. Rptr. at 621.

105. See, e.g., *In re Marriage of Siegel*, 26 Cal. App. 3d 88, 102 Cal. Rptr. 613 (1972). See also *In re Marriage of Andreen*, 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (1978) (abuse of discretion to award spousal support of \$500.00 per month for 10 years where the decree pushed the wife's standard of living considerably below the husband's).

106. *In re Marriage of Siegel*, 26 Cal. App. 3d 88, 92, 102 Cal. Rptr. 613, 615 (1971).

107. Civil Code section 4806 provides as follows:

When either party in a proceeding under this part has either a separate estate, or is earning his or her own livelihood, or there is community property or quasi-community property sufficient to give him or her proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court may withhold any allowance to him out of the separate property of the other party. *In any original or modification proceeding, where there are not children, and either party has or acquires a separate estate, including income from employment, sufficient for his or her proper support, no support order shall be made or continued against the other party.*

CAL. CIV. CODE § 4806 (West 1983) (emphasis added).

108. 170 Cal. App. 2d 729, 339 P.2d 636 (1959).

come-producing separate property precludes an award of spousal support.<sup>109</sup> Such cases appear to be contrary to the general policy of preventing diminution of a party's own property when there is community property available for support.

The most recent case interpreting the sufficient separate property income requirement of section 4806, *In re Marriage of McNaughton*,<sup>110</sup> held that section 4806 is applicable only when the supported spouse's income from separate property is sufficient to meet that spouse's needs.<sup>111</sup> Hence, where a spouse has a separate estate which is income-producing, the requirement of sufficient proof of need in excess of income will become the determinative factor regarding the propriety of a support order. Provided the spouse's needs exceed income from all sources, including that from separate property, that spouse should be entitled to receive permanent spousal support in an amount sufficient to provide for all of her needs.

The *McNaughton*<sup>112</sup> interpretation of section 4806 is much more realistic and fair than that of earlier case law. Mere possession and control of separate property assets, whether or not income-producing, should not preclude the spouse seeking legitimate support funding where the other spouse objects. After all, support is primarily based on need, and a party may have a need for support in excess of the income received from separate property. Liquidation should not be required of the spouse seeking support as the only remedy upon dissolution.

In addition, speculation as to the ultimate amount of income available to a spouse from a division of community property or from separate property should be discouraged. In situations where the spouse from whom support is requested suggests that the parties divide community property in order to allow the supported spouse to have sufficient income pending the full division of the marital property, this policy becomes relevant. There must, therefore, be proof of the amount of income that a spouse receives from separate property.

The fact that one spouse received non-income-producing assets in the division of property may properly be considered in determining the adequacy of a support award.<sup>113</sup> A request for such non-liquid as-

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109. *Id.* at 739, 339 P.2d at 642. See also *In re Marriage of Cosgrove*, 27 Cal. App. 3d 424, 103 Cal. Rptr. 733 (1972) (wife denied support where evidence showed income from her separate property approximated her living expenses).

110. 145 Cal. App. 3d 845, 194 Cal. Rptr. 176 (1983).

111. *Id.* at 853, 194 Cal. Rptr. at 178. The circumstances at trial are the only truly relevant circumstances as to both the needs of the parties and of the income available to them, including income from the division of community property.

112. *Id.*

113. C. MARKEY, *supra* note 15, at § 21.32[2](3). The fact that the spouse requested non-income-producing property may also be important for purposes of considering motive or bad faith. *Id.*

sets may be indicative of a plan to receive support in excess of income that could be earned had that spouse requested and received property which would and could provide sufficient support. Motive may thus become another "informal" factor considered by the court under the obligations and asset determination.

The paying spouse's obligations and assets are also considered under this section, as they tend to reflect the actual ability of that spouse to pay support to the other. However, to permit that spouse to escape his support obligations because his funds are tied up, or because he has little or no "cash" available would result in the supported spouse's paying for her share of the community property out of support money that would otherwise have been awarded.<sup>114</sup> The policy requiring an equal division of community property upon dissolution thus may serve as an impetus for the court to find that a spouse's needs exceed income, and resulting awards of support will be made despite income from separate or community property otherwise sufficient to provide support.

A spouse who seeks division of community property in lieu of support, or support payable from community property prior to the division thereof should be required to reimburse the community if he would have been responsible for paying the support out of his separate property or post-separation earnings.<sup>115</sup> This result would be in accord with the legislative mandate of a completely equal distribution of community assets and obligations upon dissolution.

#### *E. Duration of the Marriage*

The fourth factor, duration of the marriage, bears upon both the need for support and the duration of any award which may be made by the courts. As previously stated, a spouse who has stayed out of the job market for an extended period of time in order to fulfill family obligations, such as the care of children and maintenance of the family residence, may not be able to quickly enter into an employment relation upon separation or dissolution. It is often noted that

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114. To permit this "would be to distort the statutory scheme and, indirectly, contravene the statutory mandate that the community property be divided equally." *In re Marriage of Rosan*, 24 Cal. App. 3d 885, 895 n.5, 101 Cal. Rptr. 295, 302 n.5 (1972).

115. California Civil Code section 4805 provides that the "earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouse had not been living separate and apart from the other spouse . . ." shall be the primary source for spousal support payments. CAL. CIV. CODE § 4805 (West 1983).



"the longer the marriage, the stronger is the case in favor of granting spousal support."<sup>116</sup>

In some cases, a "displaced homemaker" may never be able to adequately provide for her needs after a lengthy marriage. As in *In re Marriage of Brantner*,<sup>117</sup> a wife who has spent her married years as a homemaker and mother may, despite good faith attempts, find it impossible to reenter the job market. "[T]he husband simply has to face up to the fact that his support responsibilities are going to be of extended duration—perhaps for life. This has nothing to do with feminism, sexism, male chauvinism. . . . It is ordinary commonsense, basic decency and simple justice."<sup>118</sup>

Hence, one spouse cannot force the other spouse to enter the job market by refusing to pay spousal support where such action would be futile. The same is true, of course, for a husband whose wife has pursued a career while he has devoted his time to raising the children and maintaining the family home. In view of the fact that today more women work outside of the home and care for their children, spousal support awards may be decreasing.<sup>119</sup> Each case must, however, be considered on its own facts, and the duration of the marriage may have affected the ability of one or both of the spouses to earn income, thus necessitating the extension of the duration of a "permanent" spousal support order.

Problems arise with regard to determining exactly what constitutes the required duration of a marriage. There are no cases which have examined this issue, although dicta on various marriage terms is plentiful. One judge, for example, has defined long-term marriages as those lasting for more than fifteen years, middle-term marriages as those lasting from seven to fifteen years, and short-term marriages as those lasting less than seven years.<sup>120</sup> However, in *In re Marriage of Vomacka*,<sup>121</sup> the court found that eleven years was a lengthy marriage in allowing modification of a support order.<sup>122</sup>

If one spouse has little or no ability to earn income due to the length of the marriage and its negative effect on employability, then a support order would recognize the need for support for an ex-

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116. C.MARKEY, *supra* note 15, at § 21.32[2](4). See also W. HOGOBOOM, *supra* note 45, at § 6:95.

117. 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977).

118. *Id.* at 421, 136 Cal. Rptr. at 637.

119. See generally *The Alimony Myth*, *supra* note 1, at 154-59, regarding short and long term marriages and resulting support awards.

120. D. KING, GUIDELINES FOR DOMESTIC RELATIONS CASES 14-15 (1977).

121. 36 Cal. 3d 459, 683 P.2d 248, 204 Cal. Rptr. 568 (1984).

122. *Id.* at 469, 683 P.2d at 254, 204 Cal. Rptr. at 574. See also *In re Marriage of Neal*, 92 Cal. App. 3d 834, 847, 155 Cal. Rptr. 157, 164 (1979) (a marriage lasting seven years was "lengthy" as a matter of law). See *infra* note 149 and accompanying text for the impact of this case on future modification of spousal support issues.

tended and indefinite period of time.<sup>123</sup> In such a case, it is essential for the practicing attorney to insure that the court specifically retains jurisdiction to modify the award in the future.

#### *F. Ability of Supported Spouse to Obtain Employment*

The fifth factor under Civil Code section 4801(a)<sup>124</sup> turns on the ability of the supported spouse to be employed without interfering with the interests of dependent children in her custody. The needs of young children, a legitimate state interest, have been held to justify support of indefinite duration even after a relatively short marriage.<sup>125</sup> However, surveys have indicated that the mothers of young children who were divorced after short marriages experienced a dramatic decline in spousal support between 1968 and 1972.<sup>126</sup> One reason advanced for this decline in support awards is that spousal support may be subsumed under child support awards.<sup>127</sup> A more plausible reason is that women have become increasingly more self-sufficient in recent years. It appears that the California legislature, in enacting the Family Law Act, expected that courts would issue orders encouraging supported spouses to seek job opportunities and to work toward a goal of eventual self-support.<sup>128</sup>

#### *G. Time to Acquire Education and Employment*

Another circumstance to be considered in the determination of the amount of, need for, and duration of spousal support is the time that is required for the supported spouse to obtain appropriate education, training and employment.<sup>129</sup> By using the word "appropriate," the statute necessarily contemplates that each case will be considered in relation to its own facts. This provision basically orders the spouse seeking support to prepare for employment, and reduces the chance that a spouse will claim that she should not have to become self-supporting. Case law interpreting this factor indicates that if the sup-

123. See *In re Marriage of Brantner*, 62 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977).

124. See *supra* note 79 and accompanying text.

125. See *In re Marriage of Aufmuth*, 67 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

126. *The Alimony Myth*, *supra* note 1, at 164.

127. *Id.* However, the wife is not allowed use of the funds as her own—she must use the money for the interests of the children of the marriage.

128. *In re Marriage of Morrison*, 20 Cal. 3d 437, 451, 573 P.2d 41, 50, 143 Cal. Rptr. 139, 148 (1978). Speculation as to future self-support, however, will mandate that the spouse continue to receive support. *In re Marriage of Epstein*, 24 Cal. 3d 76, 91, 592 P.2d 1165, 1174, 154 Cal. Rptr. 413, 422 (1979).

129. CAL. CIV. CODE § 4801(a)(6) (West Supp. 1985). See *supra* note 79.

ported spouse does have job skills, then she may not need a support order.<sup>130</sup> If support is in fact ordered by a court under facts revealing that the spouse receiving it could obtain employment, it will generally be for a shorter duration. Housewives with no job skills, other than as a homemaker or cleaning woman, however, are entitled to support for an extended period of time.<sup>131</sup>

During the pendency of section 4801 support proceedings, the court is empowered to order a party to submit to an examination conducted by a "vocational training consultant."<sup>132</sup> The purpose of the interview is to provide the court with a benchmark to determine the true amount of training or experience the party seeking support already has or will need before she will be able to obtain "gainful" employment. Like an expert witness, the vocational training consultant, and any reports prepared by her, aid and assist the court in examining the earning capacity and the time required to acquire skills and appropriate employment. Support will generally be awarded for the period of time found by the consultant, unless it is unusually speculative.<sup>133</sup> Furthermore, the findings of the vocational consultant may be used to reduce the amount of support awarded to a spouse who is unwilling, yet capable, of entering the job market. To insure that the goal of a self-supporting society is reached, provisions such as this examination serve to remind unwilling workers that there are no free rides.

The use of vocational consultants may be beneficial in providing a spouse, who has not been in the job market for a number of years, with encouragement and advice. However, it appears that the experience of having one spouse "force" the other to submit to an interview with the consultant, by asking the court to order the examination, is not a pleasant one. One should expect that some clients may be unwilling to meet with a vocational consultant. The examination, however, should be encouraged by counsel because it will better enable a spouse to achieve self-sufficiency through increased knowledge of her skills and employment opportunities.

#### *H. The Age and Health of the Parties*

The court must also consider the age and health of both parties in

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130. See, e.g., *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 419, 136 Cal. Rptr. 635, 637 (1977).

131. See *id.* at 419, 136 Cal. Rptr. at 637. Accordingly, support may truly be "permanent" in such cases.

132. Civil Code § 4801(e) provides, in pertinent part, as follows: "In any proceeding under this section the court may order a party to submit to an examination by a vocational training consultant." CAL. CIV. CODE § 4801(e) (West Supp. 1985).

133. Speculation of future ability to become self-supporting seems to be the major concern of the California courts. If there is doubt regarding the ability of the supported spouse to become self-sufficient, an indefinite award of support is likely.

support proceedings.<sup>134</sup> Previously, our courts did implicitly consider these factors when reviewing the totality of the parties' circumstances. For example, in *In re Marriage of Andreen*,<sup>135</sup> an award of \$500.00 per month in support was held to be an abuse of discretion.<sup>136</sup> The court considered that the wife "had some physical problems (recurrent bursitis and arthritis) which might interfere with her employment expectations," and was entering the employment market at age fifty.<sup>137</sup> The age and health of the spouse seeking support is thus relevant to the questions of ability to become self-supporting and need for support. On the other hand, the husband's age and health relates to his ability to provide the requested and/or proper support. A denial of support to the wife has thus been upheld where the husband was disabled and the wife, seven years his junior, was in good health.<sup>138</sup>

Case law has established the general principle that "[t]he older the spouse seeking support is and the poorer her or his health, the greater the need for a spousal support award."<sup>139</sup> It is submitted that the employment opportunities in relation to the locality of the parties must be considered in conjunction with the age and health of the parties (as an "informal" factor) to insure that speculative need and ability findings by the court are kept to a minimum. The opportunities within the locale of the parties will demonstrate whether the spouse, because of her age or good health, will be able to support herself.

In addition to other factors which the court may deem "just and equitable," Civil Code section 4801(a) directs the court to consider the standard of living of the parties in determining permanent spousal

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134. The language of the statute is mandatory. CAL. CIV. CODE § 4801(a)(7) (West Supp. 1985). See *supra* note 79.

135. 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (1978).

136. *Id.* at 672, 143 Cal. Rptr. at 97. The court felt that the wife needed more.

137. *Id.* at 673, 143 Cal. Rptr. at 97. The wife had also shown no unwillingness to obtain employment, and in fact expected to become a secretary after appropriate training.

138. *In re Marriage of Mason*, 93 Cal. App. 3d 215, 222, 155 Cal. Rptr. 350, 353 (1979). For other cases discussing the age and health of the parties in relation to support issues, see *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 136 Cal. Rptr. 635 (1977) (wives' ages made ability to enter job market competitively too speculative); *In re Marriage of Holmgren*, 60 Cal. App. 3d 869, 130 Cal. Rptr. 440 (1976) (wife had medical ailments and was receiving psychiatric care); *In re Marriage of Dennis*, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973) (wife's eyesight may affect employment opportunities necessitating retained jurisdiction regarding support).

139. C. MARKEY, *supra* note 15, at § 221.32[2](7).

support awards.<sup>140</sup> Unlike pendente lite support issues, this factor is determined de novo at the time of the trial and considers the effects of the post-division of community property on the parties' standard of living. In general, "[t]he higher standard of living of the spouses and the lower the ability of the supported spouse to maintain that standard without help from the other spouse, the greater is the need for a support award."<sup>141</sup> In *In re Marriage of Wright*,<sup>142</sup> for example, the court upheld an award of \$2,000.00 per month to the wife where she had received custody of the parties' four children, there was a modest amount of community property accumulated during a lengthy marriage, the husband earned between \$100,000.00 and \$200,000.00 per year, and the parties had enjoyed a "free-spending" lifestyle.<sup>143</sup>

Finally, other factors which may be considered by the court under this catch-all subsection are the non-marital relationship of the supported spouse (including cohabitation),<sup>144</sup> and the paying spouse's history of disobedience to court-ordered support decrees.<sup>145</sup> Again, these factors must be considered together, and seen as the totality of the "circumstances of the parties" by which the court must be guided. Only then can a court make a fair determination of what, if any, spousal support should the party requesting it receive.

### *I. Modification and Termination of Support Orders*

It is well-established that a court cannot award support to a spouse after a final judgment of dissolution has been entered, or extend duration of the support obligation after expiration of its original order, unless it has expressly reserved jurisdiction to modify, revoke, or terminate the support obligations of the parties.<sup>146</sup> Typically, continuing jurisdiction is effected by an "until further order of this court" clause. Specifically, the court should not terminate jurisdiction to extend future support after a lengthy marriage unless the record clearly indicates that the supported spouse will be able to adequately

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140. CAL. CIV. CODE § 4801(a)(8) (West Supp. 1985).

141. C. MARKEY, *supra* note 15, at § 21.32[2](8).

142. 60 Cal. App. 3d 253, 131 Cal. Rptr. 870 (1976).

143. *Id.* at 259, 131 Cal. Rptr. at 872 (1976).

144. *In re Marriage of Leib*, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978). "[T]he services of a homemaker, housekeeper, cook and companion who has demonstrated competence to the recipient of such services . . . have a reasonable market value. . . ." *Id.* at 642-43, 145 Cal. Rptr. at 770. Thus, the court found that a wife who cohabited after dissolution had a decreased need for support in modification proceeding brought by husband. *Id.* at 644, 145 Cal. Rptr. at 772.

145. See *In re Marriage of Stalcup*, 97 Cal. App. 3d 294, 158 Cal. Rptr. 679 (1979).

146. Civil Code § 4801(d) provides as follows:

(d) Termination at end of fixed period. An order for payment of an allowance for the support of one of the parties shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction.

CAL. CIV. CODE § 4801(d) (West Supp. 1985).

meet her financial needs at the date set for expiration of the order.<sup>147</sup>

The reservation of jurisdiction has been traditionally inferred from step-down orders, wherein the obligation is reduced to a nominal sum (typically \$1.00 per month or year) after a certain number of years.<sup>148</sup> In the past, the courts have favored the retention of jurisdiction over spousal support awards in judgments containing ambiguous language. Hence, the practitioner should be careful to scrutinize orders for a fixed period which has been designated as the complete termination of jurisdiction to award spousal support on a specified date.

In July, 1984, the California Supreme Court rendered an opinion in the case entitled *In re Marriage of Vomacka*.<sup>149</sup> The court held that a trial court does have fundamental jurisdiction to extend spousal support payments past a date it has designated as terminating the right of the supported spouse to "request" such payments.<sup>150</sup> Citing *In re Marriage of Morrison*,<sup>151</sup> the court noted that Civil Code section 4801(d) "was enacted to insure notice to the parties of a marital dissolution whether, and for what period of time, a court retains jurisdiction to make subsequent orders extending spousal support."<sup>152</sup> The *Vomacka* court found that the language of the parties' interlocutory judgment regarding termination of the wife's "right to request spousal support" necessarily included extension of support.<sup>153</sup> Since the wife sought extension of support prior to the termination date contained in the judgment, she was entitled to relief. It appears that the *Vomacka* opinion makes mandatory the policy stated in *In re Marriage of Moore*<sup>154</sup>—that "where there is an ambiguity in the language of a marital property agreement [incorporated into the judg-

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147. *In re Marriage of Morrison*, 20 Cal. 3d 437, 454, 143 Cal. Rptr. 139, 150 (1978).

148. W. HOGOBOOM, *supra* note 45, at § 6:139.

149. 36 Cal. 3d 459, 683 P.2d 248, 204 Cal. Rptr. 568 (1984). Justice Mosk, with Justice Broussard concurring, dissented. *Id.* at 475-76, 683 P.2d at 258-59, 204 Cal. Rptr. at 578-79.

150. *Id.* at 461, 683 P.2d at 248-49, 204 Cal. Rptr. at 568-69.

151. 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). *Morrison* is the leading case on the subject of modification of spousal support pursuant to Civil Code section 4801(d).

152. *Vomacka*, 36 Cal. 3d at 467, 683 P.2d at 252, 204 Cal. Rptr. at 572.

153. *Id.* at 474, 683 P.2d at 257, 204 Cal. Rptr. at 577. The court thus rejected the husband's argument that the clearly stated preference for clarity in clauses retaining or terminating jurisdiction to extend support in *In re Marriage of Maxfield*, 142 Cal. App. 3d 755, 191 Cal. Rptr. 267 (1983), precluded interpretation of an ambiguous support order to permit extension thereof.

154. 113 Cal. App. 3d 22, 29, 169 Cal. Rptr. 619, 622 (1980).

ment] it must be decided in favor of the right to spousal support.”<sup>155</sup> Clarity, with regard to the termination of spousal support obligations, has thus become a necessity under California law.

Although the California courts are enforcing the policy favoring self-sufficiency by making generally smaller awards for more limited durations, California still maintains that an order absolutely terminating spousal support is disfavored.<sup>156</sup> Such orders, particularly with respect to lengthy marriages, will be upheld only if the record clearly reveals that the wife will be financially self-sufficient on the date of termination. Thus, permanent spousal support will continue to provide divorced spouses with financial aid until such time as they have, in fact, become self-supporting.

The question of whether a spouse, who has been awarded spousal support, can enforce or modify her order when either of the parties has appealed the order has long plagued the California courts. In *Fontana v. Superior Court*,<sup>157</sup> the court held that if the supported spouse appeals the whole judgment, she cannot enforce any part of it during the pendency of the appeal. If the spouse obligated to pay spousal support appeals the award, execution will not, however, be stayed unless a bond is posted, which is usually in the amount equal to double the total sum of support that would become due during the pendency of the appeal.<sup>158</sup>

On August 21, 1984, the California Court of Appeal, Fifth Division, issued an opinion entitled *In re Marriage of Horowitz (Horowitz II)*.<sup>159</sup> There, the court held that, on a showing of changed circumstances, the trial court can modify spousal support despite a pending appeal. The trial court's modification upon the showing that the wife's need for support had decreased was upheld in part because the parties' property division had been reversed.<sup>160</sup> Thus, the court found that:

Modification of the trial judge's order for child or spousal support while the issue of validity of that amount is on appeal, when based upon a change of circumstances justifying a change in amount, does not interfere with the jurisdiction of the appellate court, since its review is based upon the record at trial.<sup>161</sup>

Allowing modification on appeal is a dramatic new twist in California

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155. *Vomacka*, 36 Cal. 3d at 469, 683 P.2d at 254, 204 Cal. Rptr. at 574 (citing *Moore*, 113 Cal. App. 3d at 28, 169 Cal. Rptr. at 622).

156. *Id.* at 468, 683 P.2d at 253, 204 Cal. Rptr. at 573.

157. 72 Cal. App. 3d 159, 139 Cal. Rptr. 851 (1977).

158. CAL. CIV. PROC. CODE §§ 916(a), 917.1 (West Supp. 1984).

159. 159 Cal. App. 3d 377, 205 Cal. Rptr. 880 (1984).

160. *Id.* at 385, 205 Cal. Rptr. at 886.

161. *Id.* The wife's mother had died, relieving her of an annuity debt and giving her access to additional funds. These facts were found sufficient to constitute the changed circumstances necessary for modification of a support order.

law, and we should expect that the new rule may be applied in other areas, such as child support.

### III. CONCLUSION

The modern trend in California spousal support cases is to limit the amount of support and its duration to a time sufficient to enable the supported spouse to become self-supporting. In most cases, however, an absolute termination of jurisdiction to extend or modify spousal support in the future will be an abuse of discretion. These policies are in accord with the legislative history of the relevant sections of the California Civil Code. Under no circumstances will support be awarded to a spouse who does not, or cannot, demonstrate sufficient need for spousal support. Each of the factors discussed herein must be examined in relation to the others—no one factor, in itself, is controlling on the issue of need.

The mandatory language in Civil Code section 4806, which prohibits the court from awarding support in a childless marriage where one spouse has sufficient income for support (whether from separate property or from a disbursement of community property) indicates a movement toward a more restrictive conception of what constitutes sufficient need to entitle a spouse to receive spousal support for a limited time. Only in the rarest of circumstances will a spouse be able to receive support for an indefinite period of time. As speculation regarding the length of time necessary to become self-supporting decreases, so will spousal support awards.

Currently, California is attempting to simplify the process of obtaining a dissolution of marriage, and to reduce the astronomical costs of divorce proceedings. The courts and attorneys will find that the abolishment of the interlocutory judgment brings with it fewer papers to read, file, and shuffle. This simplified process will also decrease attorney's fees for parties who contest issues in dissolution proceedings. Spousal support is on the wane in California and will continue only where there is no assurance that a given spouse will be able to find employment in the future.

SARAH J. HOOVER



