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PERMANENT ALIMONY UPON ABSOLUTE DIVORCE — A NECESSARY CHANGE IN PENNSYLVANIA LAW

I. INTRODUCTION

Under present Pennsylvania statutes, a court may decree permanent alimony¹ where a divorce from bed and board, *i.e.*, a legal separation has been obtained.² However, in the case of absolute divorce, permanent alimony is unavailable to either spouse except in one minor instance.³ The drafters of the Proposed Marriage and Divorce Code have suggested that Pennsylvania should permit permanent alimony upon divorce.⁴ The purpose of this Comment is to explore the merits of this proposal. Two basic hypotheses will provide a starting point for analysis of the problem. First, the type of divorce that spouses obtain in any particular instance should reflect the best interests of the parties involved and the choice should not be dictated solely by economic considerations. Second, the state has a valid interest in permitting permanent alimony upon absolute divorce since it alleviates the danger that either spouse will become a public charge.

II. HISTORICAL PERSPECTIVE

The Pennsylvania position on permanent alimony subsequent to absolute divorce finds support from a historical viewpoint. Alimony developed as an incident to divorce in the ecclesiastical courts of England.⁵ These

1. Alimony may be either *pendente lite* or permanent in nature. Permanent alimony is an award made to the wife after a decree of divorce and is designed to provide for her support on a more or less permanent basis. Alimony *pendente lite*, on the other hand, is a temporary award, designed to provide support for the wife during the pendency of a suit for divorce or annulment. See 2 A. FREEDMAN & M. FREEDMAN, *LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA* § 427 (2d ed. 1957) [hereinafter cited as FREEDMAN]. See also *Commonwealth v. Scholl*, 156 Pa. Super. 136, 39 A.2d 719 (1945).

2. See PA. STAT. tit. 23, § 47 (1955) which provides in pertinent part:

In cases of divorce from bed and board, the court may allow the wife such alimony as her husband's circumstances will admit of, but the same shall not exceed the third part of the annual profit or income of his estate, or of his occupation and labor, which allowance shall continue until a reconciliation shall take place, or until the husband shall, by his petition or libel, offer to receive and cohabit with her again. . . .

3. See PA. STAT. tit. 23, § 45 (1955) which provides in pertinent part:

In case of the application of a husband for divorce from an insane wife, the court, or the judge thereof to whom the application is made, shall have power to decree alimony for the support of such insane wife during the term of her natural life, by requiring the libellant to file a bond . . .

If the wife be the petitioner, and have sufficient means, the court, or the judge, may provide for the support of the insane husband, as provided in this section for the insane wife, if the insane husband has not sufficient estate in his own right for his support.

4. See JOINT STATE GOVERNMENT COMMISSION, *PROPOSED MARRIAGE AND DIVORCE CODE FOR PENNSYLVANIA* § 504, at 1113 (1961). This is actually a compilation of separate divorce and marriage codes which will hereinafter be cited as *PROPOSED MARRIAGE CODE* or *PROPOSED DIVORCE CODE* as appropriate.

5. For an authoritative discussion of alimony in a historical context see Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 *LAW & CONTEMP. PROB.* 197 (1939).

courts were empowered to grant only divorces *a mensa et thoro* (a.m.t.), which provided only that the parties live separately, unable to remarry. Alimony then served the important function of providing support for the wife at a time when employment opportunities for females were practically non-existent.⁶ When American courts imported the practice of granting alimony they failed to recognize that it was developed as an incident to divorce a.m.t. rather than absolute divorce.⁷ While the imposition of continuing obligations on the husband in the case of divorce a.m.t. is easily justified, the imposition of such continuing obligations on the husband in the case of absolute divorce is in direct contradiction to the purpose of an absolute divorce in which all marital rights and duties are purportedly severed. The anomaly created by granting alimony on absolute divorce becomes particularly apparent when such payments are justified on the grounds that the husband's support duty⁸ survives the decree.⁹

It has not always been the case that Pennsylvania courts have denied permanent alimony on absolute divorce. Alimony was an incident of divorce a.v.m. as a matter of right from 1854 to 1895, and could be granted at the court's discretion until 1925.¹⁰ Under the Divorce Law of 1929, however, no mention was made of permanent alimony upon absolute divorce except in the case where either spouse was insane.¹¹ This absence of a provision for permanent alimony was held in subsequent decisions by Pennsylvania courts to manifest a legislative intent to place husband and wife in the same position in the matter of absolute divorce.¹² Thus, where the husband, by virtue of the conduct of his wife, is entitled to a complete divorce, it is reasonable to assume "that he should be fully restored to the single state," with no ensuing obligations to his wife.¹³ This policy of treating the divorced parties as equals was in part based on the fact that women were being treated as equals in other aspects of

6. See H. CLARK, LAW OF DOMESTIC RELATIONS 420 (1968).

7. *Id.* at 420-21.

8. Pennsylvania courts uniformly hold that the husband's duty to support his wife is terminated by absolute divorce. See *Commonwealth ex rel. Bortin v. Bortin*, 210 Pa. Super. 216, 234 A.2d 55 (1967); *Lorusso v. Lorusso*, 189 Pa. Super. 403, 150 A.2d 370 (1959); *Harrison v. Harrison*, 183 Pa. Super. 562, 133 A.2d 870 (1957). Most other jurisdictions hold that the duty to support continues after divorce, and that alimony payments are decreed to fulfill this duty. See H. CLARK, *supra* note 6, at 421 (1968). Some jurisdictions view alimony as a penalty imposed on the guilty husband. See, e.g., *Lewis v. Lewis*, 202 Ark. 740, 151 S.W.2d 998 (1941).

9. In *Myers v. Myers*, 17 Pa. D. & C. 236 (C.P. Cent. Co. 1931), the court stated: It is wholly inconsistent for a court to decree that all "duties, rights and claims" accruing to either of the parties to an action in divorce, by reason of their marriage, "shall cease and determine," and that the parties "shall severally be at liberty to marry again in like manner as if they had never been married," and then to *entail upon the husband an obligation to pay the offending party any sum*. *Id.* at 238 (emphasis added).

10. 17 Pa. D. & C. at 237.

11. See PA. STAT. tit. 23, § 45 (1955).

12. See *Hooks v. Hooks*, 123 Pa. Super. 507, 187 A. 245 (1936).

13. *Id.* at 511, 187 A. at 247.

legal affairs, and also partly based on the realization that women did have opportunities to earn their own livelihood.¹⁴ The position of Pennsylvania courts has not changed significantly since these early decisions.

III. THE GENERAL RULE

Despite the historical and logical validity of the Pennsylvania rule, statutes in the vast majority of American jurisdictions authorize courts to grant alimony upon a decree of absolute divorce.¹⁵ In fact, Pennsylvania appears to be the only state which refuses to award alimony on complete divorce or to require a property settlement in lieu thereof.¹⁶ The basis of the majority rule can best be described as a bending of the traditional concept that a duty to support must be based on some form of marital status in favor of economic necessity. While it is true that more employment opportunities exist today for women, it is important to note that the mother is more often than not designated the custodial parent, and is thus often unable to avail herself of these opportunities.¹⁷

The Pennsylvania view regarding permanent alimony on complete divorce has evoked harsh criticism. In *Dixon v. Commissioner of Internal Revenue*,¹⁸ for example, the court stated:

[T]he lawgivers of Pennsylvania have refused to advance a step beyond the medieval notion of alimony as an incident to limited divorce. . . . At the same time they have recognized the modern concept of absolute divorce. But no matter how great the wickedness of the husband — be he bigamist, bully, philanderer or worse . . . — his innocent wife must risk the poorhouse to be rid of him. The miscreant must go on feeding her only if she is of a mind to quit his bed and board alone, and, correspondingly, if his villainy is less. . . . We may say that this rather unchivalrous anomaly is unique among the forty eight states. . . .¹⁹

Whether, in fact, changes in the present Pennsylvania view are necessary can best be determined by an examination of the psychological and economic implications of alimony in general.

IV. PSYCHOLOGICAL AND ECONOMIC INCIDENTS OF ALIMONY

Unfortunately, no empirical studies have been directed at determining the specific psychological aspects of alimony. At best, therefore, generalities govern examination of the problem.

14. See *Myers v. Myers*, 17 Pa. D. & C. 236, 238 (C.P. Cent. Co. 1931).

15. For a compilation of the various state statutes, see Vernier & Hurlbut, *supra* note 5, at 201. See also H. CLARK, *supra* note 6, at 421 n.12 (1968), for an updating of this compilation.

16. PROPOSED DIVORCE CODE § 504, comment, at 113.

17. See H. CLARK, *supra* note 6, at 422 (1968).

18. 109 F.2d 984 (3rd Cir. 1940).

19. *Id.* at 986.

One commentator has suggested that the payment of alimony "is a concrete thing around which all the feelings concerning divorce or separation are likely to gather."²⁰ Thus, emotion is an essential psychological element of alimony. The argument can be made that alimony payments rekindle and keep alive the hostility between spouses which divorce is designed to terminate, and thus have a harmful effect on the parties involved. The difficulty with this argument is that it is too simplistic; it fails to take into account the myriad of situations leading to divorce. Thus, while in some cases the husband may resent the payments he is forced by law to make to his wife, it is often the case, particularly where the marital break-up resulted from specific misconduct of the husband, that the payments may help to alleviate guilt feelings on the part of the husband and thus help to smooth, rather than hinder, the transition from a married to a separated state.²¹ It is impossible, on the basis of the evidence now available, to assert either that the institution of alimony is in all cases harmful psychologically or that the harmful effects which may exist should preclude granting alimony in certain cases.²²

Several economic considerations buttress the position that alimony is a social necessity. Surprisingly, two of the most important considerations do not relate directly to the wife herself. First, it is important to note that payments to the wife for her support are necessary if she is to properly care for children in her custody.²³ While child support payments may defray expenses of the children, the wife must also meet her own expenses. Without support payments, the mother must often seek employment which may seriously undercut her effectiveness in the home. Secondly, if the wife is unskilled or unemployable there is a danger that she may become a public charge. In this respect the state has a valid interest in seeing that alimony is available to the wife upon permanent divorce. Perhaps recognizing that the psychological and economic considerations which bear upon the termination of a marriage are severe, the drafters of the Proposed Marriage and Divorce Code have recommended provisions which seem to advance the interests of both the state and the parties.

V. THE PROPOSED REVISION — SPECIFIC RECITALS²⁴

While the inequities under the present Pennsylvania rule, as outlined previously, precipitated a strong impetus for change, the drafters of the

20. Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 LAW & CONTEMP. PROB. 283 (1939).

21. *Id.* at 288.

22. It is submitted that the absence of permanent alimony in Pennsylvania may in fact be detrimental psychologically to both spouses in that the wife may continue the marriage relationship out of economic necessity at a time when a separation would enhance the well-being of both parties.

23. H. CLARK, *supra* note 6, at 441 (1968).

24. Section 504 provides as follows:

In cases of annulment or divorce from the bonds of matrimony, the court or the judge thereof to whom application is made may order the payment of a periodic allowance, whether or not the same is sought by the complaint, where it is established that the petitioning party has actual need therefor and the other party

Proposed Code were careful to avoid the abuses²⁵ which have occurred under alimony statutes in other jurisdictions. Among the most important of the specific recitals within the proposal is the elimination of fault as a determinative factor in the granting of alimony. Realization of the fact that fault is usually present on both sides, and also, that a denial of alimony to a "guilty" wife might result in her becoming a public charge were important considerations in the formation of this provision. As one commentator has stated:

Considerations of guilt or innocence should be eliminated from the law of alimony. The difficulty which alimony seeks to solve is an *economic question* of allocating the property out of which support should come during the married state in the circumstances of temporary litigation or permanent dissolution of the old relationship. To consider it a reward of merit for the virtuous or as a punishment for the wrongdoer, is to misconstrue the premises.²⁶

It is the majority rule in other jurisdictions that alimony should be granted without reference to the wife's fault,²⁷ and a few of the jurisdictions holding to the contrary have exhibited a tendency to relax the rule as to fault in certain instances.²⁸

A second point advocated by the Proposed Code is that the amount of any particular award should be dependent on (1) the wife's needs and (2) the husband's ability to pay. Unfortunately, the drafters did not

has sufficient property, income, or earning capacity to pay such an allowance. The marital fault of either party as it appears in the annulment or divorce proceeding shall not preclude nor affect the granting of such an allowance where both need and ability to pay are established. In no event shall such allowance exceed more than one-third of the net annual income or profits from the estate of the party ordered to pay such allowance. Such allowance shall be subject to modification due to changed circumstances regardless of whether or not the decree reserves such power and either party may petition the court for modification and wherever practicable the same judge who heard the original petition for an allowance shall pass upon the request for modification. Death of either party shall terminate the allowance, as shall the remarriage or purported remarriage of the party receiving such allowance. Such allowance may be awarded in conjunction with and shall take into account any property settlement approved by the court and the property and earning capacity of the petitioner shall be considered in determining whether there is need for such allowance. The court in its discretion may require the party ordered to pay such allowance to provide such security for its payment as shall be determined and approved by the court and any and all remedies available in nonsupport actions shall be available and applicable to cases where such allowance is not paid as ordered by the court. No allowance shall be awarded to a party who shall have been found by the court to have ample resources to maintain an accustomed standard of living.

PROPOSED DIVORCE CODE § 504.

25. The use of the term "abuses" may in effect, be a misnomer. One commentator has suggested that although the amount of alimony granted in specific cases may be excessive, the major difficulty with alimony is that it often can not be granted in sufficient amounts to adequately support a wife and her children. See H. CLARK, *supra* note 6, at 422 (1968).

26. See Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROB. 186, 195 (1939).

27. See H. CLARK, *supra* note 6, at 445 & n.44 (1968).

28. See *Salvato v. Salvato*, 195 Cal. App. 2d 869, 16 Cal. Rptr. 263 (1961), noted in 50 CALIF. L. REV. 353 (1962). The case was interpreted "as a further step toward the abolition of the fault principle and the establishment of complete equitable control of alimony awards" within the courts of California, 50 CALIF. L. REV. at 356.

specify the particular factors to be considered in the above determinations.²⁹ Whether, for example, the fact that a wife has the ability and opportunity for employment should be considered in relation to her need for alimony is a disputed issue in some jurisdictions.³⁰

A third important recital within the proposal is that alimony be available to either spouse upon a showing of need. While granting alimony to a husband may appear to be unusual,³¹ it is indicative of the general policy behind the proposal to allow economic considerations to control. Finally, it is important to note that the drafters of the code placed great weight on the encouragement of private settlement between the parties.

It is also provided that the court shall take into account any property settlement arrived at by the parties. Wherever possible encouragement should be given to the private determination of the economic problems which arise upon dissolution of a marriage. It is far better that the parties themselves, where possible, arrive at terms, rather than to have them imposed by a court. *Because of this there is much to be said for present Pennsylvania policy in not recognizing alimony and; but for the hardship and injustice which occurs in some instances under present law, no change would be recommended.*³²

VI. CONCLUSION

The proposal that Pennsylvania permit permanent alimony upon absolute divorce is directed at alleviating the inequitable situation where a wife, with few economic resources, is forced to accept a legal separation, *i.e.*, divorce *a mensa et thoro*, despite the fact that grounds exist for absolute divorce; otherwise there is a high risk of her becoming a public charge. Although the proposal is specific in this respect, it also is demonstrative of a broad new approach to alimony law in general wherein antiquated concepts of the support duty of the husband and historical precedent are relegated to a position subservient to the economic realities involved. For this reason, the proposal is worthy of close legislative attention.³³

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29. For an excellent discussion of factors that should be considered in a determination of need and ability to pay, see Hofstadter & Levittan, *Alimony — A Reformulation*, 7 J. FAM. L. 51 (1967).

30. See, *e.g.*, *Kneble v. Kneble*, 189 S.W.2d 464 (Mo. App. 1945); *Bowser v. Bowser*, 236 Mo. App. 514, 155 S.W.2d 530 (1941).

31. For a compilation of state statutes authorizing alimony awards to the husband, see H. CLARK, *supra* note 6, at 448 n.4 (1968).

32. PROPOSED DIVORCE CODE § 504, comment at 114.

33. It is important to note that many of the specific recitals within the proposal relating to absolute divorce have applicability in the situation where alimony is granted upon divorce *a mensa et thoro*. See PROPOSED DIVORCE CODE § 503.