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INDIANA'S ALIMONY CONFUSION

In Indiana, alimony is an award determined in a judicial division of property[1] owned by the parties at the termination of the marriage. Historically, however, alimony was awarded only to a separated wife in order to satisfy her continuing need for support upon separation of the spouses.[2] Yet in recognition of that need, many jurisdictions now award support alimony when granting absolute divorces as well as when granting mere separations.[3] The result may be to allow the wife a double award;

1. *See, e.g.,* Sidebottom v. Sidebottom, 140 Ind. App. 657, 233 N.E.2d 667 (1967), *appeal dismissed,* 249 Ind. 572, 233 N.E.2d 667 (1968); McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 215 (1964); Shula v. Shula, 235 Ind. 210, 132 N.E.2d 612 (1956).

2. Prior to 1857, the ecclesiastical courts of England possessed exclusive jurisdiction over all marital disputes, *see,* Rheinstein, *Trends in Marriage and Divorce Law of Western Countries,* 18 L. & CONTEMP. PROB. 3 (1953). Viewing marriage as a sacred and indissoluble institution, the Church's authority was limited to declaring that a valid marriage never existed (*void ab initio*) or to authorizing the parties to live separately while remaining man and wife, divorce *a menso et thoro.* Since the granting of a divorce *a menso et thoro* did not terminate the marriage, the necessity to award alimony as support arose. The court considered such variables as the needs of the wife, Kempe v. Kempe, 162 Eng. Rep. 668 (1828) and the ability of the husband to pay, Durant v. Durant, 162 Eng. Rep. 667 (1828). Then the courts established an amount which the husband was to pay periodically, Wilson v. Wilson, 162 Eng. Rep. 1175 (1830) in order to satisfy his legal liability for her support. Kelso, *The Changing Social Setting of Alimony Law,* 6 L. & CONTEMP. PROB. 186, 188 (1941). The award was designated "permanent alimony" and was in effect an obligation to support the separated wife.

When the ecclesiastical courts were abolished parliament granted to the English courts the right to give absolute divorces (*divorce a vinculo matrimone*) which dissolved the existing marriage. Thus the development of the absolute divorce required special treatment to be given to permanent alimony, since it terminated the husband's common law duty to support the wife and similarly ended the wife's right to demand alimony. Emerson v. Emerson, 120 Md. 584, 589, 87 A. 1033, 1035 (1913).

3. "Alimony" literally means nourishment or sustenance, Smith v. Smith, 86 Ohio App. 479, 92 N.E.2d 418 (1949), but since it is a creation of each state's statutory enactments no single definition is sufficient. Some provisions for alimony have been made in almost every state. See C. FOOTE, R. LEVY, & F. SANDERS, CASES AND MATERIALS ON FAMILY LAW, 908 note 3 (1966), for a listing of some relevant statutes. Some courts simply define alimony as support for the wife. "'Alimony' is an allowance for support and maintenance subsequent to divorce." Wilson v. Supreme Ct., 31 Cal. 2d 458, 462, 189 P.2d 266, 269 (1948); "'Alimony' is a prospective provision by divorce decree for a wife's future support, to be administered in the future, expressly variable from time to time as seems just and reasonable to the court, and involving the state's public policy." Bogert v. Watts, 32 N.Y.S.2d 750, 754-55, (1942) *rev'd on other grounds,* 38 N.Y.S.2d 426, 265 A.D. 931; "'Alimony' is but a judicial admeasurement of the husband's obligation to maintain his former wife periodically out of his income." Madden v. Madden, 136 N.J. Eq. 132, 136, 40 A.2d 611, 614 (1945); "'Alimony' . . . is a continuous allotment of sums, payable at regular intervals, for a wife's support from year to year." Birnstill v. Birnstill, 218 Ark. 130, 131, 234 S.W.2d 757, 758 (1950). While others award alimony for the purpose of requiring the husband to make periodic payments to the wife commensurate with his circumstances and her necessities. Burger v. Burger, 6 N.J. Super. 52, 54, 69 A.2d 741, 742 (1949).

one for support and another for a division of the spouses' property.[4] Indiana courts, however, rather consistently have construed the current alimony statute so as to preclude awards based on future support of the divorced wife.

In equating alimony to a mere division of property, the divorced wife in Indiana is often placed in a financially insecure position, where the marital property is insufficient to satisfy her continuing needs. In addition, the failure of courts to adopt variable alimony awards, or to consider support as an element in lump-sum awards has denied divorced spouses in Indiana the full benefit of increased awards through the deduction of such payments from the husband's gross income.[5] However, several recent cases[6] have indicated a possible willingness to consider future support as an element in granting the award. The result has been total confusion as to the actual nature of an alimony award in Indiana.

In order more clearly to evaluate Indiana's alimony confusion, a summary explanation of the process utilized in determining an alimony award is necessary. Although Indiana has no explicit rules for awarding alimony,[7] it does have some general guidelines. Perhaps most frequently mentioned is the "one-third rule of thumb" which allows the trial court, when awarding alimony to an injured wife, to grant a sum which would leave her as financially secure as if she had been a surviving wife upon her husband's death.[8] An Indiana court may also consider the existing property rights of the parties,[9] the amount of property owned and held by the husband, including the source from which it came,[10] the financial

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4. "Division of property" is not the same concept as alimony. Fincham v. Fincham, 174 Kan. 199, 209, 225 A.2d 1018, 1025 (1953), to the extent that the court takes into consideration all property accumulated by the spouses, and then determines the ownership of the property, Paul v. Paul, 183 Kan. 201, 326 P.2d 283 (1958).

5. *See,* INT. REV. CODE of 1954, §§ 71(a)(1), (c)(2).

6. *See, In Re* Webb, 160 F. Supp. 544 (S.D. Ind. 1958); State *ex rel.* Roberts v. Morgan Circuit Court, 249 Ind. 649, 232 N.E.2d 871 (1968); Baxter v. Baxter, 138 Ind. App. 24, 195 N.E.2d 877 (1964); Bahre v. Bahre, 133 Ind. App. 567, 181 N.E.2d 639 (1962).

7. Ringenberg v. Ringenberg, 110 Ind. App. 290, 38 N.E.2d 870 (1942); Radabaugh v. Radabaugh, 109 Ind. App. 350, 35 N.E.2d 114 (1941); Glasscock v. Glasscock, 94 Ind. 163 (1883). The awarding of alimony is not controlled by definite rules. The determination of each case must depend upon its own circumstances.

8. Temme v. Temme, 103 Ind. App. 569, 9 N.E.2d 111 (1937); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927). A similar general rule is that the wife must be left as well in non-cohabitation as in cohabitation. Adams v. Adams, 117 Ind. App. 335, 69 N.E.2d 632 (1947); Boggs v. Boggs, 45 Ind. App. 397, 90 N.E. 1040 (1910); Yost v. Yost, 141 Ind. 584, 41 N.E. 11 (1895). An exception has developed in that the one-third rule is no longer applicable to property held by the entireties or under agreement of survivorship. Shula v. Shula, 235 Ind. 210, 132 N.E.2d 612 (1956).

9. Bahre v. Bahre, 133 Ind. App. 567, 181 N.E.2d 639 (1962); Ferguson v. Ferguson, 125 Ind. App. 596, 125 N.E.2d 816 (1955).

10. Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944); McHie v. McHie, 106 Ind. App. 152, 16 N.E.2d 987 (1939).

condition and income of the parties and the ability of the husband to earn money.[11] At the same time the court may evaluate the industry and economy of the wife in contributing to the accumulation of her husband's property,[12] the separate estate of the wife,[13] the misconduct of the husband,[14] and the misconduct of the wife.[15]

In providing for alimony, the award of which is not mandatory,[16] the courts have been vested with broad discretion,[17] and judgments will not be disturbed upon appeal unless there has been a clear abuse of such discretion.[18] When the court, in its discretion, determines that alimony is proper, two considerations become necessary. First, the court must weigh all available, and relevant financial conditions;[19] and second, the court must consider the circumstances of the parties at the time the divorce is granted, but not according to representations made before the marriage.[20]

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11. Bahre v. Bahre, 133 Ind. App. 567, 181 N.E.2d 639 (1962); Cornwell v. Cornwell, 108 Ind. App. 350, 29 N.E.2d 317 (1940); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Hendrick v. Hendrick, 128 Ind. 522, 26 N.E. 768 (1891).
12. Yost v. Yost, 141 Ind. 584, 41 N.E. 11 (1895).
13. Stultz v. Stultz, 107 Ind. 400, 8 N.E. 238 (1886).
14. The court should consider the nature of the abuse inflicted upon the wife, and particularly, if the abuse affected the wife's earning capacity. Shula v. Shula, 235 Ind. 210, 214, 132 N.E.2d 612, 614 (1956). *See also* Poppe v. Poppe, 114 Ind. App. 348, 52 N.E.2d 506 (1944); Rariden v. Rariden, 33 Ind. App. 254, 70 N.E. 398 (1904); Ifert v. Ifert, 29 Ind. 473 (1868).
15. While finding gross misconduct on the part of the wife may result in a denial of alimony, it does not necessarily prevent the award of alimony, *see, e.g.,* Proctor v. Proctor, 125 Ind. App. 692, 125 N.E.2d 443 (1955), where the husband was granted a divorce, custody of the children, and ownership of property held by the entireties, and no alimony was given the wife. The appellate court affirmed finding no abuse of discretion due to the wife's gross misconduct.
16. While IND. ANN. STAT. § 3-1217 (Burns Repl. 1968) reads "The court shall make such decree for alimony . . ." it has been held that "the word 'shall' . . . merely relates to the amount of alimony that may be allowed in cases where it is proper to allow alimony." Glasscock v. Glasscock, 94 Ind. 163, 164-65 (1883). *See also,* Ralston v. Ralston, 111 Ind. App. 570, 571, 41 N.E.2d 817, 818 (1942); Smith v. Smith, 131 Ind. App. 38, 46, 169 N.E.2d 130, 134 (1960).
17. Adams v. Adams, 117 Ind. App. 335, 69 N.E.2d 632 (1947); Cornwell v. Cornwell, 108 Ind. App. 350, 29 N.E.2d 317 (1940); Dissette v. Dissette, 208 Ind. 567, 196 N.E. 684 (1935).
18. McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 215 (1964); Shula v. Shula, 235 Ind. 210, 132 N.E.2d 612 (1956); Ralston v. Ralston, 111 Ind. App. 570, 41 N.E.2d 817 (1942); Temme v. Temme, 103 Ind. App. 569, 9 N.E.2d 111 (1937); Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927).
19. In McDaniel v. McDaniel, 245 Ind. 551, 561, 201 N.E.2d 215, 218 (1964), the court granted a divorce to the wife but made no findings as to a "spendthrift trust" made up of money used solely to compensate the husband for a personal injury. The court held: the trust was property of the parties and the trial court had a duty to state findings of fact, and conclusion of law regarding the trust in order to award alimony. Failure to do so is reversible error.
20. Ferguson v. Ferguson, 125 Ind. App. 596, 125 N.E.2d 816 (1955). Where the husband made representation of great wealth prior to the marriage, it is in no way relevant to the question of the divorce or alimony. In Ferguson at the time of the divorce

Although alimony is discretionary with the court, once the court has acquired jurisdiction over the divorce, it must decide *all* property rights whether the property was owned by one of the parties prior to marriage or was acquired during the marriage.[21] This obligation to adjust all property rights is statutory[22] and has been developed and extended by the courts.[23]

Included within the power of the court in making such adjustments, is the authority to order the transfer of any property, real, personal or mixed, between the parties.[24] The courts have exercised broad powers of discretion in the adjustment and division of such property,[25] and the decision of the court in such matters will rarely be reversed.[26]

While there is considerable recent authority holding that alimony is awarded as a sum in settlement of the property interests existing upon dissolution, and not for support,[27] early Indiana divorce law provided for open-ended alimony payments,[28] with continuing jurisdiction, in the court to alter and revise the original decree.[29] The complexity of the

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the husband did not have great wealth, and the alimony based partly upon this representation is reversible error. *See also* Ringenberg v. Ringenberg, 110 Ind. App. 290, 38 N.E.2d 870 (1942).

21. Draime v. Draime, 132 Ind. App. 99, 173 N.E.2d 70 (1961); Gray v. Miller, 122 Ind. App. 531, 106 N.E.2d 709 (1952); Wise v. Wise, 67 Ind. App. 647, 119 N.E. 501 (1917); Murry v. Murry, 153 Ind. 14, 53 N.E. 946 (1899).

22. IND. ANN. STAT. § 3-1218 (Burns Repl. 1968). This statute while primarily focused upon the awarding of alimony, also recognizes the legislative intent to adopt a policy to grant broad powers to the court to fully adjudicate the property rights of the parties. *See,* Wallace v. Wallace, 123 Ind. App. 454, 110 N.E.2d 514 (1953).

23. Grant v. Grant, —— Ind. App. ——, 230 N.E.2d 339 (1967); Nagel v. Nagel, 130 Ind. App. 465, 165 N.E.2d 628 (1960); Radabaugh v. Radabaugh, 109 Ind. App. 350, 35 N.E.2d 114 (1941).

24. Originally, it had been held that a court could not set off an interest in the husband's real estate to a wife. Rice v. Rice, 6 Ind. 100, 105 (1854). Also in accord was dicta in Alexander v. Alexander, 140 Ind. 560, 561, 40 N.E. 55, 56 (1894). However, the Alexander case was expressly overruled in Mendenhall v. Mendenhall, 116 Ind. App. 545, 555, 64 N.E.2d 806, 810 (1945), where the conveyance of property held as tenants by the entireties to the injured party was proper—even after it had settled on her spouse. The case of Gray v. Miller, 122 Ind. App. 531, 538, 106 N.E.2d 707, 712 (1952), also reiterates the court's power to order a transfer of property between the parties, whether it be real, personal, or mixed. In accord with Gray v. Miller, *see,* Wallace v. Wallace, 123 Ind. App. 454, 110 N.E.2d 514 (1953).

25. In Draime v. Draime, 132 Ind. App. 99, 103-04, 173 N.E.2d 70, 72 (1961), the court awarded the wife an absolute divorce, and title to all assets of the parties, except a 1955 Oldsmobile and $5500 which went to the husband. The court held that in adjusting the property rights between the parties this award was not an abuse of the broad discretionary powers of the trial court.

26. Seward v. Seward, 126 Ind. App. 607, 134 N.E.2d 560 (1956); McHie v. McHie, 106 Ind. App. 152, 16 N.E.2d 987 (1938); Tomchany v. Tomchany, 134 Ind. App. 27, 185 N.E. 301 (1922).

27. Sidebottom v. Sidebottom, 140 Ind. App. 657, 233 N.E.2d 667 (1967); *appeal dismissed* 249 Ind. 572, 233 N.E.2d 667 (1968); McDaniel v. McDaniel, 245 Ind. 551, 201 N.E.2d 612 (1964); Shula v. Shula, 235 Ind. 210, 132 N.E.2d 612 (1956).

28. Ind. Acts, 1843, ch. 35, § 56.

29. Ind. Acts, 1843, ch. 35, § 63.

1842-1843 statute led to a general revision in Indiana alimony statutes,[30] and the language of an 1852 revision has been carried forward in subsequent statutory revisions.[31]

The bandwagon for Indiana's current position, of a lump sum, non-support form of alimony, began rolling following the decision in *Marsh v. Marsh*, where the court stated in dicta:

> In providing that . . . the wife shall not receive annual payments it was evidently the purpose of the legislature to prohibit all indefinite allowances for support, and to require the court to confine its allowances to her to a fixed sum on the theory that henceforth they would be strangers.[32]

It should be noted, however, that *Marsh* was decided on the question of whether contempt would issue for failure to pay support, and that its holding has since been modified by *State ex rel. Roberts v. Morgan Circuit Court*.[33] It is also important to note that even during the period when *Marsh* was the accepted guideline, some case law developed which arguably supports a distinction between division of property and alimony as support.[34]

The adoption in 1949 of section 3-1218 to the Indiana statutes added a new dimension to awards of alimony in Indiana, in providing for alimony to be paid:

> . . . in gross or in periodic payments, either equal or unequal, and that if paid in periodic payments the court would further provide for their discontinuance or reduction upon the death or remarriage of the wife.[35]

The question is whether the term "periodic payments" and the phrase

30. Ind. Acts, 1852, ch. 4, §§ 19, 22.

31. Ind. Acts, 1873, ch. 43, § 22. "The decree of alimony to the wife shall be for a sum in gross and not for annual payments, but the court in its discretion may give a reasonable time for the payments thereof, by installment, on a sufficient surety being given." Ind. Acts, 1901, ch. 1059; Ind. Acts, 1914, ch. 1088; Ind. Acts, 1933, ch. 1111. This latter statute placed alimony under the currently used § 3-1218.

32. Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904).

33. 249 Ind. 649, 232 N.E.2d 871 (1968). The Roberts court denied the husband's petition for a writ of prohibition. Roberts based his case upon Marsh v. Marsh, 162 Ind. 210, 70 N.E. 154 (1904), which held that alimony is not enforceable by contempt proceedings. The reasoning of this court, however, is that Acts 1949, ch. 120, § 2, p. 310, § 3-1218 and 3-1219(a) which allow for alimony as a sum in gross to be paid in periodic payments which may be discontinued or reduced upon death or remarriage, *modify* the holding of Marsh v. Marsh *supra*, so that where there is a separation agreement which is submitted to the court for enforcement, the court may exercise its equitable power of civil contempt.

34. Radabaugh v. Radabaugh, 109 Ind. App. 350, 35 N.E.2d 114 (1941).

35. IND. ANN. STAT. § 3-1218 (Burns Repl. 1968).

"discontinuance or reduction upon death or remarriage of the wife" were inserted in order to allow the courts to make support payments to the divorced spouse, or whether it was incorporated as a means to allow Indiana alimony payments by the husband to be deductible under the 1942 Revenue Act,[36] or both.

Prior to 1942 alimony paid by the husband was not deductible on his federal income tax return, and the wife paid no federal income tax on alimony which she received.[37] With the gradual increase in tax rates, this situation placed considerable hardships on an alimony paying husband. Consequently the Federal Revenue Act of 1942 changed the prior law to allow the husband to deduct alimony paid a former spouse and to require the wife to pay income tax on the amount received.[38] To qualify for the deduction under the Revenue Code, the alimony paid must either qualify as a "periodic payment," which has been interpreted as meaning payments which are indefinite either as to time or amount,[39] or else it must qualify under a special provision for installments payable over ten years or more.[40]

Qualification under the 1942 Revenue Act is generally beneficial to both the husband and wife. It allows the husband to deduct alimony payments from his income, resulting in a lowered tax. In turn the husband can afford to pay more alimony (where necessary) and since the wife is typically in a lower tax bracket, her payment of the tax results in a net increase in support payments.

The legislative purpose in adopting section 3-1218 conceivably could have been to allow husbands to deduct alimony payments from their income. However, the mere insertion of the term "periodic payments" in the Indiana statute would not be sufficient to qualify under the tax law, which requires more than mere recitation of the term "periodic payments." In order to qualify as a "periodic payment" under the Code the award must be indefinite as to time or amount.[41] The addition of the phrase "discontinuance or reduction upon death or remarriage of the wife" is an example of terminology used to signal a support award. Because the husband pays alimony according to the wife's necessity, her

36. REVENUE ACT of 1942, § 120, 56 Stat. 816, 817 (1942), INT. REV. CODE OF 1954, § 71(a)(1).

37. Douglas v. Willicuts, 296 U.S. 1 (1935); Gould v. Gould, 245 U.S. 151 (1917).

38. H. CLARK, JR., LAW OF DOMESTIC RELATIONS 482, § 14.12 (1968).

39. Treas. Reg. § 1.71-1(d)(3)(i) (1957).

40. INT. REV. CODE of 1954, § 71(c)(2). The statute expressly provides that a fixed principal sum payable in installments will be considered to be periodic if it is payable over a period of more than ten (10) years, but then only to the extent of ten per cent of the principal sum.

41. Treas. Reg. § 1.71-1(d)(3)(i) (1957).

death or remarriage would cancel his statutory duty of support. Thus, interpreted literally, the statute would allow alimony as support and at the same time, since it would be variable as to amount or duration, the husband could receive his tax deduction.

Had courts followed a literal interpretation of the Indiana statute, judicial power to determine the form and method for alimony payments would have been expanded.[42] Yet despite the statutory provision for periodic payments, the courts continue to award alimony only as a sum in gross.[43]

One illustration of the above policy is *Shula v. Shula* where the court held:

> (1) Alimony in Indiana is awarded for the purpose of making a present and complete settlement of the property rights of the parties. (2) It does not include future support for the wife.[44]

Other more recent cases follow the *Shula* doctrine and overlook the 1949 statutory revision.[45] These cases along with *Shula* serve to illustrate the basic conflict between what the Indiana courts are awarding as alimony and division of property. Recalling that the court in Indiana must adjust all property rights (division of property) and that the court may grant alimony, one asks whether granting alimony serves any valid purpose. It is unclear, however, whether alimony in Indiana serves as a means of support for the divorced spouse, or only as a division of property. If the alimony award is already serving as support, it should be acknowledged as such; if it is merely serving as another division of property, it is unnecessarily repetitive.

Some recent cases have recognized a form of alimony which is not solely a sum in gross. In particular there are four cases which recognize

42. Note, *Alimony in Indiana: Traditional Concepts v. Benefits to Society*, 29 IND. L.J. 461, 470 (1953-54). Alimony awarded pursuant to an agreement including a "death or remarriage" clause would clearly be a variable support award and therefore deductible from the husband's income tax. IND. ANN. STAT. § 3-1218 (Burns Repl. 1968).

43. See note 27 *supra*.

44. 235 Ind. 210, 214, 132 N.E.2d 612, 614 (1956). More recently in Smith v. Smith, 131 Ind. App. 38, 169 N.E.2d 130 (1960), under the Shula doctrine the Smith case found it to be an abuse of judicial discretion to base a determination to allow or not allow alimony on the economic situation of the appellant and her ability or inability to support herself, since in Indiana alimony is not considered in the nature of support in the future, for a wife.

45. Sidebottom v. Sidebottom, 140 Ind. App. 657, 662, 233 N.E.2d 667, 671 (1967) affirms Shula and McDaniel as to alimony in Indiana being made as a present and complete settlement of the property rights of the parties. More particularly in McDaniel v. McDaniel, 245 Ind. 551, 559, 201 N.E.2d 215, 219 (1964), the court states that ". . . insofar as it is possible, there [is to] be a full and complete separation of the parties at the time of the divorce and to this end . . . a fixed sum of alimony be determined, based on the recent and immediately foreseeable circumstances of the parties. . . ."

that under certain circumstances alimony as support may be awarded: *In re Webb,*[46] *Bahre v. Bahre,*[47] *Baxter v. Baxter,*[48] and *State ex rel. Roberts v. Morgan Circuit Court.*[49]

In re Webb[50] is the earliest case which indicates an awareness that alimony may be other than a sum in gross. In that case a federal district court strained to approve a separation agreement providing for variable alimony instead of merging it into the decree. By approving the agreement the court tacitly acknowledged an award which it felt would be beyond its power if merged.

In *Bahre v. Bahre*[51] the court granted a divorce to the wife and awarded 24,400 dollars to be paid over ten years and two months. The wife appealed the judgment claiming that the award was insufficient. The court reversed the award of alimony since the "one-third rule of thumb" had been violated. Upon retrial the court relitigated the division of property as well as alimony. When the second trial was appealed, the court reversed the relitigation of the division of property for being beyond the intent of the court order but affirmed the new alimony award.[52] The significance of *Bahre* lies in its recognition that the division of property and the award of alimony constitute distinct issues.

Baxter v. Baxter[53] approved a 680.25 dollar monthly payment, to be incorporated into the divorce decree from a valid separation agreement, until the sum of 204,075 dollars was paid. In the absence of death or remarriage after payment of the total award, the payments of 680.25 dollars per month were to continue until her death or remarriage. Further, the court held that the alimony judgment was a lien upon the husband's real estate to the extent of the future monthly alimony payments. It is apparent that *Baxter* contains two elements characteristic of a support award: first, an alimony award which is clearly not a sum in gross, a prerequisite of pre-1949 awards, as shown by the contingency of the alimony lasting until death or remarriage. Second, the court allows the alimony decree to serve as a judgment lien upon the husband's real estate.[54]

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46. 160 F. Supp. 544 (S.D. Ind. 1958).
47. 133 Ind. App. 567, 181 N.E.2d 639 (1962).
48. 138 Ind. App. 24, 195 N.E.2d 897 (1964).
49. 249 Ind. 649, 232 N.E.2d 871 (1968).
50. 160 F. Supp. 544 (S.D. Ind. 1958).
51. 133 Ind. App. 567, 181 N.E.2d 639 (1962).
52. Bahre v. Bahre, 140 Ind. App. 246, 211 N.E.2d 627 (1965).
53. See note 47 *supra*.
54. In holding that the judgment for alimony is a present lien on real estate now owned by the husband or a lien for future payments on property subsequently acquired, the court used its power to enforce a variable alimony award.

In the most recent case, *State ex rel. Roberts v. Morgan Circuit Court,*[55] another wedge was inserted into the opening in Indiana's non-support complete settlement doctrine. In *Roberts* the court merged a separation agreement providing for six thousand dollars in alimony payments. The wife petitioned for contempt for failure to pay the alimony, and the husband, relying upon *Marsh v. Marsh,*[56] sought a writ of prohibition. The court denied the writ, thereby modifying *Marsh v. Marsh,*[57] which had held that alimony is not enforceable by contempt proceedings. The significance of *Roberts* is that an action for contempt, available only to enforce support judgments, is no longer necessarily improper in Indiana. Also by merging the separation agreement, unlike the *approval* in *Webb,* the court indicated that it had the authority to allow variable alimony.[58]

Before suggesting how Indiana's alimony problems could be resolved, a glance at the nature of alimony awards in other states may be helpful. Today the form of alimony awards in the United States is generally a matter for the determination of the trial court, and customarily the alimony award is made in such a manner that it remains under the control of the court.[59] Where authorized by statute alimony may take the form of a sum in gross,[60] but in some jurisdictions a sum in gross award is not considered alimony because it is in the nature of a final property settlement, not money payments at regular intervals.[61] Most commonly alimony is awarded as periodic payments,[62] and in some states alimony must be paid periodically.[63] Because of the importance of allowing the court continued jurisdiction, it has been held that periodic payments are preferable to alimony in gross.[64]

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55. See note 33 *supra.*
56. 162 Ind. 210, 70 N.E. 154 (1904).
57. *Id.*
58. Here the court used the contempt power to enforce an agreement providing for variable alimony, which had been merged into the courts decree. Contempt would not have issued unless the agreement had been merged.
59. Cruikshank v. Cruikshank, 25 Cal. App. 2d 144, 121 P.2d 25 (1942); Lewis v. Lewis, 109 Mont. 42, 94 P.2d 211 (1939); Greenberg v. Greenberg, 99 N.J. Eq. 461, 133 A. 768 (1926); Meighen v. Meighen, 307 Ill. 306, 138 N.E. 613 (1923).
60. CONN. GEN. STAT. ANN. § 46-21 (1958); FLA. STAT. ANN. § 61.08 (1969); ILL. ANN. STAT. ch. 40, § 19 (Smith-Hurd Supp. 1970); MICH. STAT. ANN. § 552-23 (Supp. 1970); ORE. REV. STAT. §§ 107, 100 (1969).
61. Parmly v. Parmly, 125 N.J. Eq. 545, 547, 5 A.2d 789, 791 (1939).
62. Heckes v. Heckes, 129 Fla. 653, 176 So. 541 (1937); McIlroy v. McIlroy, 191 Ark. 45, 83 S.W.2d 550 (1935); Bushman v. Bushman, 157 Md. 166, 145 A. 488 (1929).
63. Birnstill v. Birnstill, 218 Ark. 130, 234 S.W.2d 757 (1950).
64. Druck v. Druck, 258 Minn. 114, 116, 103 N.W.2d 123, 124 (1960). Alimony in gross is in the nature of a final property settlement, and in some jurisdictions is not included in the term "alimony" which in a strict or technical sense contemplates money payments at regular intervals. *See also,* Yandell v. Yandell, 39 So. 2d 554, 556 (Pa. 1949).

Where there is little or no property to be divided, Indiana's current practice of awarding alimony as a present and complete settlement of property rights, if the doctrine were adhered to, is unjust. Recognizing possible injustice, courts have attempted to avoid it by characterizing the husband's income earning capacity as a valuable "property" capable of division. Yet even where future earning ability has been considered an asset of the marriage, there is difficulty when the need for support increases or the ability to earn decreases. Where the award is a liquidated sum in gross there is no flexibility for the court to modify the award to meet real changes in circumstances.

For Indiana to overcome the inherent conflict in its "alimony" awards it must first recognize the difference between the distinctive rationales of property division and alimony. Second, since the court must divide the property in all cases, particularly where there is sufficient property to satisfy the needs of the wife, property division should remain the basic tool of the court. Hopefully the court in dividing this property would make an award which is just and proper, and would not refer back to the source from whence it came.[65] In those cases, however, in which the assets are insufficient to support the spouse after a division of property, the court should award alimony as support. This award should be for a periodic payment, under the continuing jurisdiction of the court, capable of alteration where necessary.

Although it may be gratifying to provide for finality in divorce with a present and complete settlement, in most cases it simply is not practical to do so. Instead a balance must be struck between the desire for finality of divorce and the necessity of support to an ex-wife. Further, since the end result of a spouse who cannot provide for herself requires either the ex-husband or the state to provide her support, policy considerations demand that the husband continue this support to the extent of his current ability.

Section 3-1218 has given the court the means to award alimony as a periodic, modifiable, support order. The task is to begin immediately the use of this statute as an alimony award for support where it is needed. The court could adopt a "net need"[66] approach to the awarding of alimony. This entails the balancing of the wife's financial requirements against the husband's ability to pay from future income, taking into consideration the wife's earning capacity.

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65. *See,* Hopson, *Divorce and Alimony Under the New Code,* 12 KAN. L. REV. 27 (1963), in which all property would be placed into a "common pot" with the source not being relevant, and then divide the property as is just and proper.

66. *See,* Hofstacher & Levittan, *Alimony—A Reformulation,* 7 JOUR. OF FAMILY LAW 51, 56 (1967).

The elements of support are already present in Indiana cases. Consideration of such factors as income of parties, their total financial condition, and the earning ability of the husband, automatically result in making support judgments. Considering the breadth of section 3-1218, which allows either periodic payments or a sum in gross, and the recent decisions in *Webb, Bahre, Baxter,* and *Roberts,* the time is ripe for the courts to utilize fully their statutory authority to grant periodic payments which may be variable and in which support may be considered as an element. Because the courts already consider the proper elements in those cases where division of property is insufficient to meet the basic needs of the ex-spouse, the courts merely need to award alimony as support using periodic payments and to retain continuing jurisdiction.

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