

# THE ELIMINATION OF MARITAL FAULT IN AWARDING SPOUSAL SUPPORT: THE MINNESOTA EXPERIENCE

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## I. INTRODUCTION

It has now been more than thirty years since California, in the late 1960s, launched the modern-day reform movement in divorce laws<sup>1</sup> by adopting the first no-fault<sup>2</sup> divorce law in the United States<sup>3</sup> and eliminating the concept of fault in marriage dissolution actions.<sup>4</sup> The no-fault movement was premised on the idea that the removal of fault as a basis for divorce would significantly reduce the amount of personal animosity and bitterness typically associated with divorce.<sup>5</sup>

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1. For a detailed account of the no-fault divorce movement in California and nationally, see Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 7-17 (1987).

2. While the actual terminology of no-fault grounds may vary from state to state, they share a common theoretical basis allowing for the dissolution of marriages deemed no longer viable, regardless of the cause, rather than requiring that dissolution be granted only if based on the fault of one of the parties. WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 78-80 (2001).

3. Family Law Act, ch. 1608, §§ 1-32, 1969 CAL. STAT. 3312 (1970).

4. Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 385 (2001) (urging reform of divorce law that would include mutual consent).

5. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79-80 (1991); see also Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 405 (1971) (noting the bitterness often associated with fault-based divorce litigation whose explicit purpose was to allocate blame as a

Following California's lead, in August, 1970, the Uniform Marriage and Divorce Act<sup>6</sup> (UMDA) was proposed by the National Conference of Commissioners on Uniform State Laws, recommending that the sole ground for divorce should be a finding of irretrievable breakdown of the marriage.<sup>7</sup> Delays in obtaining an endorsement of the UMDA by the American Bar Association meant that states eager to reform their divorce laws looked to the California legislation<sup>8</sup> or early versions of the UMDA<sup>9</sup> for guidance.

In 1974, the Minnesota legislature followed suit and eliminated "fault" from its law of marital dissolution by enacting no-fault divorce legislation.<sup>10</sup> In 1978, Minnesota enacted a maintenance statute<sup>11</sup> that required that maintenance<sup>12</sup> be granted

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reason to terminate a marriage and recommending more humane divorce laws).

6. UNIF. MARRIAGE & DIVORCE ACT (amended 1971 & 1973), 9A U.L.A. 159 (1998).

7. For an historical account of the UMDA and its adoption in several states, see Kay, *supra* note 1, at 44-55.

8. Kay, *supra* note 1, at 4-5.

9. *Id.* at 51.

10. Act of March 14, 1974, ch. 107, 1974 Minn. Laws 157. The 1974 amendments were part of the no-fault divorce act that rewrote MINN. STAT. § 518.06, which had previously set forth the following grounds for divorce:

- (1) Adultery;
- (2) Impotency;
- (3) Course of conduct detrimental to the marriage relationship of the party seeking the divorce;
- (4) Sentence to imprisonment . . . ;
- (5) Willful desertion for one year next preceding the commencement of the action;
- (6) Habitual drunkenness for one year immediately preceding the commencement of the action;
- (7) Three years under commitment . . . ;
- (8) Continuous separation under decree of limited divorce for more than five years.

MINN. STAT. § 518.06 (repealed 1974). MINN. STAT. § 518.06(1) now provides for the dissolution of a marriage upon a finding that there has been an "irretrievable breakdown of the marriage relationship." MINN. STAT. § 518.06 (1) (1990).

11. Act of April 5, 1978, ch. 772, § 51, 1978 Minn. Laws 1083 (effective March 1, 1979) (codified at MINN. STAT. § 518.552 (1990)).

12. Alimony is now alternatively referred to as support, spousal support, maintenance, or separate maintenance in many jurisdictions. In Minnesota, 1978 amendments eliminated the term alimony and substituted maintenance, defined as an "award made in a dissolution or legal separation proceeding of payments from the future income or earnings of one spouse for the support and

without regard to marital misconduct. Both measures were intended to reduce the adversarial nature of divorce proceedings as well as to diminish the bitterness and costly litigation associated with divorce. More recent measures include the encouragement of alternative dispute resolution<sup>13</sup> and the availability of a summary dissolution process.<sup>14</sup>

By June 1, 1974, after Minnesota enacted no-fault legislation, there remained only five states<sup>15</sup> where marital misconduct provided the sole basis for granting a divorce.<sup>16</sup> At the time, Minnesota was one of fourteen states where irretrievable breakdown of the marriage provided the only ground for divorce.<sup>17</sup> Currently, sixteen states allow a no-fault basis as the sole ground for divorce while an additional thirty-two states allow for the granting of a divorce on a no-fault basis while also retaining the traditional fault-based grounds.<sup>18</sup>

The increase in and public awareness of divorce and its effects, both economically as well as psychologically, on the parties involved, have heightened public policy debates and calls for legislative action to reform divorce legislation and judicial doctrines.<sup>19</sup> Some commentators have argued that the transformation from fault-based divorce to a system involving no-fault has resulted in the impoverishment of women and children, both in absolute as well as relative terms.<sup>20</sup> The economic issues

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maintenance of the other.” MINN. STAT. ANN. § 518.54(3) (West Supp. 2001). The terms are used interchangeably throughout this article.

13. See, e.g., MINN. GEN. R. PRACTICE 310 (1996) (effective July 1, 1997); MINN. STAT. § 518.091(a)(4) (West Supp. 2001).

14. MINN. STAT. § 518.195 (West Supp. 2001) (providing summary dissolution in select cases within thirty days of the filing of a joint declaration for parties who otherwise meet certain statutory qualifications and procedural requirements).

15. Illinois, Massachusetts, Mississippi, Pennsylvania and South Dakota.

16. Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions* [as of June 1, 1974], 8 FAM. L. Q. 401, 401 (1974).

17. *Id.* at 421 chart B.

18. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L. Q. 865, 911 chart 4 (2000) (noting that Arizona and Louisiana covenant marriage statutes establish specific grounds for divorce for covenant marriages).

19. Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L. Q. 543, 550-51 (1999).

20. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 358, 365 (1985); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 85-95 (1993).

associated with divorce have directed the debate over the consequences of no-fault divorce legislation and their impact on the fairness and equity of financial outcomes for women when marriages are dissolved.

The focus of this article is to examine the historical development and current status of one particular economic issue associated with the dissolution of a marriage: the award of spousal support. A court is called upon to consider not only whether an award of spousal support is appropriate but, if so, the amount and duration of the support as well. A comparison of approach to spousal support in Minnesota with other states should highlight the underlying debate on these important issues of public policy.

## II. THE DEBATE OVER SPOUSAL SUPPORT

Spousal support has become a topic engendering considerable debate because of the wide-ranging views of judges, lawyers, legislators and the public on fundamental issues underlying its proper function as well as the basis for its award.<sup>21</sup> As a consequence, alimony determinations have resulted in substantial conflict and lack of predictability of result.<sup>22</sup>

One of the variables affecting the outcome of alimony requests is the degree to which fault or marital misconduct is allowed to be considered in the actual determination. A number of commentators have debated the proper role of fault in dissolution proceedings and allocation of financial resources following the marriage.<sup>23</sup>

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21. For a detailed discussion of alternative theories underlying alimony awards, see Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

22. Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 23 (2001).

23. See, e.g. Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J.L. POL'Y. & FAM. 216 (1997) (discussing the introduction of fault in divorce as a misguided attempt to regulate conduct between spouses in marriage and suggesting that the reintroduction of fault will reduce neither the rate of divorce nor spousal violence); Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 269 (1997) (exploring how the use of fault-based factors can ultimately create better living conditions for women and make each party act more responsibly during the marriage); Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996) (suggesting that marital fault should be an integral part of any alimony system); J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 553-54 (1994) (examining how no fault divorce has had a serious negative impact on women); Norman B. Lichtenstein, *Marital*

Should considerations of fault and moral blame have economic consequences in divorce? Or should such considerations be eliminated due to the fact that marital misconduct is often difficult to assess and introduces issues collateral to financial need and ability to pay? States have had to consider whether marital fault should be an absolute bar to the award of maintenance, as only one factor among many to be considered or whether fault should be totally disregarded in making a determination of support following marriage. Of course, the law of domestic relations generally has been reserved to the states with little uniformity and substantial consensus on many significant issues, including the proper role of fault in spousal support determinations.<sup>24</sup>

A. *The Theoretical Basis for Awarding Support*

Alimony originated as a remedy in the English ecclesiastical courts when a final dissolution of marriage was available only by special legislative action; gender roles were fixed and not subject to question; and the principle that a husband had a legal and established duty to support his wife was generally accepted.<sup>25</sup> The theoretical basis for a continuing obligation of support following a marriage was the idea of enforcing the husband's duty to support his wife and as punishment for his wrongdoing.<sup>26</sup>

The introduction of misconduct or marital fault in divorce proceedings has traditionally appealed to those individuals viewing divorce in moralistic terms. Proponents of the moralistic approach believe that any economic losses resulting from the breakup of a marriage should fall upon those morally responsible.<sup>27</sup> Prior to 1968 and the adoption of no-fault divorce legislation, marital misconduct or "fault" was almost universally accepted as a relevant

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*Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985).

24. WADLINGTON & O'BRIEN, *supra* note 2, at 3-4.

25. For a detailed historical account of the development of alimony both in England and the United States, see Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28-31 (2001).

26. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 420-21 (1968).

27. Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 67 U. ILL. L. REV. 719, 721 (1997).

factor in deciding economic issues as part of a divorce.<sup>28</sup>

This perception began to change, however, with the inception of no-fault divorce. As states quickly adopted no-fault statutes, public perception shifted to the notion that the fault leading to the breakup of a marital relationship was no longer relevant for any purpose from a legal perspective.<sup>29</sup> More recent changes in legislation and judicial opinions replacing references to alimony with terms such as maintenance or spousal support are a reflection of the shift from fault-based divorce and strict gender roles in society.<sup>30</sup>

As a result, justifications for awarding support have shifted, as well. One commentator has suggested that there are two divergent theoretical bases for awarding alimony upon a divorce, a victim-oriented approach based on fault and a partnership model<sup>31</sup> based on equality of the spouses.<sup>32</sup> In the victim-oriented approach, one view is represented by the idea that consideration of fault brings accountability and compensation for harm caused by the misconduct<sup>33</sup> while the alternative view is that alimony's purpose is not punitive-which even states permitting consideration of fault in alimony determinations acknowledge, and that compensation or punishment for victims is best left to tort law and criminal law respectively.<sup>34</sup>

### B. *Current Application of Marital Misconduct*

Marital misconduct continues to be a relevant factor in some jurisdictions, however. In some states adultery serves as a complete bar to support,<sup>35</sup> while in others<sup>36</sup> it is only one of several

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28. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 776 (1996); THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 17 (Tentative Draft No. 2, March 14, 1996).

29. Barbara Bennett Woodhouse, with comments by Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2525 (1994).

30. Ellman, *supra* note 28, at 773.

31. For a proposal advocating a partnership model, see Starnes, *supra* note 20.

32. Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 498 (1988).

33. Swisher, *supra* note 23, at 302-03.

34. AMERICAN LAW INSTITUTE, *supra* note 28, at 28.

35. See, e.g., GA. CODE ANN. § 19-6-1(b) (West 1999) ("A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the

considerations on which spousal support is based. In a slight minority of states, twenty-three, marital fault is not considered in alimony determinations. In the remaining states, as well as the District of Columbia and Puerto Rico, such misconduct is deemed relevant.<sup>37</sup> The circumstances under which marital fault, as one of the factors, may be considered are most often defined by statute.<sup>38</sup>

However, even when fault may be considered in establishing support obligations, a threshold issue that must be resolved is what is meant by the term marital fault: it can include the conduct of parties toward each other as well as “fault”, however defined, as a cause for the breakdown of the marriage.<sup>39</sup> Determining fault can be a very difficult task for trial courts if they are required to take it into account in awarding alimony.<sup>40</sup> Fault has been referred to as

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separation between the parties was caused by that party’s adultery or desertion.”); N.C. GEN. STAT. § 50-16.3A (1999) (“If the court finds that the dependant spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony.”); S.C. CODE ANN. § 20-3-130(a) (West 1998) (“No alimony may be awarded a spouse who commits adultery” prior to the execution of a written separation agreement or entry of a final decree.); VA. CODE ANN. § 20-107.1 (B) (Michie 1995) (denying permanent maintenance if there are grounds for divorce based upon adultery unless “the court determines from clear and convincing evidence that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.”); W.VA. CODE § 48-2-15 (i) (1999) (“nor shall an award of alimony . . . be ordered which directs the payment of alimony to a party determined to be at fault when, as a grounds granting the divorce, such party is determined by the court: (1) To have committed adultery; . . .”).

36. *E.g.*, FLA. STAT. ANN. § 61.08 (1) (West 1997) (“The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.”); 23 PA. CONS. STAT. ANN. § 3701 (b) (14) (West 1991).

37. Elrod & Spector, *supra* note 18, at 908 chart 1. For a thorough discussion and classification of existing state laws on the relevance of fault in the award of alimony, see Ellman, *supra* note 28, at 776-81 (1996); *see also* THE AMERICAN LAW INSTITUTE, *supra* note 28, at 20-24.

38. For example, S.C. CODE ANN. § 20-3-130 (c) (10) (1998), in listing the factors that must be considered and balanced in making an award of alimony or separate maintenance refers to “marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage . . . .”

39. THE AMERICAN LAW INSTITUTE, *supra* note 28, at 30-31.

40. For example, in *Bollenbach*, the court stated: “[t]he assessment of fault in the ordinary divorce action is most difficult and the dissolution of a marriage is the result frequently of a series of circumstances so complicated as to defy accurate fault assessment.” *Bollenbach v. Bollenbach*, 285 Minn. 418, 434, 175 N.W. 2d

“inherently contextual,”<sup>41</sup> indicative of the additional factual issues that must be resolved when fault is a factor in determinations of spousal maintenance.

Moreover, permitting the consideration of fault in alimony determinations increases the discretion of judges in making determinations leading to outcomes less certain and provides additional incentive to raise misconduct issues, even unfounded, for posturing in the negotiation process.<sup>42</sup> Some commentators argue that maintaining vestiges of fault in adjudicating economic issues in connection with a divorce are counter-productive to the principal objectives of spousal support statutes.<sup>43</sup> Others note that marital fault often results in gender bias.<sup>44</sup>

### C. Minnesota's Approach

As early as 1877, the Minnesota Supreme Court addressed the propriety of considering marital misconduct in determining alimony in *Buerfening v. Buerfening*<sup>45</sup> where it was stated:

But, while the adultery of plaintiff is not necessarily a bar to the action in such cases, it is proper to be pleaded, as a total or partial defence [sic], to the claim for alimony. An adulterous woman can not [sic] stand, in regard to alimony, the equal of one whose conduct is irreproachable. In determining the amount to be allowed, the good or bad conduct of the parties is always material.<sup>46</sup>

The appropriate consideration to be accorded fault in alimony determinations continued to evolve in Minnesota courts throughout the following years to the point where misconduct became one of several factors that a trial court, in the exercise of its discretion, was to consider in considering a request for alimony.<sup>47</sup> In *Peterson v. Peterson*,<sup>48</sup> the Minnesota Supreme Court continued to hold that evidence of marital misconduct should be only one of

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148, 158 (1970).

41. Woodhouse, *supra* note 29, at 2539.

42. Ellman, *supra* note 28, at 808-09.

43. Donald C. Schiller, *Fault Undercuts Equity*, FAM. ADVOC., Fall 1987, at 10.

44. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1109-11 (1989).

45. 23 Minn. 563 (1877).

46. *Id.* at 564.

47. Borchert v. Borchert, 279 Minn. 16, 20, 154 N.W.2d 902, 906 (1967).

48. 308 Minn. 365, 242 N.W.2d 103 (1976).

many factors considered by the trial court in allocating property and making awards of alimony in a no-fault divorce. Although acknowledging the adoption of no-fault divorce legislation, substituting the broad concept of irretrievable breakdown for divorce based on fault grounds, designed to minimize the bitterness associated with protracted divorce litigation, the court nevertheless declared that such legislation was limited to the grounds for dissolution and did not extend to the issues of property division and alimony, having failed to enact proposed bills that would have removed fault from consideration.<sup>49</sup>

Although an assessment of when spousal support should be granted as well as the duration and level of support to be awarded can differ significantly from state to state, financial need and ability to pay continue to be primary considerations.<sup>50</sup> Minnesota follows the general standard of considering need as an important consideration<sup>51</sup> to be balanced against the other spouse's ability to pay.<sup>52</sup> Under modern divorce law, there has been considerable criticism for the lack of any unified basis for the granting of alimony leading to a lack of predictability and consistency in decisions.<sup>53</sup>

Most states,<sup>54</sup> including Minnesota,<sup>55</sup> set forth factors that must be considered when making alimony determinations. In Minnesota, the balancing of those statutory factors<sup>56</sup> by the trial

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49. *Id.* at 107-08.

50. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 *FAM. L.Q.* 607, 617 (2001).

51. Minnesota Statutes section 518.552(1) (1990) permits a court to grant maintenance upon a finding that the spouse either "(a) lacks sufficient property, including martial property apportioned to the spouse, to provide for reasonable needs of the spouse. . . or (b) is unable to provide adequate self-support, after considering the standard of living established during the marriage . . . ."

52. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39-40 (Minn. 1982); *Jensen v. Jensen*, 409 N.W.2d 60, 61 (Minn. 1987).

53. AMERICAN LAW INSTITUTE, *supra* note 28, at 7; CLARK, JR., *supra* note 26, at 441 ("If we do not know what we are trying to accomplish by giving the wife alimony, we will not easily be able to decide whether it should be granted in a particular case, or, if so, in what amount . . . .").

54. Forty states have a statutory list of factors for granting alimony/spousal support. Elrod & Spector, *supra* note 18, at 908 chart 1.

55. Minnesota's statute, MINN. STAT. § 518.552 (1990) is modeled significantly on § 308 of the Uniform Marriage and Divorce Act, 9A U.L.A. 147 (1973).

56. Minnesota lists the following factors to be considered in awarding maintenance:

(a) the financial resources of the party seeking maintenance, including

court allows for considerable discretion in their application.<sup>57</sup> In fact, the standard of review from the district court's determination of the maintenance award is whether the district court abused its wide discretion.<sup>58</sup>

Although Minnesota law now requires that spousal support be adjudicated "without regard to marital misconduct,"<sup>59</sup> fault or misconduct may nevertheless be taken into account indirectly.<sup>60</sup> Additionally, acts of marital misconduct may be considered relevant when they result in economic waste, loss of financial expectations or other serious economic injury<sup>61</sup> resulting in

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marital property apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;

(c) the standard of living established during the marriage;

(d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;

(e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;

(f) the age, and the physical and emotional condition of the spouse seeking maintenance;

(g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and

(h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

MINN. STAT. ANN. § 518.552(2) (West 1990).

57. Susanne C. Sedgwick & Cindy K. Telstad, *Family Law in the Minnesota Court of Appeals: A Review*, 9 HAMLIN L. REV. 387, 392 (1986).

58. Erlandson v. Erlandson, 318 N.W.2d 36, 38 (Minn. 1982).

59. MINN. STAT. ANN. § 518.552(2) (West 1990).

60. Burt v. Burt, 386 N.W.2d 797, 800 (Minn. Ct. App. 1986) (holding that an award of maintenance to a wife was proper despite the statutory prohibition against considering marital misconduct since it did not preclude a trial court from considering a wife's increased financial needs resulting from chronic health issues resulting from abuse perpetrated by the husband during the marriage).

61. Woodhouse, *supra* note 29, at 2525-26.

increased future living costs or reduced earning capacity. Nevertheless, the Minnesota legislature has taken a step in the right direction.

### III. CONCLUSION

Minnesota has wisely removed fault from consideration in deciding issues of maintenance in divorce proceedings. This is consistent with those who have argued that decisions related to support and maintenance, like the granting of the divorce itself, should not be based on a moral standard that considers misconduct of the parties but rather on the ideals of economic fairness, premised on need and ability to pay.<sup>62</sup> Those states that continue to allow considerations of fault to influence such determinations or those who seek to reintroduce fault will necessarily increase the bitterness associated with divorce, lead to more unpredictable results and promote protracted and costly litigation, increasing the emotional toll on families and their children.

Minnesota's decision to exclude consideration of fault in the award of maintenance is consistent with the position of the Uniform Marriage and Divorce Act and nearly half of the states. This is not to suggest that there is no room for additional clarification and refinement of the principles underlying a theory of spousal maintenance following divorce. In fact, the ongoing debate within the legislative, judicial and academic communities of the proper role marital fault should have in resolving economic issues incident to divorce can hopefully provide the necessary incentive to arrive at a consensus on basic principles to guide decision-making that will provide additional consistency and reliability.

The American Law Institute's *Principles of the Law of Family Dissolution (Principles)*,<sup>63</sup> which advocates a total abolition of all fault-based factors in marital dissolution, provides a framework for further discussion and consideration as states continue to consider reform in the area of family law. To provide a unifying theory underlying what had previously been referred to as alimony, the *Principles* substitute the concept of compensatory spousal

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62. Schiller, *supra* note 43, at 42.

63. AMERICAN LAW INSTITUTE, *supra* note 28.

payments<sup>64</sup> resulting from an unfair distribution of financial loss from the failure of the marriage as opposed to the concept of financial need.<sup>65</sup> Minnesota, as well as other states, may wish to consider these *Principles* as they search for ways to improve the approach to achieving economic fairness and justice to parties upon dissolution.

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64. *Id.* at ch. 5.

65. *Id.* at 10.