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## Comments: Petitioning a Court to Modify Alimony When a Client Retires

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## PETITIONING A COURT TO MODIFY ALIMONY WHEN A CLIENT RETIRES

### I. INTRODUCTION

The belief that marriage is a lifelong union is fast becoming an antiquated notion as approximately fifty percent of all marriages end in divorce.<sup>1</sup> Accordingly, the area of family law has expanded to encompass the ever-changing situations of divorcing couples,<sup>2</sup> varying moral standards, and a society loathe to address the emotional and economic fallout produced by divorce.<sup>3</sup> As a result of the many

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1. See Susan Hager, Comment, *Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act*, 77 NEB. L. REV. 567, 567 (1998); see also HUGH CARTER & PAUL C. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 28 (1976). However, the assumption that the weakening of marital bonds is a product of the changing family ideals of the twentieth century is not completely accurate. See JACQUELINE D. STANLEY, *DIVORCES FROM HELL* 11 (1995). In the seventeenth century, King Henry VIII of England established a new religion to obtain a divorce from his first wife, Catherine of Aragon. See *id.* at 19. In addition, Abraham Lincoln handled divorce cases as a routine part of his law practice before becoming President of the United States. See *id.* at 70. In one particular case, Lincoln was believed to have carried his client into the courtroom on his shoulders, declaring: "Unless my client gets both mules and the good pitchfork, all the thunder of the heavens will descend upon you in a manner that no human being has ever been witnessed to." *Id.*
  2. See generally WALTER O. WEYRAUCH & SANFORD N. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* (1983) (providing an in-depth perspective on the theory of family law).
  3. The new burden on society is incited largely by the intense chain of events preceding divorce and the resulting adverse impact on the parties involved. See Paul Bohannon, *The Six Stations of Divorce*, in *READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES* 4 (Frederica K. Lombard ed., 1990). According to Bohannon, there are six stages of divorce that transpire simultaneously and complicate the daily social routines of couples. See *id.* These six overlapping experiences are:
    - (1) the emotional divorce, which centers around the problem of the deteriorating marriage;
    - (2) the legal divorce, based on grounds;
    - (3) the economic divorce, which deals with money and property;
    - (4) the coparental divorce, which deals with custody, single-parent homes, and visitation;
    - (5) the community divorce, surrounding the changes of friends and community that every divorcee experiences; and
    - (6) the psychic divorce, with the problem of regaining individual autonomy.

distinctions in family morals and values, divorce—"[t]he legal separation of man and wife, effected by the judgment or decree of a court,"<sup>4</sup>—can no longer be considered a simple legal matter.

One aspect of divorce proceedings that has been the subject of much debate and discussion is alimony.<sup>5</sup> Specifically, the issue of terminating or modifying an alimony award has become the subject of scrutiny in numerous jurisdictions.<sup>6</sup> The focus of this Comment is on modifying alimony awards in Maryland.

Initially, this Comment addresses the historical development of alimony in Maryland by examining its origin from the practices of

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*Id.* at 4-5.

4. BLACK'S LAW DICTIONARY 480 (6th ed. 1990).
5. See Robert F. Kelly & Greer Litton Foxh, *Determinants of Alimony Awards: An Empirical Test of Certain Theories and a Reflection of Public Policy*, 44 SYRACUSE L. REV. 641, 642-43 (1993) (questioning the lack of scholarly literature addressing alimony, despite recent legal discussion); John C. Sheldon, *The Sleepwalker's Tour of Divorce Law*, 48 ME. L. REV. 7, 26 n.56 (1996) (listing recent scholarly discussions underlying a "furious and nation-wide debate" of alimony). Alimony is derived from the Latin word *alimonia*, which means sustenance and it typically defined as a "court-ordered allowance one spouse pays to support his or her estranged spouse." *Me First*, 8 FAM. ADVOC. 3, 3 (1986). When alimony was first awarded by the English ecclesiastical courts, the husband was ordered to make support payments to the wife, but the parties actually remained married during the course of their lives. See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3, 5 (1989).
6. See *infra* Parts III and IV for a general discussion of decisions affecting the post-separation termination or modification of alimony.

The distinction between the terms "alimony" and "spousal support" is relatively unimportant in Maryland today. The traditional definition of alimony involved a court order demanding payments from a husband to a wife to continue as long as they live separate and apart, and for the joint lives of the parties. See *Mendelson v. Mendelson*, 75 Md. App. 486, 496, 541 A.2d 1331, 1336 (1988). Violation of this order could subject the non-compliant party to contempt and the accompanying possibility of jail time or other sanctions. See *id.* at 497, 541 A.2d at 1336. Spousal support, on the other hand, was traditionally viewed as a creature of contract, which a court could not grant but for an agreement of some sort between the parties. See *id.* Non-compliance with agreements of this sort had typically subjected the party only to civil penalties for breach of contract. See *id.* The distinction has historically been of consequence because courts that found that an element of technical alimony was missing from a factual situation, even though the parties intended for the payments to constitute alimony, would nonetheless have been required to treat the payments as being pursuant to an agreement of spousal support, and thus not enforceable or modifiable by the courts. See *id.* at 497, 541 A.2d at 1336-37.

the English ecclesiastical courts in the eighteenth century<sup>7</sup> to its present treatment.<sup>8</sup> The historical development includes a brief discussion of the purpose of alimony,<sup>9</sup> the three categories of alimony that Maryland courts are presently authorized to grant,<sup>10</sup> and the essential elements required for an award under each.<sup>11</sup> Parts Three and Four of this Comment explain the circumstances that permit courts to modify alimony awards,<sup>12</sup> as well as the rare situations that have been found sufficient to terminate alimony.<sup>13</sup> One of the most common situations in which a court will modify an alimony award is when a payor spouse retires.<sup>14</sup> To that end, a major focus of this Comment is a comparative analysis of various jurisdiction's treatment of retirement as it relates to modifying alimony.

## II. HISTORICAL DEVELOPMENT OF ALIMONY IN MARYLAND

In England, prior to the eighteenth century, the ecclesiastical courts did not have the power to completely dissolve a marriage by granting an absolute divorce.<sup>15</sup> However, the ecclesiastical courts did have the power to order a legal separation of a couple through a limited divorce.<sup>16</sup> The ecclesiastical courts had the authority to grant

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7. For a general overview of the historical development of alimony, see Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939); *infra* notes 15–36 and accompanying text.
  8. See, e.g., *Horsey v. Horsey*, 329 Md. 392, 410, 620 A.2d 305, 314–15 (1993) (“Alimony’ in a legal sense (often referred to as ‘technical alimony’) is a periodic allowance for spousal support, payable under judicial decree, which terminates upon the death of either spouse or upon the remarriage of the spouse receiving the payments or upon the reconciliation and cohabitation of the parties.”).
  9. See *infra* notes 41–60 and accompanying text.
  10. See *infra* notes 61–80 and accompanying text.
  11. See *infra* notes 61–80 and accompanying text.
  12. See *infra* notes 81–257 and accompanying text.
  13. See *infra* notes 258–82 and accompanying text.
  14. See *infra* notes 81–257 and accompanying text.
  15. See *Thomas v. Thomas*, 294 Md. 605, 609–10, 451 A.2d 1215, 1217 (1982) (footnote omitted). An absolute divorce, often referred to as “a vinculo matrimonii”—from the bed of matrimony—is a type of divorce that results in a complete dissolution of the marriage contract. BLACK’S LAW DICTIONARY 136 (6th ed. 1990); see also MD. CODE ANN., FAM. LAW § 7-103 (1998) (providing the grounds for an absolute divorce in Maryland).
  16. A limited divorce is a “judicial separation of husband and wife not dissolving the marriage.” BLACK’S LAW DICTIONARY 927 (6th ed. 1990); see also MD. CODE ANN., FAM. LAW § 7-102 (providing the grounds for a limited divorce in Mary-

alimony, but only to the wife and only when a limited divorce was granted.<sup>17</sup> Thus, the ecclesiastical courts could not grant alimony to a wife that sought support if she was not divorcing her husband.<sup>18</sup>

In Maryland, ecclesiastical courts did not exist.<sup>19</sup> Parties seeking to dissolve their marriage could not get relief from Maryland's judiciary because divorce "was deemed exclusively a legislative function."<sup>20</sup> Thus, the General Assembly retained exclusive authority to grant divorces in Maryland.<sup>21</sup> Though the ecclesiastical alimony doctrine that limited the circumstances in which a court could grant an alimony award was adopted through decisional law in many jurisdictions,<sup>22</sup> it was not fully embraced by Maryland courts.<sup>23</sup> Instead, Maryland equity courts assumed broader inherent authority and granted alimony to wives that received a limited divorce through the legislature, *as well as* to wives that did not even seek a divorce.<sup>24</sup>

In 1777, in an apparent attempt to restrict this inherent power, "the General Assembly authorized equity courts to hear and determine alimony causes in the same manner" as the English ecclesiasti-

land).

17. See *Thomas*, 294 Md. at 609-10, 451 A.2d at 1217.
18. See *McAlear v. McAlear*, 298 Md. 320, 327, 469 A.2d 1256, 1259 (1984).
19. See *Thomas*, 294 Md. at 610, 451 A.2d at 1217.
20. *Id.* (citing *Crane v. Meginnis*, 1 G. & J. 463, 474 (1829)); see also *McAlear*, 298 Md. at 327, 469 A.2d at 1259 (observing that "[d]ivorce in Maryland is a statutory creation that was unknown to the common law"); *Bender v. Bender*, 282 Md. 525, 529, 386 A.2d 772, 775 (1978); *Altman v. Altman*, 282 Md. 483, 490, 386 A.2d 766, 770 (1978); *Emerson v. Emerson*, 120 Md. 584, 589, 87 A. 1033, 1035 (1913).
21. See *McAlear*, 298 Md. at 328, 469 A.2d at 1259.
22. See *Courson v. Courson*, 213 Md. 183, 185, 129 A.2d 917, 918 (1957).
23. See *Thomas*, 294 Md. at 610, 451 A.2d at 1217; *Courson*, 213 Md. at 185, 129 A.2d at 918. Several other cases have examined the history of divorce and alimony in England and in Maryland. See, e.g., *Bender*, 282 Md. at 529-31, 386 A.2d at 775-77; *Altman*, 282 Md. at 490-91, 386 A.2d at 770-71; *Foote v. Foote*, 190 Md. 171, 176-80, 57 A.2d 804, 807-09 (1948).
24. See *McAlear*, 298 Md. at 328, 469 A.2d at 1260 (citing *Galwith v. Galwith*, 4 H. & McH. 477, 478 (1689)); *Emerson*, 120 Md. at 590, 87 A. at 1035-36 (noting that the "right" to alimony "was founded on the common-law obligation of the husband to support his wife").

For example, in *Galwith v. Galwith*, 4 H. & McH. 477 (1689), scandalous rumors arose about Mrs. Galwith; her husband evicted her and their child from the family's home. See *id.* Mrs. Galwith did not seek a divorce decree, but instead sought an order requiring her husband to pay her maintenance if he was not ordered to allow her back into the home. See *id.* at 477-78. The court ordered Mr. Galwith to provide a specified amount of his tobacco crop each year if he did not allow her to move back into the family's home. See *id.*

cal courts.<sup>25</sup> Nevertheless, courts construed this statute "as merely confirming the previously existing inherent authority of Maryland equity courts over alimony."<sup>26</sup> Thus, Maryland courts continued to grant alimony awards to wives without requiring a limited divorce.<sup>27</sup> Although Maryland courts took greater liberties in awarding alimony than their ecclesiastical counterparts, Maryland courts still viewed alimony as a right incident to marriage.<sup>28</sup> Inasmuch as a limited divorce did not sever the parties' marital bond,<sup>29</sup> Maryland courts would only grant alimony "to be paid during the term of the marriage."<sup>30</sup>

A major change occurred in 1841, when the General Assembly greatly expanded the power of the courts to grant alimony after the marriage was terminated.<sup>31</sup> Maryland equity courts were empowered by the General Assembly to grant both limited and absolute divorces, along with the authority to grant an award of alimony to the wife in either type of divorce proceeding.<sup>32</sup> This power was subsequently codified in sections 24 and 25 of Article 16 of the Maryland Annotated Code.<sup>33</sup> In 1975, the General Assembly broadened the judicial power to grant alimony.<sup>34</sup> Article 16, section 1(a) "authorized equity courts . . . to award alimony to either spouse."<sup>35</sup> Further-

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25. *McAlear*, 298 Md. at 328, 469 A.2d at 1260. Alimony awards were only granted to the wife. *See id.*

26. *Id.*

27. *See, e.g., Galwith*, 4 H. & McH. at 478.

28. *See* JOHN F. FADER, II & RICHARD J. GILBERT, MARYLAND FAMILY LAW § 4-1(c), at 116 (2d ed. 1995).

29. *See supra* note 16 and accompanying text.

30. *See* FADER & GILBERT, *supra* note 28, § 4-1(c), at 116.

31. *See id.*

32. *See* *Thomas v. Thomas*, 294 Md. 605, 609-14, 451 A.2d 1215, 1217-20 (citing MD. ANN. CODE art. 16, §§ 24 and 25 (1957)); *see also* *Mendelson v. Mendelson*, 75 Md. App. 486, 495, 541 A.2d 1331, 1336 (1988) ("[T]he traditional definition of alimony was court ordered payments to a wife . . ."); *Bebermeyer v. Bebermeyer*, 241 Md. 72, 76-77, 215 A.2d 463, 466 (1965); *Blades v. Szatai*, 151 Md. 644, 648, 135 A. 841, 843 (1927); *Hood v. Hood*, 138 Md. 355, 360, 113 A. 895, 897 (1921); *Newbold v. Newbold*, 133 Md. 170, 174-75, 104 A. 366, 367 (1918); *McCaddin v. McCaddin*, 116 Md. 567, 571, 82 A. 554, 556 (1911); *Wallingsford v. Wallingsford*, 6 H & J 485, 488 (1825).

33. *See* *McAlear v. McAlear*, 298 Md. 320, 330, 469 A.2d 1256, 1261 (1984).

34. *See id.* The code sections, which provided an amended and expanded version of the statute, were repealed in 1984. *See* MD. ANN. CODE art. 16, §§ 1-5 (1982).

35. *McAlear*, 298 Md. at 330, 469 A.2d at 1261. While article 16 broadened the power of a court to award alimony, it somewhat restricted the court's discretion by requiring courts to consider "an enumerated set of factors" before

more, section 5(a) "confirmed the authority of equity courts to modify the amount of alimony awarded."<sup>36</sup>

Maryland's current alimony statute<sup>37</sup> was enacted by the General Assembly in 1980.<sup>38</sup> Courts are now supplied with a multi-factor framework to use in determining the amount and duration of an alimony award.<sup>39</sup> When a party seeks to modify an alimony award by either extending the payment period or adjusting the amount of the award, section 11-107 of the Family Law Article sets forth standards that the party seeking relief must meet.<sup>40</sup> The next section of this Comment demonstrates that these statutory provisions represent a philosophical departure from prior approaches to alimony.

#### A. *The Purpose of Alimony*

The fundamental purpose of alimony has been the subject of considerable debate.<sup>41</sup> Maryland alimony payments were initially awarded on an indefinite basis, allowing the husband and wife to live separate and apart without eliminating the husband's obligation to support his wife.<sup>42</sup> In essence, alimony represented a continuation of the socioeconomic aspect of the legal bond of marriage for the duration of the couple's joint lives.<sup>43</sup> Alimony awards embodied both the continuing legal duty of a husband to support his wife and the lack of employment opportunity for women.<sup>44</sup>

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rendering an award. *Id.*

36. *Id.*

37. See MD. CODE ANN., FAM. LAW §§ 11-101 to 11-111 (1998) (originally codified as MD. ANN. CODE art. 16 §§ 1, 2, 3, 5 (Supp. 1980)).

38. See *Blaine v. Blaine*, 336 Md. 49, 63, 646 A.2d 413, 420 (1994).

39. See MD. CODE ANN., FAM. LAW § 11-106 (1998).

40. See *id.* § 11-107.

41. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.1, at 421 (1968). For example, a few articulated purposes of alimony include continuing the support that the financially dependent spouse was entitled to receive while the marriage was in existence, punishment for the payor spouse's transgressions, and damages for wrongful breach of the marriage contract. See *id.* at 421-22.

42. See *Knabe v. Knabe*, 176 Md. 606, 611, 6 A.2d 366, 369 (1939).

43. See *Dougherty v. Dougherty*, 187 Md. 21, 32, 48 A.2d 451, 457 (1946); Michael D. Smith, Note, *The Duration of the Alimony Obligation in Wyoming: Longer Than We Both Shall Live?* *Oedekoven v. Oedekoven*, 920 P.2d 649 (Wyo. 1996), 33 LAND & WATER L. REV. 383, 384-85 (1998) (citing HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, § 16.1, at 619 (2d ed. abr. 1988)).

44. See Smith, *supra* note 43, at 384-85 (1998) (citing CLARK, *supra* note 43, § 16.1, at 619).

As time passed, however, alimony award amounts were increasingly based on the wife's level of need, the standard of living established during the course of the marriage,<sup>45</sup> and the assumption that the wife would not become self-sufficient.<sup>46</sup> Although these considerations increasingly shaped the amount of alimony awarded, courts continued to provide indefinite, periodic support for the financially dependent wife following the divorce without encouraging her to become self-sufficient in the future.<sup>47</sup>

For example, in *Dougherty v. Dougherty*,<sup>48</sup> a wife appealed a divorce decree that denied her request for alimony on the grounds of abandonment.<sup>49</sup> The Court of Appeals of Maryland emphasized that in applying for alimony, a wife was not "asking for favors but demanding rights."<sup>50</sup> The court found that the wife was entitled to alimony based on the husband and wife's financial circumstances, sta-

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45. See *Timanus v. Timanus*, 178 Md. 640, 642-43, 16 A.2d 918, 920 (1940). In *Timanus*, the wife was living with a married daughter at the time of the hearing, paying five dollars per week for rent and sleeping in the living room on a cot. See *id.* at 642, 16 A.2d at 919. Her former husband, an attorney, lived alone in an eight-bedroom house. See *id.* at 643, 16 A.2d at 920. The court concluded, based on a comparison of the former couple's situation, that the wife was entitled to demand support from her husband under the applicable law. See *id.* The court looked at the parties' standard of living and affirmed the award of alimony to the wife based largely in part on the wife's need and the husband's earning capacity. See *id.* at 644, 16 A.2d at 920.
46. See Linda D. Elrod, *The Widening Door of Alimony*, 8 FAM. ADVOCATE, 4, 4-5 (1986).
47. See *infra* notes 48-52 and accompanying text. Traditionally, alimony has been regarded as "a money allowance payable under a judicial decree by a husband at stated intervals to his wife, or former wife, during their joint lives or until the remarriage of the wife, so long as they live separately, for her support and maintenance." *Knabe*, 176 Md. at 612, 6 A.2d at 368-69.
48. 187 Md. 21, 48 A.2d 451 (1946).
49. See *id.* at 25, 48 A.2d at 454. At trial, the husband established that his wife's adulterous relationships had led to their divorce. See *id.* at 28, 48 A.2d at 455.
50. *Id.* at 33, 48 A.2d at 457; cf. *Condore v. Prince George's County*, 289 Md. 516, 520, 425 A.2d 1011, 1013 (1981) (citing *Ewell v. State*, 207 Md. 288, 114 A.2d 66 (1955); *Coastal Tank Lines, Inc. v. Canoles*, 207 Md. 37, 113, 521 A.2d 82 (1955); *Stonesifer v. Shriver*, 100 Md. 24, 59 A. 139 (1904)) ("Under the common law of Maryland, prior to the adoption of ERA, the husband had a legal duty to supply his wife with necessaries suitable to their station in life, but the wife had no corresponding obligation to support her husband, or supply him with necessaries, even if she had the financial means to do so."). Alimony also proved to be a valuable tool for an ex-husband who wished to control his former wife's behavior after the dissolution of the marriage. See Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1109-10 (1989).

tion in life, age, physical condition, ability to work, length of time together, circumstances leading to their separation, and the husband's earning capacity.<sup>51</sup> Although the *Dougherty* court discussed a variety of factors that Maryland courts were just beginning to develop, the opinion remained true to the prevailing view that the primary purpose of alimony was for the wife's "support during the joint lives of the parties as long as they [remained] separated."<sup>52</sup>

Modern courts began to de-emphasize the idea that alimony was an entitlement by shifting to the rationale that the purpose of alimony should be to rehabilitate the wife so that she may ultimately become self-sufficient.<sup>53</sup> Consistent with this rehabilitative purpose, alimony evolved to encompass gender neutral<sup>54</sup> support obligations that are awarded for a pre-determined period of time.<sup>55</sup> Nevertheless, the financial independence that rehabilitative alimony<sup>56</sup> is designed to provide may be difficult to take advantage of when a dependent spouse is left alone with children and is forced to become self-sufficient while struggling to care for the family.<sup>57</sup>

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51. See *Dougherty*, 187 Md. at 33, 48 A.2d at 457.

52. *Id.* at 32, 48 A.2d at 457 ("Under the law of this State no allowance to a wife is considered as alimony which does anything more than provide for the payment of money at stated periods for her support during the joint lives of the parties as long as they are separated.").

53. See *Holston v. Holston*, 58 Md. App. 308, 321, 473 A.2d 459, 465 (1984). The main purpose of alimony is "to rehabilitate the dependant spouse so she or he may become economically self-sufficient." *Rogers v. Rogers*, 80 Md. App. 575, 591, 565 A.2d 361, 369 (1989) (citations omitted); see also *Quigley v. Quigley*, 54 Md. App. 45, 54, 456 A.2d 1305, 1311 (1983) (noting that the Governor's Commission report clearly stated that the primary purpose of alimony was to provide the recipient with the opportunity to become self-sufficient), *overruled on other grounds*, *Parker v. Robins*, 68 Md. App. 597, 514 A.2d 1237 (1986).

54. See *supra* note 35 and accompanying text.

55. See FADER & GILBERT, *supra* note 28, § 4-3, at 119.

56. Rehabilitative alimony is defined as "sums necessary to assist a divorced person in regaining a useful and constructive role in society through vocational or therapeutic training or retraining and for the further purpose of preventing financial hardship on society or [the] individual during the rehabilitative process." BLACK'S LAW DICTIONARY 1287 (6th ed. 1990) (citing *Sever v. Sever*, 467 So. 2d 492, 494 (Fla. Dist. Ct. App. 1985)).

57. See generally RIANE TENNENHAUS EISLER, DISSOLUTION: NO FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 54 (1977). Data indicative of the first year after divorce has shown that men enjoy a 42% increase in their standard of living, while women and children suffer a 73% decline. See 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, 79 (1993) (citing

While Maryland courts are still permitted to grant indefinite alimony awards,<sup>58</sup> the state has recognized and accepted rehabilitation as alimony's primary purpose,<sup>59</sup> replacing the traditional belief that

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LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985)). Starnes provided a concise overview of the situation as it existed a few years ago, declaring that "[w]hen a woman whose principal job has been homemaking loses her occupation and her patriarch, she faces a sea-change in both income and status." *Id.* at 78.

58. See *Tracey v. Tracey*, 328 Md. 380, 393-94, 614 A.2d 590, 596-97 (1992) (holding that a gross disparity existed when recipient's income was 28% of the payor's and that recipient would not automatically forfeit her right to alimony should she engage in additional part-time work), *cert. granted*, 325 Md. 551, 601 A.2d 1114 (1992), *rescinded on other grounds*, 328 Md. 380, 614 A.2d 590 (1992); *Blaine v. Blaine*, 97 Md. App. 689, 708, 632 A.2d 191, 201 (1993) (finding that because the recipient spouse's income was equal to 22.7% of the payor's income, it was sufficient to support an award of indefinite alimony); *Rock v. Rock*, 86 Md. App. 598, 609-11, 587 A.2d 1133, 1138 (1991) (deferring to the lower court's decision to award indefinite alimony based on the fact that the recipient spouse did not have the skills or professional opportunities to earn more than 21.7% of the payor spouse's income); *Broseus v. Broseus*, 82 Md. App. 183, 196, 570 A.2d 874, 880-81 (1990) (upholding the lower court's grant of indefinite alimony to recipient spouse whose earnings were equal to 34.9% of the payor spouse); *Rogers*, 80 Md. App. at 591-92, 565 A.2d at 369-70 (noting that a gross disparity in income existed when the payor spouse's annual income exceeded \$100,000 and the payee, a full-time student whose income was pure conjecture, had never earned more than \$17,500); *Bricker v. Bricker*, 78 Md. App. 570, 577, 554 A.2d 444, 447 (1988) (finding that even when the recipient spouse maximized her income by working excessive hours, the recipient's income was only 35% of that earned by the payor spouse and therefore, finding an award of indefinite alimony proper); *Holston*, 58 Md. App. at 322-23, 473 A.2d at 466 (observing that even if the recipient spouse were able to re-enter the job market after 15 years, her earnings would be less than 15% of the payor spouse's); *Kennedy v. Kennedy*, 55 Md. App. 299, 306-07, 462 A.2d 1208, 1214 (1983) (upholding the trial court's finding that 34% difference in incomes resulted in unconscionably disparate standards of living, justifying an indefinite alimony award); see also *Strauss v. Strauss*, 101 Md. App. 490, 512, 647 A.2d 818, 829 (1994) (holding that the trial court abused its discretion in only basing the award of indefinite alimony on the recipient spouse's "expressed needs and her ability to meet those needs" without considering the parties' respective lifestyles); *Melrod v. Melrod*, 83 Md. App. 180, 195-97, 574 A.2d 1, 8-9 (1990) (finding that despite a short marriage, the disparity in income was so great that an award of indefinite alimony was not an abuse of discretion).
59. See *Doser v. Doser*, 106 Md. App. 329, 352, 664 A.2d 453, 464 (1995) (emphasizing that fixed-term rehabilitative alimony, is "clearly preferred to indefinite alimony"); see also *Tracey*, 328 Md. at 391, 614 A.2d at 596 (observing that the statutory scheme generally favors fixed-term or rehabilitative alimony which provides an opportunity for the recipient spouse to become self-supporting);

alimony was to serve as a "lifetime pension."<sup>60</sup>

*B. Categories of Alimony in Maryland*

Maryland courts are now vested with the power to grant awards of alimony.<sup>61</sup> Under section 11-101(c) of the Maryland Family Law

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*Rock*, 86 Md. App. at 609, 587 A.2d at 1138 (justifying the award of indefinite alimony because rehabilitative spousal support for a limited time would result in a gross inequity); *Blake v. Blake*, 81 Md. App. 712, 727, 596 A.2d 724, 731 (1990) (noting that although rehabilitative alimony has become the preferred legislative award, the trial judge was well suited to determine whether, given the time necessary to achieve further education or training, a 57 year-old spouse would be able to become self-supporting or was statutorily qualified to receive indefinite alimony); *Rogers*, 80 Md. App. at 591, 565 A.2d at 369 (declaring that the primary purpose of alimony is to be rehabilitative, as opposed to punitive or compensatory, so that the dependent spouse can become financially independent); *Bricker*, 78 Md. App. at 580, 554 A.2d at 449 (observing that the statutory preference for rehabilitative alimony dates back to a recommendation by the Governor's Commission on Domestic Relations Laws); *Turrisi v. Sanzaro*, 308 Md. 515, 530, 520 A.2d 1080, 1087-88 (1987) (acknowledging that while the General Assembly has embraced the concept of rehabilitative alimony, a trial court may reserve the right to award alimony in a case when one spouse was suffering from multiple sclerosis, even though that spouse was presently self-supporting); *Rosenberg v. Rosenberg*, 64 Md. App. 487, 536, 497 A.2d 485, 510 (1984) (concluding that although the principal function of alimony is rehabilitation, the lower court could find that the recipient spouse would never become sufficiently self-supporting to allow her to continue the lifestyle she shared with her husband of thirty years). *But cf.* *Coviello v. Coviello*, 91 Md. App. 638, 652, 605 A.2d 661, 668 (1992) (noting that if supported by the evidence, and within the purposes of the statute, simultaneous awards of rehabilitative and indefinite alimony are permissible).

60. *Holston*, 58 Md. App. at 321, 473 A.2d at 465-66. In *Holston*, the court of special appeals noted:

[T]he concept of alimony as a lifetime pension enabling the financially dependent spouse to maintain an accustomed standard of living has largely been superseded by the concept that the economically dependent spouse should be required to become self-supporting, even though that might result in a reduced standard of living.

*Id.* (citing the Governor's Commission on Domestic Relations Laws, Report on a Proposal Bill Relating to Alimony and Comment on a Proposed Bill Relating to the Decriminalization of Non-support, Beverly Anne Grover, Chairman, Jan. 18, 1980). More recently, the court of special appeals reiterated this standard in *Jensen v. Jensen*, 103 Md. App. 678, 692-93, 654 A.2d 914, 921 (1995) and *Campolattaro v. Campolattaro*, 66 Md. App. 68, 75, 502 A.2d 1068, 1072 (1986). For an enlightening discussion of alimony awards, see Charles J. Aldrich, Comment, *The Spousal Support Scheme in Ohio Under 3105:18: Trial Courts Have Too Much Judicial Discretion*, 22 OHIO N.U. L. REV. 815 (1996).

61. See MD. CODE ANN., FAM. LAW § 1-201(a)(2) (1998).

Article, an alimony award may be granted to an individual who is entitled to an annulment,<sup>62</sup> limited divorce,<sup>63</sup> or absolute divorce.<sup>64</sup> There are three categories of alimony that may be awarded in Maryland: (1) temporary alimony,<sup>65</sup> (2) statutory alimony,<sup>66</sup> and (3) indef-

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62. *See id.* § 11-101(a)(2)(i) "An 'annulment' differs from a divorce in that a divorce terminates a legal status, whereas an annulment establishes that a marital status never existed." BLACK'S LAW DICTIONARY 91 (6th ed. 1990) (citing *Wheaton v. Wheaton*, 432 P.2d 979 (Cal. 1967)).
63. *See MD. CODE ANN., FAM. LAW* § 11-101(a)(2)(ii).
64. *See id.* § 11-101(a)(2)(iii).
65. *See id.* § 11-102. Temporary alimony, or alimony *pendente lite*, is a form of alimony intended to temporarily stabilize the financial situation of a dependant spouse through the preliminary steps of a divorce proceeding. *See Guarino v. Guarino*, 112 Md. App. 1, 10, 684 A.2d 23, 27-28 (1996) (citing *Speropulos v. Speropulos*, 97 Md. App. 613, 617, 631 A.2d 514, 516 (1993)). Alimony *pendente lite* is defined as "[a]n allowance made pending a suit for divorce or separate maintenance including a reasonable allowance for preparation of the suit as well as for support." BLACK'S LAW DICTIONARY 47 (6th ed. 1990).
66. Underlying statutory alimony is the legislative intent to "change the focus of alimony from a form of lifetime pension toward a 'bridge' to self-sufficiency." *Jensen v. Jensen*, 103 Md. App. 678, 693, 654 A.2d 914, 921 (1994); *see also FADER & GILBERT, supra* note 28, § 4-7, at 142 (referring to alimony awarded under MD. CODE ANN., FAM. LAW § 11-106(b) as "statutory alimony"). Section 11-106(b) of the Maryland Family Law Article provides the following twelve factors for a court to consider in determining the amount of an alimony award:
- (1) the ability of the party seeking alimony to be wholly or partly self supporting;
  - (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
  - (3) the standard of living that the parties established during their marriage;
  - (4) the duration of the marriage;
  - (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
  - (6) the circumstances that contributed to the estrangement of the parties;
  - (7) the age of each party;
  - (8) the physical and mental condition of each party;
  - (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
  - (10) any agreement between the parties;
  - (11) the financial needs and financial resources of each party, including: (i) all income and assets, including property that does not produce income; (ii) any award made under §§ 8-205 and 8-208 of this article; (iii) the nature and amount of the financial obligations of each party; and (iv) the right of each party to receive retirement benefits; and
  - (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

inite alimony.<sup>67</sup>

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Md. CODE ANN., FAM. LAW § 11-106(b). Maryland courts have applied these factors in a number of cases. *See, e.g.,* Tracey v. Tracey, 328 Md. 380, 387-90, 614 A.2d 590, 594-96 (1992) (holding that income includes wages or salary from regular, full-time employment, not income from a second job), *cert. granted*, 325 Md. 551, 601 A.2d 1114 (1992), *rescinded on other grounds*, 328 Md. 380, 614 A.2d 590 (1992); Rock v. Rock, 86 Md. App. 598, 605, 587 A.2d 1133, 1137 (1991) (acknowledging that the Legislature made the circumstances contributing to the estrangement a factor in granting alimony in lieu of the relatively modern common law doctrine which precluded spousal support where the one seeking support was at fault); Alston v. Alston, 85 Md. App. 176, 189-90, 582 A.2d 574, 580-81 (1990) (affirming the trial court's finding that the recipient's non-economic contributions, such as taking care of the children, preparing meals, and maintaining a clean home, far exceeded the payor's contributions), *rev'd on other grounds*, 331 Md. 496, 629 A.2d 70 (1991); Blake v. Blake, 81 Md. App. 712, 728-29, 569 A.2d 724, 732 (1990) (finding that the trial judge was well suited to permit indefinite alimony when the evidence showed that the 57-year-old recipient spouse had a difficult time getting her present job and did not think that, given her age, she would return to school or be able to compete for jobs against younger people); Rogers v. Rogers, 80 Md. App. 575, 590-92, 565 A.2d 361, 369 (1989) (determining that even if the recipient spouse were to earn a college degree while receiving alimony, there would be no reason to expect that the respective standard of living of the parties would not be unconscionably disparate); Benkin v. Benkin, 71 Md. App. 191, 203, 524 A.2d 789, 794-95 (1987) (holding that the trial court should have explained why a woman who suffers from a longstanding arthritic condition should not be eligible for indefinite alimony given the difficulty she will likely experience in attempting to re-enter the job market). However, conditions aside from these factors may affect a court's alimony award. *See* Reuter v. Reuter, 102 Md. App. 212, 230-33, 649 A.2d 24, 32-34 (1994) (agreeing with the trial court that the recipient spouse is not required to act contrary to the best interests of her child in order to be self supporting); Cheryl Lynn Hepfer & Sherri Beth Ginsburg, *Alimony Update*, MD. BAR J., Mar./Apr. 1995, at 27, 28 ("The legislative intent regarding these factors is to cause the courts to focus on the rehabilitation of the financially dependent spouse rather than simply to assume that the financially dependent spouse is entitled to indefinite alimony."); Kathryn Lego Arminger, Note, *Antenuptial Agreements Waiving Alimony Are Not Void Per Se*: Frey v. Frey, 298 Md. 552, 471 A.2d 705 (1984), 14 U. BALT. L. REV. 200 (1984) (discussing the validity of antenuptial agreements waiving alimony).

67. Indefinite alimony, awarded on a case by case basis, is a form of alimony intended to prevent gross disparities in the income levels of the parties that will never be alleviated. *See* Tracey v. Tracey, 328 Md. 380, 393, 614 A.2d 590, 597 (1992) (28% disparity), *cert. granted*, 325 Md. 551, 601 A.2d 1114 (1992), *rescinded on other grounds*, 328 Md. 380, 614 A.2d 590 (1992); Crabill v. Crabill, 119 Md. App. 249, 266-67, 704 A.2d 532, 540-41 (1998); Caldwell v. Caldwell, 103 Md. App. 452, 464, 653 A.2d 994, 1000 (1995) (43% disparity); Blaine v. Blaine, 97 Md. App. 689, 708, 632 A.2d 191, 200 (1993) (23% disparity). *See*

Temporary alimony, or alimony *pendente lite*,<sup>68</sup> refers to the type of alimony a court may grant to provide a spouse with financial support in the interim between filing for divorce and final adjudication of the suit.<sup>69</sup> In order to award temporary alimony, Maryland law requires proof of a marriage, a pending divorce, proof of a financial need on the part of one party, and the ability to pay on the part of the other.<sup>70</sup> The amount of temporary alimony awarded, however, is not considered in the subsequent award of statutory alimony.<sup>71</sup>

Statutory alimony refers to the codification of various factors Maryland courts must consider in order to award alimony for a fixed period of time.<sup>72</sup> The principal purpose of statutory alimony is rehabilitation – to provide a recipient spouse with the opportunity to become financially self-supportive.<sup>73</sup> Before awarding statutory alimony, a trial court must consider the twelve factors set forth in section 11-106(b) of the Family Law Article.<sup>74</sup> While a court is not required to articulate a reason for its decisions regarding each of these twelve factors, it is required to clearly indicate that it has con-

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MD. CODE ANN., FAM. LAW, § 11-106(c) (1991), which provides:

The court may award alimony for an indefinite period, if the court finds that: (1) due to age, illness, infirmity or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be *unconscionably disparate*.

*Id.* (emphasis added).

68. See FADER & GILBERT, *supra* note 28, § 4-5, at 133 (citing BLACK'S LAW DICTIONARY 1020 (5th ed. 1979)).
69. See *supra* note 65.
70. See FADER & GILBERT, *supra* note 28, § 4-5(c)-(d), at 135-36. The decision to offset financial need and ability to pay is "based primarily on considerations of the reasonable needs of the recipient spouse, balanced against the other spouse's ability to pay." *Id.* at 136 (quoting *James v. James*, 96 Md. App. 439, 450-55, 625 A.2d 381, 386-89 (1993) (citing *Maynard v. Maynard*, 42 Md. App. 47, 51, 399 A.2d 900, 902 (1979))).
71. See *id.* at 134 (citing *Maynard*, 42 Md. App. at 52-53, 399 A.2d at 902-03).
72. See MD. CODE ANN., FAM. LAW, § 11-106(b)(1)-(12) (1998) (listing twelve factors a court must consider in awarding alimony). For a recitation of the twelve factors upon which an original grant of alimony is based, see *supra* note 66.
73. See *Holston v. Holston*, 58 Md. App. 308, 321, 473 A.2d 459, 465 (1984) (commenting that the primary function of alimony is rehabilitation) *superceded by statute on other grounds as explored in* *Quinn v. Quinn*, 83 Md. App. 460, 465 n.4, 575 A.2d 764, 766 n.4 (1990). For a discussion of rehabilitation as the primary purpose of alimony in Maryland, see *supra* note 59 and accompanying text.
74. See *supra* note 66.

sidered each factor in arriving at the amount awarded.<sup>75</sup>

The third type of alimony granted in Maryland, indefinite alimony, is a monetary payment to a dependent spouse which may continue indefinitely.<sup>76</sup> Indefinite alimony may only be awarded when, by reason of age or infirmity, a party seeking alimony will *never* become self-supportive, or when after becoming self-supportive, the standard of living between the two divorcing parties will be "unconscionably disparate."<sup>77</sup>

With the creation of statutory alimony in 1980, indefinite alimony has become an exception to the norm.<sup>78</sup> While Maryland's statutory regime for alimony takes a hybrid approach accepting both the goal of rehabilitation and the idea that certain circumstances call for an indefinite award the rehabilitation rationale has achieved primacy.<sup>79</sup> Nevertheless, alimony awards that extend over years of the parties' lives persist.<sup>80</sup> As the parties reach retirement age, courts have been forced to revisit these indefinite alimony awards as both the recipient and payor spouse alter their financial circumstances creating scenarios that may warrant modification of alimony payments.

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75. See *Doser v. Doser*, 106 Md. App. 329, 356, 664 A.2d 453, 466-67 (1995) (observing that the court must indicate that all factors were considered in the decision-making process, but formalistic language need not be used with respect to the decision regarding each factor); *Hollander v. Hollander*, 89 Md. App. 156, 176, 597 A.2d 1012, 1022 (1991) (noting that the trial judge "is not required to use a formal 'checklist' but may declare an award for alimony in any way that shows consideration of the necessary factors"); *Mount v. Mount*, 59 Md. App. 538, 552, 476 A.2d 1175, 1182 (1984) (declaring that the court is required to "consider all relevant factors, including [twelve] specific factors as required by the Maryland statute").

76. See MD. CODE ANN., FAM. LAW § 11-106(c) (1998) ("The court may award alimony for an indefinite period . . ."); *supra* note 62.

77. MD. CODE ANN., FAM. LAW § 11-106(c); see also *Rock v. Rock*, 86 Md. App. 598, 609, 587 A.2d 1133, 1138 (1991) (noting that indefinite alimony may be granted when it is impractical to expect a spouse to become self-supportive, or when alimony for a limited period would result in gross inequity); *Rosenberg v. Rosenberg*, 64 Md. App. 487, 531-32, 497 A.2d 485, 507 (1985) (holding that a wife of 30 years who possesses no specialized skills is unlikely to obtain a standard of living comparable to the one she enjoyed during marriage and any temporary alimony award would make the future standard of living of the parties unconscionably disparate).

78. See FADER & GILBERT, *supra* note 28, § 4-8, at 165.

79. For a discussion of Maryland courts' preference for rehabilitative, rather than indefinite, alimony awards, see *supra* notes 58-60 and accompanying text.

80. See *infra* notes 81-257 and accompanying text.

### III. MODIFYING ALIMONY

In Maryland, section 11-107 of the Family Law Article<sup>81</sup> permits a court to modify an alimony award originally granted under section 11-106.<sup>82</sup> A court is authorized to modify an award by either extending the period for which alimony is awarded<sup>83</sup> or by modifying the amount of the award.<sup>84</sup> Either type of modification requires a change in one or both of the parties' circumstances.<sup>85</sup>

Once an alimony award has been granted, it is critical for the practitioner to understand the factual circumstances courts have accepted to justify modifying alimony awards. The following section reviews the standard for modifying alimony in Maryland, changed circumstances,<sup>86</sup> and discusses arguments considered both by Maryland and other state courts.

#### A. *Changed Circumstances*

It is well established in Maryland that alimony awards are sub-

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81. See MD. CODE ANN., FAM. LAW § 11-107. The statute states the following:
- (a) *Extension of period.* – Subject to § 8-103 of this article, the court may extend the period for which alimony is awarded, if: (1) circumstances arise during the period that would lead to a harsh and inequitable result without an extension; and (2) the recipient petitions for an extension during the period. (b) *Modification of amount.* – Subject to § 8-103 of this article and on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require.
- Id.*
82. See *id.*
83. See *id.* § 11-107(a).
84. See *id.* § 11-107(b).
85. See *Blaine v. Blaine*, 336 Md. 49, 64, 646 A.2d 413, 420 (1993); see also *Brodak v. Brodak*, 294 Md. 10, 29, 447 A.2d 847, 856 (1982); *Garner v. Garner*, 257 Md. 723, 727–28, 264 A.2d 858, 860 (1970); *Benkin v. Benkin*, 71 Md. App. 191, 207–08, 524 A.2d 789, 797 (1986); *Lott v. Lott*, 17 Md. App. 440, 444, 302 A.2d 666, 668 (1973); *Verges v. Verges*, 13 Md. App. 608, 615, 284 A.2d 451, 454 (1971).
86. See MD. CODE ANN., FAM. LAW § 11-107(b). Some states, however, have adopted a much more restrictive standard that must be met before alimony will be modified. See Scott Bassett, *Changing Circumstances, Changing Agreements: Standards for Modification are Uniform, but how the Courts Apply Them Varies*, 8 FAM. ADVOC. 29, 29 (1986). For example, Arizona, Illinois, Kentucky, and Montana require a party to show that it would be unconscionable to continue the original award based on the change in circumstances. See *id.* On the other hand, Massachusetts is one of the few states that allow automatic modification of alimony awards based on an increase in the payor spouse's income. See *Wooters v. Wooters*, 677 N.E.2d 704, 705–06 (Mass. App. Ct. 1997).

ject to revision based on a change in circumstances.<sup>87</sup> Indeed, almost every jurisdiction in the United States permits its courts to modify alimony awards when a party can demonstrate a change in circumstance.<sup>88</sup> In Maryland, an award of alimony is subject to modification "upon the motion of either party."<sup>89</sup> The proponent of modification "must show a change in circumstances either with respect to the [spouse's] ability to pay support or in the [dependant spouse's] need for support or both."<sup>90</sup> What amounts to a substan-

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87. See *Jensen v. Jensen*, 103 Md. App. 678, 689, 645 A.2d 914, 920 (1995) (concluding that a recipient spouse was entitled to reinstatement of an alimony award based on a change in circumstances). The change in circumstances standard is well-documented in Maryland jurisprudence. See *Stansbury v. Stansbury*, 223 Md. 475, 477, 164 A.2d 877, 878 (1960) (noting that a material change in circumstances justifies a modification of alimony); *Warren v. Warren*, 218 Md. 212, 217, 146 A.2d 34, 37 (1958) (holding that remarriage without further evidence of a substantive change in payor's financial position provided insufficient grounds for modification); *Langrell v. Langrell*, 145 Md. 340, 344, 125 A. 695, 697 (1924) (declaring that without a finding of materially different circumstances a petition for a reduction in alimony should not have been granted); *Young v. Young*, 161 Md. App. 103, 112, 484 A.2d 1054, 1059 (1984) (citing *Brodak*, 294 Md. at 10, 447 A.2d at 847) (declaring that the recipient spouse has the burden of proving a change in circumstance at time modification is sought); *Cole v. Cole*, 44 Md. App. 935, 939, 409 A.2d 734, 738 (1979) (observing that a material change in circumstances justifies a modification of alimony); *Meyer v. Meyer*, 41 Md. App. 13, 18, 394 A.2d 1220, 1223 (1978) (noting that "[s]ubstantial changes in needs, financial conditions, and circumstances" may justify modification or termination of alimony); cf. *Garner*, 257 Md. at 728, 264 A.2d at 860 (holding, in an appeal from a divorce decree, that a modification in alimony may be warranted when the payor is no longer paying recipient spouse's expenses at a mental institution); *Gebhard v. Gebhard*, 253 Md. 125, 131, 252 A.2d 171, 174 (1969) (declaring, in an appeal from a divorce decree, that an alimony decree is subject to modification as circumstances change); *Moore v. Moore*, 218 Md. 218, 221, 145 A.2d 764, 765 (1958) (noting, in the context of temporary alimony modification, a change in circumstances could supply grounds for modification); *Lopez v. Lopez*, 206 Md. 509, 520, 112 A.2d 466, 471 (1955) (observing, in an appeal from a divorce decree, that alimony may be modified upward in light of discovery that payor's income warrants such revision). But see *Lott*, 17 Md. App. at 444, 302 A.2d at 668-69 (holding that modification upward of alimony payments was proper even though court found recipient's needs had not substantially changed).
88. See *Bassett*, *supra* note 86, at 29. Forty-six jurisdictions in the United States have statutory provisions authorizing the modification of alimony under changed circumstances. See *id.* at 29-31.
89. 8A MARYLAND LAW ENCYCLOPEDIA § 178 (1985).
90. *Meredith v. Meredith*, 614 A.2d 920, 921-22 (D.C. 1992) (quoting *Alibrando v. Alibrando*, 375 A.2d 9, 15 (D.C. 1977)). A court may increase or reduce a sup-

tial<sup>91</sup> change is left to the discretion of the court.<sup>92</sup>

### 1. Changed Circumstances Cases in Maryland

In reviewing whether a recipient's alimony award should be increased in relation to the circumstances of the parties, Maryland courts will consider such factors as the physical condition of the parties, their ability to work, station in life, and each spouse's wealth and earning capacity.<sup>93</sup> Maryland courts have provided examples of situations that satisfy the requisite change in circumstances needed to increase a recipient spouse's alimony award.<sup>94</sup> For example, an increase has been granted when there was a showing of a substantial increase in the payor spouse's income,<sup>95</sup> and also when the recipient

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port obligation when there is a showing of a change in circumstances justifying modification. *See Garner*, 257 Md. at 728, 264 A.2d at 860 (stating that alimony modification may be warranted when the payor spouse is no longer paying the recipient spouse's expenses at a mental institution); *Crandall v. Crandall*, 14 Md. App. 476, 480, 287 A.2d 326, 328 (1972) (noting that alimony awards are never permanent because if the circumstances change, then the awards are subject to modification); *Verges*, 13 Md. App. at 613-15, 284 A.2d at 453-54 (holding that, based on the change in circumstances, alimony modification was warranted because payor spouse was in failing health and decreased his work hours). In *Lott*, 17 Md. App. at 440, 302 A.2d at 666, the Court of Special Appeals of Maryland addressed the question of whether a substantial change in the payor spouse's income was sufficient to warrant modification of the alimony award. *See id.* at 447, 302 A.2d at 670. The court held that the change in the payor spouse's earnings alone was sufficient to increase the recipient spouse's alimony subsidy, regardless of the recipient spouse's financial situation. *See id.* at 447-48, 302 A.2d at 670-71. The court explained that it is not necessary for both parties to undergo a change in circumstances, because a change in the situation of one of the parties is bound to affect the other party in one way or another. *See id.* at 445, 302 A.2d at 669.

91. It should be noted that Maryland courts have alternatively used substantial, material, or no term at all to modify the change in circumstance standard. *See supra* note 86 and accompanying text.

92. *See Lott*, 17 Md. App. at 447, 302 A.2d at 670.

93. *See Brodak v. Brodak*, 294 Md. 10, 28, 447 A.2d 847, 856 (1982) (holding that a court should also consider the length of time the parties lived together, circumstances leading to divorce, and fault); *Lott*, 17 Md. App. at 450, 320 A.2d at 671-72 (observing that a court should also consider the recipient spouse's assets and income).

94. *See Blaine v. Blaine*, 336 Md. 49, 80, 646 A.2d 413, 428 (1994) (holding that the recipient spouse's failure to obtain a degree was sufficient to modify alimony); *Lott*, 17 Md. App. at 447, 302 A.2d at 670 (holding that a substantial increase in the payor spouse's income was sufficient to justify an increase in alimony).

95. *See Lott*, 17 Md. App. at 447, 302 A.2d at 670 (holding that an increase in the payor spouse's income is, in some cases, sufficient to justify an increase in the

spouse made as much economic progress as possible, but failed to achieve the court's expectations from when it initially granted the award.<sup>96</sup> Alternatively, when the payor spouse remarries and consequently incurs greater financial responsibilities, a payor spouse may assert that the change in circumstances should be considered in support of a petition to reduce the alimony payments.<sup>97</sup> Numerous reasons exist that do not warrant modifying an alimony award at all. For example, the unchaste conduct of a spouse<sup>98</sup> and a spouse's abuse of alcohol<sup>99</sup> have been deemed inadequate to justify a change in the amount of support payments.<sup>100</sup>

Practitioners should be prepared to address complicated factual situations in which the ideals underlying rehabilitation may be abandoned by a court. Such a situation arose in the Court of Appeals of Maryland's decision in *Blaine v. Blaine*.<sup>101</sup> The *Blaine* case involved a request for alimony modification under section 11-107(a) of the Family Law Article,<sup>102</sup> which permits a court to extend the period of time for which alimony payments must be made when "circumstances arise during the period that would lead to a harsh and inequitable result without an extension."<sup>103</sup> Mrs. Blaine had been awarded rehabilitative alimony<sup>104</sup> based on the assumption that by

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amount of alimony paid whether or not the recipient spouse's needs have changed).

96. See *Blaine*, 336 Md. at 74-75, 646 A.2d at 425 (holding that the recipient spouse's failure to achieve a degree contemplated at the time of divorce and the subsequent failure to gain employment constituted a change in circumstances sufficient to warrant modification of the divorce decree). For a further discussion of *Blaine*, see *infra* notes 101-12 and accompanying text.
97. See *Lott*, 17 Md. App. at 449, 302 A.2d at 671.
98. See *Meyer v. Meyer*, 41 Md. App. 13, 21, 394 A.2d 1220, 1224 (1978) (holding that the recipient spouse's alimony award was not subject to reduction because of her unchaste conduct subsequent to divorce).
99. See *Roberts v. Roberts*, 35 Md. App. 497, 506, 371 A.2d 689, 694 (1977) (holding that alcoholism is not considered "flagrant misconduct" justifying the reduction of alimony).
100. See *Meyer*, 41 Md. App. at 21, 394 A.2d at 1224; *Roberts*, 35 Md. App. at 506, 371 A.2d at 694.
101. 336 Md. 49, 646 A.2d 413 (1994).
102. See *supra* note 81 and accompanying text.
103. *Blaine*, 336 Md. at 56, 646 A.2d at 416 (quoting MD. CODE ANN., FAM. LAW § 11-107(a) (1991)). Dr. Blaine's income increased substantially in the years after the divorce, while Mrs. Blaine continued to experience financial difficulties. See *id.* at 58, 646 A.2d at 417.
104. For a discussion of rehabilitative alimony, see *supra* notes 59-60 and accompanying text.

obtaining a professional degree, she would eventually increase her earnings and eliminate her need for support payments.<sup>105</sup> However, as the fixed period of time during which she would receive support approached its end,<sup>106</sup> it became apparent that Mrs. Blaine would not attain the level of income anticipated at the time of divorce.<sup>107</sup> The domestic relations master recommended extending Mr. Blaine's obligation to pay alimony for an indefinite period.<sup>108</sup> The trial court affirmed the master's recommendation and the court of special appeals upheld the ruling.<sup>109</sup> The court of appeals concluded that Mrs. Blaine's situation, coupled with a failing job market, satisfied the requisite change in circumstances and awarded her indefinite alimony.<sup>110</sup>

Arguably, the incentive to become self-supporting after divorce is diminished when a court provides indefinite alimony to those who fail to achieve their financial goals.<sup>111</sup> Although the recipient spouse would retain the burden of proving that efforts had been made toward becoming self-supporting, a mere showing of a good faith attempt may oblige a payor spouse to continue alimony payments indefinitely.<sup>112</sup> Though the *Blaine* decision must be limited to

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105. *See Blaine*, 336 Md. at 57-58, 646 A.2d at 417.

106. The initial award of alimony was \$800 per month for five years. *See id.* at 58, 646 A.2d at 417.

107. *See id.* at 58-59, 646 A.2d at 417. Mrs. Blaine had hoped that after receiving her master's degree, she would be able to earn an annual salary of approximately \$40,000. *See id.* at 58, 646 A.2d at 417. However, an economic recession caused the narrow field she was attempting to enter to become static. *See id.* at 59, 646 A.2d at 417. Furthermore, her degree was not the equivalent of a Master of Social Work, which further limited her ability to branch out into teaching or psychological treatment. *See id.* These factors caused her to reexamine her financial status and conclude that termination of rehabilitative alimony payments would impair her unstable economic status. *See id.* at 58-59, 646 A.2d at 417-18.

108. *See id.* at 60, 646 A.2d at 418.

109. *See id.*

110. *See id.* at 75-76, 646 A.2d at 425-26; *see also Tracey v. Tracey*, 89 Md. App. 701, 708-12, 599 A.2d 856, 860-61 (1991) (holding that the recipient spouse was entitled to indefinite alimony when it was shown that her income from two jobs was equal to only one-third of her former spouse's sole source of income), *cert. granted*, 325 Md. 551, 601 A.2d 1114 (1992), *rescinded on other grounds*, 328 Md. 380, 614 A.2d 590 (1992).

111. *See Hepfer & Ginsburg*, *supra* note 66, at 32.

112. *See id.* In their analysis, Hepfer and Ginsburg refer to the dissenting opinion by Judge Bell, in *Blaine*, that attacked the majority's reasoning. *See id.* Judge Bell asserted that a trial judge could, as a result of the majority's decision, award indefinite alimony "if the payor former spouse were to hit the lottery,

its facts, it provides significant commentary as to both the fundamental nature of support obligations and the level of judicial discretion exercised by Maryland courts.

## 2. Can Retirement of the Payor Result in Changed Circumstances?

There are several cases that deal with the elements necessary for altering an alimony award for the benefit of the recipient spouse.<sup>113</sup> However, little attention has been given to the hardship a payor spouse must endure throughout that spouse's lifetime.<sup>114</sup> Although alimony is no longer considered a lifetime pension for the payee spouse,<sup>115</sup> there appears to be little support for modifying or terminating the payor spouse's obligation.<sup>116</sup> One scenario that appears to be gaining acceptance by courts outside Maryland arises when the payor spouse retires. The next section discusses how other jurisdictions deal with retirement as a factor in alimony modification cases. In Maryland, however, the effect of retirement on a petition to modify alimony has never been addressed.<sup>117</sup>

### *a. Voluntary Retirement as a Factor in Alimony Modification Cases*

A number of jurisdictions have addressed the issue of whether voluntary retirement is a valid reason to reduce alimony payments.<sup>118</sup> Some have concluded that voluntary retirement may con-

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settle a lawsuit involving personal injury resulting from an accident occurring subsequent to the divorce, inherit funds after the divorce, or, as in this case, increase his or her earnings significantly." *Blaine*, 336 Md. at 83, 646 A.2d at 430 (Bell, J., dissenting).

113. See *supra* notes 93–101 and accompanying text.

114. See *Blaine*, 336 Md. at 83, 646 A.2d at 430 (1994) (Bell, J., dissenting) (arguing that payor spouse is giving a lifetime pension to dependent spouse); *Warren v. Warren*, 218 Md. 212, 216, 146 A.2d 34, 36–37 (1958) (noting that changed financial or other conditions of the payor spouse such as a new wife or birth of a child was not a sufficient cause for reduction of alimony to the first wife).

115. See *Holston v. Holston*, 58 Md. App. 308, 321, 473 A.2d 459, 465–66 (1984).

116. See *supra* note 114 and accompanying text.

117. For a discussion of income imputed to a retired payor spouse in the modification of an initial grant of alimony in Maryland, see *infra* notes 138–50 and accompanying text.

118. See *Swayze v. Swayze*, 408 A.2d 1, 8 (Conn. 1978) (noting that early retirement constituted changed circumstances and warranted modification in alimony payments); *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992) (noting that voluntary retirement was a factor to be considered in modifying alimony obligation); *Silvan v. Silvan*, 632 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1993) (“[G]ood faith retirement at age sixty-five may constitute changed circumstances for purposes of modification of alimony.”).

stitute a change of circumstances sufficient to reduce alimony payments.<sup>119</sup> Other courts have held that an early or voluntary retirement does not rise to the level of a change in circumstances and have elected to impute income to the payor spouse.<sup>120</sup>

In *Pimm v. Pimm*,<sup>121</sup> the Supreme Court of Florida addressed whether a husband's retirement constituted a change of circumstances that would justify reducing his alimony payments.<sup>122</sup> Answering in the affirmative, the court concluded that the retirement need only be reasonable.<sup>123</sup> In assessing reasonableness, the court considered "the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire."<sup>124</sup> The court observed that sixty-five years of age is widely accepted as the normal age of retirement<sup>125</sup> and that an individual voluntarily retiring before that age would face a "substantial burden" in demonstrating that the retirement was reasonable.<sup>126</sup> However, even when a payor reaches age

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119. See, e.g., *In re Marriage of Schrimpf*, 687 N.E.2d 171, 175 (Ill. Ct. App. 1997) (setting forth factors, among them retirement, to be considered in determining whether a reduction in alimony is appropriate); *Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982) (relying upon the payor spouse's retirement as well as other factors in finding changed circumstances).

120. See, e.g., *In re Marriage of Stephenson*, 46 Cal. Rptr. 2d 8, 14-15 (Cal. Ct. App. 1995) (providing that a court may impute income to a payor spouse who elects early retirement); *Leslie v. Leslie*, 827 S.W.2d 180, 183 (Mo. 1992) (stating that voluntary loss of employment is not the type of circumstances that allows for a modification of alimony); *Stubblebine v. Stubblebine*, 473 S.E.2d 72, 74 (Va. Ct. App. 1996) (imputing income when the payor spouse had made an employment decision to the detriment of the recipient spouse).

121. 601 So. 2d 534 (Fla. 1992).

122. See *id.* at 535.

123. See *id.* at 537.

124. *Id.*

125. See *id.* The court declared:

The age of sixty-five years has become the traditional and presumptive age of retirement for American workers: many pension benefits maximize at the age of sixty-five; taxpayers receive an additional federal tax credit at the age of sixty-five in recognition of the reduced income which accompanies retirement; under the Social Security Act the definition of "retirement age" includes "65 years of age"; and the Employee Retirement Income Security Act of 1974 defines "normal retirement age" as including the "time a plan participant attains age 65."

*Id.* (footnotes omitted).

126. *Id.*

sixty-five, retirement does not become presumptively reasonable.<sup>127</sup> Instead, a "court should consider the needs of the receiving spouse and the impact a termination or reduction of alimony would have on him or her."<sup>128</sup> Other courts have also found that voluntary retirement may amount to a sufficient change of circumstances, but have emphasized principles of equity in reaching their result.

In *Misinonile v. Misinonile*,<sup>129</sup> the Appellate Court of Connecticut held that voluntary retirement could offer a sufficient basis for finding a substantial change of circumstances.<sup>130</sup> Reviewing the trial record, the court emphasized that the payor spouse, who had retired at sixty-eight, had not done so to avoid or reduce his alimony payments.<sup>131</sup> The *Misinonile* court emphasized that the payor spouse could have retired six years earlier and that he had health problems.<sup>132</sup> The court concluded that "[u]nder the circumstances, it [was] not unreasonable for the defendant . . . to be 'tired' and to seek the less strenuous and demanding lifestyle offered by retirement."<sup>133</sup>

However, as *Smith v. Smith*<sup>134</sup> makes clear, a payor spouse needs to do more than simply invoke the magic word "retirement."<sup>135</sup> In *Smith*, the Supreme Judicial Court of Maine held that the payor spouse, in using the word "retirement" to describe his voluntary departure from employment and subsequent decrease in income, was not given a preferred status.<sup>136</sup> Nonetheless, the court acknowledged the weight to be given to such factors as the age and health of the parties, the circumstances of estrangement, and their station in life, concluding that the payor spouse, a sixty-four-year-old doctor in failing health, was entitled to a reduction in alimony payments.<sup>137</sup>

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127. *See id.*

128. *Id.*; *see also* Deegan v. Deegan, 603 A.2d 542, 546 (N.J. Super. Ct. App. Div. 1992) (holding that a trial court must determine "whether the advantage to the retiring spouse substantially outweighs the disadvantage to the [recipient] spouse").

129. 645 A.2d 1024 (Conn. Ct. App. 1994).

130. *See id.* at 1026.

131. *See id.* at 1027.

132. *See id.*

133. *Id.*

134. 419 A.2d 1035 (Me. 1980).

135. *See id.* at 1038.

136. *See id.* (quoting *In re Marriage of Smith*, 396 N.E.2d 859, 863 (Ill. App. Ct. 1979)).

137. *See id.* at 1039.

Numerous jurisdictions impute income to a payor spouse when the payor spouse undertakes an act that results in reduction or loss of income.<sup>138</sup> In *Leslie v. Leslie*,<sup>139</sup> the former husband sought modification of his alimony based on the fact that his retirement resulted in a reduced income.<sup>140</sup> The husband claimed that his employer planned to layoff his work shift and that his retirement was therefore involuntary.<sup>141</sup> The Supreme Court of Missouri found the husband's argument on this point unpersuasive.<sup>142</sup> Rather, the court surmised that the husband's actions were voluntary.<sup>143</sup>

Looking to prior case law, the *Leslie* court stated the general rule in Missouri that "a voluntary loss of employment is not a substantial and continuing change of circumstances such as to allow modification."<sup>144</sup> The rule operates even when an individual's decision to retire is coaxed by rumors of imminent layoffs.<sup>145</sup> Accordingly, when a payor spouse elects to retire, income can be imputed to the spouse "according to the spouse's ability to earn by using his or her best efforts to gain employment suitable to the spouse's capabilities."<sup>146</sup>

Another case emphasizing the payor spouse's earning capacity

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138. See, e.g., *Grady v. Grady*, 747 S.W.2d 77, 78 (Ark. 1988) (finding that a court, in proper circumstances, may impute income to a spouse according to what could be earned by the use of best efforts to gain employment suitable to the payor spouse's ability); *Cohen v. Cohen*, 76 Cal. Rptr. 2d 866, 870 (Cal. Ct. App. 1998) (holding that when the ability and opportunity to work are present, earning capacity may properly be imputed for purposes of calculating child or spousal support even if the party lacks willingness to find more lucrative work).

139. 827 S.W.2d 180 (Mo. 1992).

140. See *id.* at 183.

141. See *id.*

142. See *id.* The trial court record reflected that Mr. Leslie could have transferred to another shift or plant, and that he in fact continued to work for his employer after retirement so that he could train his replacement. See *id.*

143. See *id.*

144. *Id.* (citing *Hughes v. Hughes*, 761 S.W.2d 274, 277 (Mo. Ct. App. 1988); *Overstreet v. Overstreet*, 693 S.W.2d 242, 245 (Mo. Ct. App. 1985); *Foster v. Foster*, 537 S.W.2d 833, 836 (Mo. Ct. App. 1976)).

145. See *id.*

146. *Id.* (citing *Hughes*, 761 S.W.2d at 276; *Klinge v. Klinge*, 554 S.W.2d 474, 476 (Mo. Ct. App. 1977)). The *Hughes* court emphasized that it is the payor spouse's "past, present, and anticipated *earning capacity* [that] serve[s] as competent evidence of [the spouse's] ability to pay the amounts awarded." *Hughes*, 761 S.W.2d at 276.

is *In re Marriage of Stephenson*,<sup>147</sup> in which the Court of Appeals of California articulated an "earning capacity" rule in the language that follows:

[W]here the supporting spouse elects to retire early and to not seek reasonably remunerative employment available under the circumstances, then the court can properly impute income to that supporting spouse given that spouse's obligation to provide support and the general notion a supporting spouse must make reasonable efforts to obtain employment which would generate a reasonable income under the circumstances to meet a continuing support obligation.<sup>148</sup>

Noteworthy is the court's admonition that a payor spouse, who is of retirement age, need not feel compelled to work just to maintain his alimony obligation.<sup>149</sup> Rather, a court must take into consideration "the totality of the surrounding circumstances unique to each individual case, including earning capacity."<sup>150</sup>

Though not addressed in the alimony modification context, recently at issue in a Maryland case was the effect of retirement of the payor spouse in an initial grant of alimony. In *Crabill v. Crabill*,<sup>151</sup> the Court of Special Appeals of Maryland addressed the issue of whether income should be imputed to a payor spouse who retired at the age of fifty-three based on past earnings as a part-time painter.<sup>152</sup> After hearing expert testimony regarding a painter's potential earning capacity, the domestic relations master imputed the supplemental income to the payor spouse.<sup>153</sup> Although affirming the master's recommendation, the trial judge reduced the amount.<sup>154</sup>

In an unsuccessful attempt to argue that it was "improper for a court to impute income to a voluntarily retired person,"<sup>155</sup> *Crabill* failed to cite Maryland authority, relying instead on *Commonwealth v.*

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147. 46 Cal. Rptr. 2d 8 (Cal. Ct. App. 1995).

148. *Id.* at 14.

149. *See id.* at 15 n.4.

150. *Id.*

151. 119 Md. App. 249, 704 A.2d 532 (1998).

152. *See id.* at 252, 704 A.2d at 533. The court reviewed the original action for absolute divorce, alimony, and child support. *See id.* The payor had retired from his employment with the District of Columbia Fire Department. *See id.* at 255, 704 A.2d at 535.

153. *See id.* at 257, 704 A.2d at 536.

154. *See id.* at 262, 704 A.2d at 538.

155. *Id.*

*Ross*.<sup>156</sup> The court of special appeals distinguished the two cases on several grounds.<sup>157</sup> The payor spouse in *Ross* was sixty-five years of age and in poor health,<sup>158</sup> whereas Crabill was considerably younger and in good health.<sup>159</sup> The parties in *Ross* had lived together after the payor spouse had retired,<sup>160</sup> while the Crabills had not.<sup>161</sup> The *Ross* court observed that "when retirement reduces the income of the couple, the wife who subsequently leaves the marital domicile cannot be expected to be restored to the standard of living she enjoyed while her husband was working."<sup>162</sup> Although seemingly inapposite in most respects, the *Crabill* court nonetheless found that *Ross* actually supported the imputing of income under Mr. Crabill's circumstances and affirmed the lower court's ruling.<sup>163</sup>

While *Crabill's* application to alimony modification may be strained, it does provide two guideposts for the practitioner. First, the *Crabill* court emphasized that the husband in *Ross* was sixty-five years old.<sup>164</sup> Second, the court clearly took into consideration the health of the payor spouse.<sup>165</sup> Thus, it appears as though Maryland courts are likely to give weight to a payor spouse's overall physical capacity in ruling on a modification petition. Courts in jurisdictions outside Maryland have also stressed the importance of the payor spouse's physical capacity.<sup>166</sup>

#### *b. Diminished Physical Capacity of Payor Spouse*

When a serious health problem impedes the payor spouse's ability to pay alimony, a court may modify the payment amount.<sup>167</sup>

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156. 213 A.2d 135 (Pa. Super. Ct. 1965).

157. See *Crabill*, 119 Md. App. at 262-63, 704 A.2d at 538-39.

158. See *id.* at 262, 704 A.2d at 538 (citation omitted).

159. See *id.* at 263, 704 A.2d at 539.

160. See *id.* at 262, 704 A.2d at 538 (citation omitted).

161. See *id.* at 263, 704 A.2d at 539.

162. *Id.* at 262, 704 A.2d at 538-39 (citing *Commonwealth v. Ross*, 213 A.2d 135, 138 (Pa. Super. Ct. 1965)).

163. See *id.* at 263, 704 A.2d at 539. The court observed that, "[the trial court] is not restricted by the actual income of the husband, but may take into consideration his assets, earning capacity and other attendant circumstances." *Id.* (quoting *Ross*, 213 A.2d at 137).

164. See *id.* at 262, 704 A.2d at 538; see also *Pimm v. Pimm*, 601 So. 2d 534, 537 (Fla. 1992) (noting that "[t]he age of sixty-five years has become the traditional and presumptive age of retirement for American workers").

165. See *Crabill*, 119 Md. App. at 262, 704 A.2d at 538.

166. See *infra* notes 167-77 and accompanying text.

167. See *Hampton v. Hampton*, 720 So. 2d 949, 952 (Ala. Civ. App. 1998) (holding that a stroke causing brain damage suffered by a payor spouse constituted a

In *Hampton v. Hampton*,<sup>168</sup> the Court of Civil Appeals of Alabama held that the payor spouse's stroke, causing brain damage, constituted a material change in circumstances that warranted the trial court to reduce the amount of his alimony payments.<sup>169</sup> The *Hampton* court considered "such factors as the recipient spouse's financial needs, the amount of the estate of each spouse, the ability of the payor spouse to respond to the recipient spouse's needs, the ability of each spouse to earn income, and the remarriage of either party" in determining whether it was appropriate to reduce the former husband's alimony payments.<sup>170</sup> The court also noted that the burden of proving that a sufficient change in circumstances had occurred was on the party attempting to modify the alimony award.<sup>171</sup>

While it has been established that physical deterioration, failing health, and age may constitute grounds for modifying alimony payments, these circumstances do not guarantee modification.<sup>172</sup> For example, in *Sifers v. Sifers*,<sup>173</sup> the Missouri Court of Appeals held that

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material change in circumstances warranting modification of alimony); *Swayze v. Swayze*, 408 A.2d 1, 8 (Conn. 1978) (holding that the trial court properly modified alimony payments by the payor spouse due to changed circumstances as a result of severe and debilitating medical problems); *Bronson v. Bronson*, 471 A.2d 977, 979 (Conn. App. Ct. 1984) (finding a substantial change in circumstances warranted alimony modification when a payor spouse's physical disability arose after the original alimony decree); *In re Marriage of Charles J. Columbo*, 555 N.E.2d 56, 57 (Ill. Ct. App. 1990) (stating that a payor spouse's retirement, three months prior to his sixty-fifth birthday due to a heart condition, was a substantial change in circumstances warranting modification of alimony); see also 24 AM. JUR. 2D *Divorce and Separation* §§ 827-28 (1998) (discussing changes in the financial circumstances of a payor spouse which warranted modification of alimony payments).

168. 720 So. 2d 949 (Ala. Civ. App. 1998).

169. See *id.* at 952.

170. *Id.* (citing *Swain v. Swain*, 660 So. 2d 1356 (Ala. Civ. App. 1995)).

171. See *id.*

172. See *Silver v. Silver*, 113 So. 2d 921, 923-24 (Ala. 1959) (holding that a payor spouse's physical condition did not warrant modification of alimony); *Galligher v. Galligher*, 527 So. 2d 858, 860-61 (Fla. Dist. Ct. App. 1988) (holding that the payor's physical condition that inhibited his ability to work overtime did not warrant reduction in alimony payments); *Sifers v. Sifers*, 544 S.W.2d 269 (Mo. Ct. App. 1976) (holding that modification was unwarranted when husband failed to demonstrate that he was in poor health or unable to obtain employment after losing his job); *Saul v. Saul*, 107 A.2d 182, 183-84 (Pa. Super. Ct. 1954) (holding that the payor spouse's heart attack and hospital stay did not constitute a change in circumstances warranting modification because his earning capacity had not been substantially reduced).

173. 544 S.W.2d 269 (Mo. Ct. App. 1976).

a sixty-two-year-old man who was unable to continue working in his usual capacity<sup>174</sup> had not sustained the burden of establishing a change in circumstances sufficient to justify reducing his support obligations.<sup>175</sup> The court based its conclusion on the payor spouse's lack of evidence demonstrating a physical inability to work in other fields of employment.<sup>176</sup> Under the court's reasoning, the payor spouse had to prove an inability to work in any other capacity and provide evidence that his voluntary election to retire was not an attempt to escape his support obligations.<sup>177</sup> Thus, *Sifers* illustrates a subjective element courts often consider in deciding whether to modify an alimony award—the payor's motivation for retiring.

*c. Good Faith Retirement*

Some jurisdictions focus on whether a payor spouse's voluntary decision to retire is made in good faith. In these jurisdictions, good faith is an important consideration when deciding whether to permit or deny an alimony reduction based on a payor spouse's retirement.<sup>178</sup> Generally, a self-imposed decrease in or cessation of income of a payor spouse for the purpose of avoiding an alimony obligation does not constitute a material change in circumstances that would justify reducing alimony payments.<sup>179</sup> However, when a

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174. *See id.* at 269–70. The payor spouse had undergone treatment for a malignant kidney, because of which he had lost his job. *See id.*

175. *See id.*

176. *See id.* at 270. The payor spouse had worked in various positions in the chocolate industry. *See id.* He had applied for employment only within that field. *See id.*

177. *See id.*; *see also Saul*, 107 A.2d at 183–84 (finding that the payor spouse's changed circumstances were insufficient to warrant modification when it appeared that he deliberately changed his circumstances to avoid support obligations).

178. *See Tydings v. Tydings*, 349 A.2d 462, 464 (D.C. Ct. App. 1975) (holding that a payor spouse's decision to voluntarily retire, absent a substantial showing of good faith, did not constitute a change of circumstances warranting a modification of alimony); *see also McFadden v. McFadden*, 563 A.2d 180, 183 (Pa. Super. Ct. 1989) (McEwen, J., concurring in part and dissenting in part) (contending that voluntary retirement constitutes a change in circumstances for purposes of modifying alimony decrees without determining whether retirement was made in good faith); *cf. Silvan v. Sylvan*, 632 A.2d 528, 530 (N.J. Super. Ct. App. Div. 1993) (concluding that good faith retirement at age sixty-five may constitute a change in circumstances warranting a modification in alimony payments).

179. *See Tydings*, 349 A.2d at 463; *Blowitz v. Blowitz*, 221 N.E.2d 160, 164 (Ill. Ct. App. 1966); *Crosby v. Crosby*, 29 S.E.2d 241, 243 (Va. 1944); *Lambert v. Lambert*, 403 P.2d 664, 667–68 (Wash. 1965). For a discussion of voluntary retire-

payor spouse has retired in good faith, and not for the purpose of avoiding an alimony obligation, retirement may satisfy the material change in circumstances requirement and result in alimony reductions.<sup>180</sup>

In *Silvan v. Sylvan*,<sup>181</sup> the payor spouse retired at the age of sixty-three and one-half years and sought reduction of alimony.<sup>182</sup> The trial court denied a motion for modification.<sup>183</sup> Reversing the trial court, the Superior Court of New Jersey concluded the "motivation which led to the decision to retire" was one of several considerations that suggested the need for reduction in alimony payments.<sup>184</sup>

Similarly, in *McFadden v. McFadden*,<sup>185</sup> the Superior Court of Pennsylvania held that changed financial circumstances caused by a payor spouse's voluntary retirement should be considered when assessing a petition for alimony modification.<sup>186</sup> Noting that the master specifically found that the retirement was in "good faith,"<sup>187</sup> the court reasoned that if the parties had not divorced, and if the payor spouse had planned to retire at a certain age, the recipient spouse could not have complained that the household income would have been reduced by the payor spouse's retirement.<sup>188</sup> Therefore, if a retirement after divorce is made in good faith, and not in an effort to avoid legal obligations, an alimony recipient should have no greater claim than if no divorce had taken place.<sup>189</sup>

The dissent in *McFadden* asserted that the payor spouse's voluntary retirement did not constitute a material change in circum-

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ment as grounds for modification of alimony, see *supra* notes 118-50 and accompanying text.

180. See *Misononile v. Misononile*, 645 A.2d 1024, 1027 (Conn. App. Ct. 1994); *Silvan*, 632 A.2d at 530.

181. 632 A.2d 528 (N.J. Super. Ct. App. Div. 1993).

182. See *id.* at 529.

183. See *id.* By the time the appellate court affirmed the trial court's denial of the husband's motion for modification, the husband had turned sixty-five. See *id.* He then renewed his motion, which was again denied, leading to this opinion. See *id.*

184. See *id.* at 530. A court should consider whether the retirement was reasonable under all of the circumstances, or whether it was primarily motivated by the payor spouse's desire to reduce his alimony payments. See *id.*

185. 563 A.2d 180 (Pa. Super. Ct. 1989).

186. See *id.* at 183.

187. See *id.* at 183 n.3.

188. See *id.*

189. See *id.*

stances warranting modification.<sup>190</sup> The dissent pointed out that if the parties had intended the husband's planned retirement at sixty-five to constitute a material change in circumstances, that intent should have been expressed in the alimony agreement since the planned retirement was only five years away at the time of the divorce.<sup>191</sup> Nevertheless, the majority declared that alimony awards "need not reflect all contingencies,"<sup>192</sup> likening the payor's retirement to death or disability.<sup>193</sup> Moreover, it is important to note that the majority did not hold that the husband was automatically entitled to a reduction in his alimony payment; rather, the court held that the lower court should have held an evidentiary hearing on whether a modification was warranted after considering the changed financial circumstances caused by the payor spouse's voluntary retirement.<sup>194</sup>

Minnesota shares the view that "[i]f the [retirement] was made in good faith, [the recipient spouse and child] should share in the hardship as they would have had the parties remained together."<sup>195</sup> The Court of Appeals of Minnesota remanded *In re Marriage of Richards*<sup>196</sup> to the lower court to determine the payor spouse's motivation for retirement.<sup>197</sup> The court explained that if the lower court found that the husband retired in good faith, Minnesota case law authorizing alimony reductions after voluntary retirement would control.<sup>198</sup> However, if the lower court found that the payor spouse acted in bad faith to limit his income, case law precluded reducing alimony payments.<sup>199</sup> The *Richards* court further directed the trial court to consider the payor spouse's "health and employment his-

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190. *See id.* at 184.

191. *See id.* (McEwan, J., concurring in part and dissenting in part). For additional information on the role of agreements in the modification of alimony awards, see *supra* note 5 and accompanying text.

192. *Id.* at 183 (citing *Teribery v. Teribery*, 516 A.2d 33, 37-38 (Pa. Super. Ct. 1986)).

193. *See id.*

194. *See McFadden*, 563 A.2d at 183. Compare 23 PA. CONS. STAT. ANN. § 3701 (West 1999) (setting forth seventeen factors for consideration in an alimony award), with MD. CODE ANN., FAM. LAW § 11-106(b) (1998) (outlining twelve factors courts are required to consider when making alimony awards).

195. *Geisner v. Geisner*, 319 N.W.2d 718, 720 (Minn. 1982); see also *In re Marriage of Richards*, 472 N.W.2d 162, 164-65 (Minn. Ct. App. 1991).

196. 472 N.W.2d 162 (Minn. Ct. App. 1991).

197. *See id.* at 165.

198. *See id.*

199. *See id.*

tory, the availability of and expectations regarding early retirement at the time of divorce, and the prevailing managerial policies and economic conditions present at the time of retirement, together with whatever subjective reasons the obligor may offer."<sup>200</sup>

While it may seem that good faith often supports a reduction in alimony or, at least, that courts encourage fact-finding on the issue of a payor spouse's motivation for voluntary retirement, practitioners should be prepared to address the following argument: a payor spouse simply does "not have the right to divest himself of his earning ability at the expense of [his former spouse and children]."<sup>201</sup>

*In re Marriage of Ilas*<sup>202</sup> involved a payor spouse who entered medical school after his divorce rather than continuing his employment.<sup>203</sup> Petitioning the court to modify his alimony obligation to the income of a full-time student,<sup>204</sup> the payor spouse argued that his earning capacity should not be considered, instead the focus should be on his actual earnings.<sup>205</sup> The reasoning was that earning capacity should only be considered when the court finds that the payor has acted deliberately to reduce his income in order to avoid his support obligations.<sup>206</sup> However, the court held that while the payor spouse was free to pursue a medical degree, he was not free to abandon his responsibilities to his former spouse and children.<sup>207</sup> The court asserted "that a finding of good faith [does not] pre-

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200. *Id.* These factors were applied in Minnesota in a subsequent case. See *Walker v. Walker*, 553 N.W.2d 90, 95 (Minn. Ct. App. 1996) (finding that a fifty-nine-year-old husband did not act in bad faith when he did not seek employment after being fired from his job).

201. *In re Marriage of Ilas*, 16 Cal. Rptr. 2d 345, 350 (Cal. Ct. App. 1993) (holding that earning capacity of a former husband could be considered even in absence of deliberate attempt to refuse to maintain or seek employment).

202. 16 Cal. Rptr. 2d 345 (Cal. Ct. App. 1993).

203. See *id.* at 346-47.

204. See *id.*

205. See *id.* at 347.

206. See *id.* at 347-48 (quoting *Philbin v. Philbin*, 96 Cal. Rptr. 408 (Cal. App. 3d 1971) ("The rule [that alimony may be based on earning capacity rather than actual earnings] 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 responsibilities."); see also *In re Marriage of Meegan*, 13 Cal. Rptr. 2d 799 (1992) (holding that a payor spouse who quit a high-paying job to enter a monastery acted in good faith and had his alimony obligation reduced to zero).

207. See *In re Marriage of Ilas*, 16 Cal. Rptr. 2d at 350.

vent[] use of the earning capacity standard."<sup>208</sup> Thus, the payor's motivation<sup>209</sup> in quitting his job and entering medical school was not dispositive.<sup>210</sup> Instead, the court imputed the payor spouse's earning capacity to him as actual income.<sup>211</sup>

The concept of good faith has enjoyed significant consideration in the arena of alimony modification after retirement. Lawyers in the area should discern the motivation of the retiree and recognize factual circumstances in which those motivations may affect a court's treatment of voluntary retirement as constituting a change in circumstances warranting a modification of alimony.<sup>212</sup> Although Maryland's statutory provisions provide little guidance in assessing what should constitute a sufficient change in circumstances, the multi-factor framework established for assessing an initial award lends support for adopting a more elaborate balancing approach as illustrated in the Section that follows.

*d. Balancing Approach: Weighing the Advantage to the Payor Spouse Against the Detriment to the Recipient Spouse*

As any change in an alimony award will simultaneously affect the payor and recipient, it is necessary to determine the impact that modification of support payments will have on both parties. For example, in *Dilger v. Dilger*,<sup>213</sup> the Superior Court of New Jersey addressed the issue of early retirement and the termination of alimony payments based on a change in circumstances.<sup>214</sup> The payor spouse elected early retirement and subsequently stopped making alimony payments to the recipient without providing any notice.<sup>215</sup>

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208. *Id.* For a discussion of the judicial practice of imputing of income after considering earning capacity, see *supra* notes 138–50 and accompanying text.

209. The payor argued that "a lifelong dream of attending medical school" motivated his action. *Ilas*, 16 Cal. Rptr. 2d at 348.

210. *See id.*

211. *See id.* at 350.

212. For a discussion of the theory of voluntary impoverishment as it relates to alimony modification, see *supra* notes 238–57 and accompanying text.

213. 576 A.2d 951 (N.J. Super. Ct. Ch. Div. 1990).

214. *See id.* at 952. Earning approximately \$85,000–\$90,000 annually at the time of this case, the payor spouse elected to retire early from a job with the New York Stock Exchange. *See id.* at 952–53. In preparation for retirement, the payor purchased an eighty-six-acre farm in Pennsylvania. *See id.* at 953.

215. *See id.* Mrs. Dilger, who earned approximately \$18,000 annually from her employment position with Citibank, was forced to use funds from a personal injury action to pay off the balance of her mortgage, and was additionally burdened by her son who suffered from black lung disease and was not entirely self-sufficient. *See id.*

As a result, the recipient spouse faced a foreclosure due to an inability to comply with monthly mortgage payments.<sup>216</sup>

In analyzing the payor spouse's cross-motion to terminate alimony payments, the court declared: "that a better approach in assessing whether early retirement constitutes a change of circumstances is to inquire not only as to whether the retirement was in good faith but also whether, in light of all the surrounding circumstances, it was reasonable for the supporting former spouse to elect early retirement."<sup>217</sup> The factors relevant to this inquiry were "the age, health of the party, his motives in retiring, the timing of the retirement, his ability to pay maintenance even after retirement and the ability of the other spouse to provide for himself or herself."<sup>218</sup> Based on these factors, the court concluded that the payor spouse's voluntary retirement "was neither in good faith nor, under the circumstances, otherwise reasonable."<sup>219</sup> As a result, his retirement constituted "self-induced 'changed circumstances'" and any modification of his support obligation was improper.<sup>220</sup>

After the decision in *Dilger*, the Superior Court of New Jersey clarified and supplemented the *Dilger* analyses in *Deegan v. Deegan*.<sup>221</sup> In *Deegan*, the payor spouse voluntarily retired at age sixty-one, after forty-two years of employment as a steamfitter, and moved for an order terminating alimony.<sup>222</sup> The trial court denied his application to terminate alimony.<sup>223</sup>

On appeal, the superior court noted that when a change in circumstances is involuntary, all a court must consider is the financial

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216. *See id.*

217. *Id.* at 955.

218. *Id.* (quoting *In re Marriage of Smith*, 396 N.E.2d 859, 863 (Ill. App. 3d 1979)). Other significant factors were "the reasonable expectations of the parties at the time of the agreement, evidence bearing on whether the supporting spouse was planning retirement at a particular age, and the opportunity given to the dependent spouse to prepare to live on the reduced support." *Id.*

219. *Id.*

220. *Id.* at 956.

221. *See Deegan v. Deegan*, 603 A.2d 542, 546 (N.J. Super. Ct. App. Div. 1992) (explaining that deciding whether a spouse may voluntarily retire "will depend on the individual circumstances of a particular case").

222. *See id.* at 543.

223. *See id.* The trial court observed:

He's been in the labor market for forty-two years. He is a healthy individual. There's no allegations that he is in bad health. So he does have the ability. He'll just have to go out and find a job to generate the income. So his application to terminate alimony will be denied.

*Id.*

situations of the parties.<sup>224</sup> However, a voluntary change in circumstances required a two-step analysis.<sup>225</sup> First, the court must determine whether the payor spouse has retired in good faith and the retirement was reasonable.<sup>226</sup> If the court answers in the negative, the analysis ends.<sup>227</sup> However, if the answer is in the affirmative, the court must decide "whether the advantage to the retiring spouse substantially outweighs the disadvantage to the payee spouse."<sup>228</sup> If this advantage to the retiring spouse does substantially outweigh the disadvantage to the payee, the retirement will be deemed a legitimate change in circumstances warranting a modification.<sup>229</sup> The court reversed and remanded the case for a review of the facts in light of the standards the court set forth.<sup>230</sup>

Florida has established an approach similar to the approach crafted by the *Deegan* court. In *Pimm v. Pimm*,<sup>231</sup> the Supreme Court of Florida acknowledged that although sixty-five may be viewed as the median retirement age, not every payor spouse should be permitted to conclude a legal support obligation through retirement.<sup>232</sup>

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224. *See id.*; *see also* *Epstein v. Epstein*, 656 A.2d 707, 710 (Conn. Super. Ct. 1994) (holding that a payor spouse's involuntary dismissal from his job was a substantial change in circumstances that supported the termination of alimony payments).

225. *See Deegan*, 603 A.2d at 546.

226. *See id.* at 544-45.

227. *See Dilger v. Dilger*, 576 A.2d 951, 956 (N.J. Sup. Ct. 1990).

228. *Deegan*, 603 A.2d at 546. The court continued its analysis by observing that when a party's basis for retiring is premised upon health concerns and the detriment to the recipient spouse is simultaneously minimal, the balance will swing to the favor of the payor spouse. *See id.* Conversely, when a desire to create a new lifestyle free of past obligations fuels the payor spouse's retirement and such a change in circumstances leaves the recipient spouse in a detrimental financial position, the balancing test will undoubtedly find in favor of the recipient spouse. *See id.*

229. *See id.* The court further commented:

Thus, where a payor spouse has substantial reasons for retiring (i.e., health concerns) and the effect on the [recipient] spouse is minimal (due for example, to other available income, qualifying for social security, or new employment) the balance will be struck in favor of the payor. Where, on the other hand, the payor spouse simply wants a new life and the [recipient] spouse will become destitute without support, the [recipient's] interests will prevail.

*Id.*

230. *See id.* at 546-47.

231. 601 So. 2d 534 (Fla. 1992).

232. *See id.* at 537 ("Based upon this widespread acceptance of sixty-five as the normal retirement age, we find that one would have a significant burden to show

The court must consider "the needs of the receiving spouse and the impact the termination or reduction of alimony would have on him or her" in reaching a decision as to terminate or reduce a support obligation.<sup>233</sup>

With this framework established, the *Deegan* test has served as an analytical foundation for one other jurisdiction faced with this unsettled issue. In *Barbarine v. Barbarine*,<sup>234</sup> the Court of Appeals of Kentucky adopted this test. Following the analysis set forth in *Deegan*, the court found that the seventy-year-old recipient spouse with a meager monthly income from social security benefits would be unable to support herself if alimony support payments were reduced.<sup>235</sup> There was no evidence presented tending to show that the husband was forced to retire or that he was in poor health.<sup>236</sup> Adopting the balancing test of *Deegan*, the Court of Appeals of Kentucky found that the detriment to the payee spouse outweighed the benefits to the payor and consequently denied the husband's requested modification of alimony.<sup>237</sup>

*e. Voluntary Impoverishment*

Another factor which may be considered by a court in assessing whether to grant a modification of alimony is voluntary impoverishment.<sup>238</sup> Voluntary impoverishment occurs when a payor spouse has voluntarily abandoned well-paying employment for a lower paying position or has otherwise taken steps to purposely deplete his financial resources.<sup>239</sup> Courts in jurisdictions throughout the nation have

that a voluntary retirement before the age of sixty-five is reasonable.")

233. *Id.*

234. 925 S.W.2d 831 (Ky. Ct. App. 1996).

235. *See id.* The court concluded that the payor spouse knew of his former spouse's financial situation at the time of his decision and her social security benefits provided her sole income. *See id.* In addition, the court examined his decision not to receive social security payments until reaching the age of sixty-five to obtain a higher payment. *See id.* The court specifically cited the *Deegan* factors and balancing test. *See id.* at 833.

236. *See id.*

237. *See id.*

238. *See Smith v. Smith*, 419 A.2d 1035, 1038 (Me. 1980) (holding that the trial court did not abuse its discretion in reducing the payor spouse's alimony payments by only \$50, even though his income dropped from \$29,000 to \$7,000 after retirement).

239. *See id.* at 1038. An additional definition is provided in American Jurisprudence, which explains voluntary impoverishment as follows:

Where the obligor spouse has voluntarily relinquished a well-paying practice and has taken a position at modest salary the court may base

held voluntary reduction of income does not constitute valid grounds to modify an alimony award.<sup>240</sup>

In *Tydings v. Tydings*,<sup>241</sup> the District of Columbia Court of Appeals held that a payor spouse was not entitled to a modification of alimony payments due to the fact that his decrease in income was self-induced.<sup>242</sup> In *Tydings*, a fifty-five-year-old payor spouse opted for early retirement, even though he suffered no physical or psychological impairments.<sup>243</sup> Based on this change in circumstances, the payor spouse petitioned the court to reduce the amount of alimony he was paying his ex-wife.<sup>244</sup> The trial court denied his petition on the grounds that the change was insufficient to warrant modification.<sup>245</sup> The appellate court affirmed the trial court's decision stating "voluntary reduction in income or self-imposed curtailment of earning capacity, absent a substantial showing of good faith, will not

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the amount of alimony on capacity to earn money, or on prospective earnings. Though an award of alimony may be based on ability to earn as distinguished from actual income, the rule is applied only when it appears from the record that there is a deliberate attempt on the part of the obligor spouse to avoid family responsibilities by refusing to seek or accept gainful employment, willfully refusing to secure or take a job, deliberately not making application to business, intentionally depressing income to an artificial low, or intentionally leaving employment to go into another business.

24 AM. JUR. 2D *Divorce and Separation* § 662 (2d ed. 1983).

240. See *Gerlach v. Gerlach*, 267 N.W.2d 149, 150 (Mich. Ct. App. 1978) (concluding that a payor spouse's unemployment was self-imposed and rejecting the payor's claim of changed circumstances sufficient to warrant reduction of alimony); *Bradley v. Bradley*, 880 S.W.2d 376, 379 (Mo. Ct. App. 1994) (holding that a reduction in income, resulting from the payor spouse's voluntary retirement was not reason enough to warrant reduction in his alimony payments); *Pope v. Pope*, 559 N.W.2d 192, 196 (Neb. 1997) (finding that a payor spouse's termination from employment for falling asleep at his desk did not constitute adequate cause to justify modification of his alimony obligation); *Fleischmann v. Fleischmann*, 601 N.Y.S.2d 16, 16 (N.Y. App. Div. 1993) (rejecting payor spouse's request for modification of alimony due to the fact that his reduced earnings were attributable to his voluntary decision to accept less lucrative employment); *Herndon v. Herndon*, 305 N.W.2d 917, 918 (S.D. 1981) (citing *Simmons v. Simmons*, 290 N.W.2d 319 (S.D. 1940)) (finding that a "person cannot voluntarily reduce his income in order to avoid alimony and support payments").

241. 349 A.2d 462 (D.C. 1975).

242. See *id.* at 464. In *Tydings*, the payor spouse's decrease in income was based on his election to voluntarily retire. See *id.*

243. See *id.* at 463.

244. See *id.*

245. See *id.*

constitute such a change of circumstances as to warrant a modification."<sup>246</sup>

The issue of voluntary impoverishment was addressed by the Court of Special Appeals of Maryland in the context of an initial alimony award in *Colburn v. Colburn*.<sup>247</sup> In *Colburn*, a husband appealed a trial court's award of alimony to his wife on the grounds that his *potential* income was considered in computing the alimony amount, rather than the amount of income he was *actually* receiving at the time of the divorce.<sup>248</sup> The court found that the husband's retirement at the age of fifty-one, his surrendering of a lucrative salary, and his act of transferring all of his stock to his nephew pending the divorce constituted voluntary impoverishment and made his current income invalid for determining an alimony amount.<sup>249</sup>

In 1992, the Court of Special Appeals of Maryland, in *John O. v. Jane O.*,<sup>250</sup> enunciated a clear set of factors to be considered in determining whether parties to a divorce proceeding had voluntarily impoverished themselves.<sup>251</sup> Although *John O.* addressed voluntary impoverishment in the child support context, the court of special appeals subsequently adopted the same factors in the alimony setting in *Guarino v. Guarino*.<sup>252</sup>

In *Guarino*, the court of special appeals addressed whether a recipient spouse had voluntarily impoverished herself and the effect such a finding would have on her eligibility for temporary ali-

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246. *Id.* at 464.

247. 15 Md. App. 503, 292 A.2d 121 (1972) (noting that when a spouse voluntarily impoverished himself, income and capital holdings prior to such acts could be considered in determining an alimony award).

248. *See id.* at 504, 292 A.2d at 123.

249. *See id.* at 515-16, 292 A.2d at 128-29.

250. 90 Md. App. 406, 601 A.2d 149 (1992) (remanding for a determination of whether the payor spouse had voluntarily impoverished himself based on enumerated factors).

251. *See id.* at 421, 601 A.2d at 156 (setting out factors to be considered in determining whether a party is voluntarily impoverished, including the following: current physical condition, level of education, timing of any change in employment or other financial circumstances relative to the divorce proceedings, the relationship between the parties before the divorce proceedings, the efforts made to find and retain work, whether the party has ever withheld support, past work history, the area in which the parties live and the status of the job market there, and any other considerations presented by the parties).

252. 112 Md. App. 1, 6, 684 A.2d 23, 25-26 (1996) (holding that the same factors used in analyzing child support voluntary impoverishment cases should be applicable in determining *pendente lite* alimony awards).

mony.<sup>253</sup> In appealing the award for temporary alimony, the payor spouse argued that his wife was voluntarily impoverishing herself because she was capable of contributing to her own support.<sup>254</sup> The *Guarino* court concluded, however, based on the evidence and after considering the ten factors set out in *John O.*, that the wife had not voluntarily impoverished herself and was indeed eligible for alimony *pendente lite*.<sup>255</sup> In so concluding, the court cited its prior use of the *John O.* factors in *Colburn* within the alimony context.<sup>256</sup>

The Court of Appeals of Maryland has yet to address the issue of voluntary impoverishment in the specific context of alimony modification. However, it can be inferred from the *Colburn* and *Guarino* decisions, both in the initial granting of temporary and statutory alimony, that the Maryland courts may apply the concept of voluntary impoverishment to deny a former spouse's petition for modification of alimony payments.<sup>257</sup>

#### IV. TERMINATION OF ALIMONY

In Maryland, petitions to terminate alimony are governed by statute.<sup>258</sup> Specifically, section 11-108 of the Family Law Article lists three occurrences that permit a court to terminate alimony. Alimony may terminate upon the death of either party,<sup>259</sup> remarriage of the payee spouse,<sup>260</sup> and when harsh and inequitable results

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253. *See id.* at 3, 684 A.2d at 24.

254. *See id.* at 1, 684 A.2d at 23.

255. *See id.* at 15, 684 A.2d at 30.

256. *See id.* at 15 n.4, 684 A.2d at 30 n.4.

257. *See generally* *Colburn v. Colburn*, 15 Md. App. 503, 514-15, 292 A.2d 121, 128 (1972) (quoting 24 AM. JUR. 2D *Divorce and Separation* § 622 (2d ed. 1983)) (finding, prior to the enactment of § 12-201(b)(2), that "where the husband has voluntarily relinquished a well-paying practice and has taken a position at a modest salary the court may base the amount of alimony upon his capacity to earn money, or upon his prospective earnings"); *Quinn v. Quinn*, 11 Md. App. 638, 643, 276 A.2d 425, 427 (1971) (holding that it is the party's overall financial ability to support and not merely the party's current income which controls the amount of alimony awarded).

258. *See* MD. CODE ANN., FAM. LAW § 11-108 (1998) (providing that, unless the parties agree otherwise, alimony terminates on the death of a party, the remarriage of the recipient, or if a court determines that termination is necessary to avoid a harsh and inequitable result).

259. *See id.* § 11-108(1).

260. *See id.* § 11-108(2). Also, alimony has been held to terminate when reconciliation between the spouses results in their sharing a residence. *See McCaddin v. McCaddin*, 116 Md. 567, 574, 82 A.2d 554, 557 (1911) ("[I]f the wife returns to her husband after a divorce *a mensa et thoro*, and is reconciled with him, she

would otherwise occur if the payor spouse was forced to continue making payments.<sup>261</sup>

The rationale that underlies terminating alimony payments when either party dies is clear.<sup>262</sup> The death of a party would render payment or receipt of alimony impossible. The reasoning for terminating alimony when the recipient spouse remarries is also well-supported.<sup>263</sup> In years past, the wife had a generally accepted right to be supported by her husband.<sup>264</sup> It was presumed that the wife was unable to support herself.<sup>265</sup> Alimony was ordered to be paid as a means of support during a given time period.<sup>266</sup> When the wife, and now the wife or husband remarries, alimony payments will terminate because the spouse has gained support from another source.<sup>267</sup>

However, the purpose underlying the termination of alimony payments in order to avoid "harsh and inequitable" results remains undeveloped in Maryland case law. On its face, the term "harsh and inequitable" is ambiguous. Compounding that problem is the fact that the Maryland courts have not addressed the issue of what constitutes "harsh and inequitable." One plausible explanation that supports why the legislature drafted the statute using such broad language is that it intended for the judiciary to make use of the discretion that is typically allowed in domestic relations cases generally, and matters concerning alimony specifically.<sup>268</sup>

The purpose of section 11-107,<sup>269</sup> which addresses extending the period of alimony and modifying the amount, is "to provide for an appropriate degree of spousal support in the form of alimony after the dissolution of the marriage."<sup>270</sup> It follows that in some situations, namely those mentioned in section 11-108,<sup>271</sup> the "appropriate de-

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cannot continue to have alimony.").

261. See MD. CODE ANN., FAM. LAW § 11-108(3).

262. See *id.* § 11-108(1).

263. See *id.* § 11-108(2).

264. See CLARK, *supra* note 41, § 14.1, at 420.

265. See *id.*

266. See *McAlear v. McAlear*, 298 Md. 320, 331, 469 A.2d 1256, 1261 (1984).

267. See *id.*

268. See *Blaine v. Blaine*, 336 Md. 49, 66, 646 A.2d 413, 421 (1993).

269. See MD. CODE ANN., FAM. LAW § 11-107 (1998) (extension of period; modification of amount).

270. *Blaine*, 336 Md. at 64, 646 A.2d at 421 (quoting *McAlear*, 298 Md. at 348, 469 A.2d at 1256).

271. That is, the death of either party, remarriage of the recipient, or to avoid a harsh and inequitable result. See MD. CODE ANN., FAM. LAW § 11-108.

gree" may be zero.<sup>272</sup> Indeed, if the promotion of equity and fairness constitutes at least some part of the foundation of Maryland family law, it may appear troubling that Maryland appellate courts have never had an occasion to interpret the "harsh and inequitable result" language of section 11-108(3) in a published opinion. One reason could be that alimony typically does not need to be terminated because it tends to terminate itself. Alimony may be viewed as a continuance of the support to which the wife was entitled under the marriage, damages for a breach of the marriage contract, or punishment for adultery.<sup>273</sup> However, in Maryland, as with many other jurisdictions, alimony is viewed most often as "rehabilitative."<sup>274</sup> Alimony in Maryland exists primarily to allow for a reasonable period of time during which the recipient spouse is expected to obtain education or training to become self-supporting.<sup>275</sup> Thus, alimony often terminates at a definite point that was established in the initial alimony proceedings. Other jurisdictions have indicated more heightened reluctance to terminate alimony payments than in the modification context.

For example, in *McNutt v. McNutt*,<sup>276</sup> the Court of Civil Appeals of Alabama held that the retirement of the payor spouse,<sup>277</sup> due to degenerative arthritis, did not preclude him from finding other forms of employment.<sup>278</sup> At trial, the recipient spouse presented evidence that the payor spouse did not always perform manual labor in his shop, but rather normally completed paperwork and administrative duties.<sup>279</sup> In response, the payor spouse presented evidence illustrating that he was no longer capable of performing physical work, that his condition would worsen over time, and that he had

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272. See 11 Cal. App. 4th 156 (Cal. Ct. App. 1992).

273. See CLARK, *supra* note 41, § 16.1, at 620-21.

274. See *supra* notes 53-60 and accompanying text.

275. See *Blaine*, 336 Md. at 62, 646 A.2d at 419 (explaining the history of Maryland's view of alimony). The Governor's Commission on Domestic Relations Laws, which submitted the bill that in 1980 became Maryland's alimony statute, proposed this significant change to Maryland's approach to alimony. See *id.* The bill provided generally for alimony to be awarded for fixed periods, with allowances for extensions in certain situations. See *id.*

276. 593 So. 2d 1032 (Ala. Civ. App. 1992).

277. The payor spouse worked as a manual laborer in an automobile repair shop. See *id.* at 1033.

278. See *id.*

279. See *id.* The husband conceded that the shop employees did in fact perform physical work in the shop, ranging from welding to painting to transmission work. See *id.*

no marketable skills that would enable him to find sedentary employment.<sup>280</sup>

The court affirmed the trial court's decision that the payor spouse was physically able to continue working in some alternative capacity and that the lower court did not abuse its discretion in modifying rather than terminating the husband's support payments.<sup>281</sup> The court's decision suggests that a thorough showing of complete inability to perform any type of work may be necessary before a court will terminate an alimony decree.<sup>282</sup>

## V. CONCLUSION

As alimony payments are often the only means of survival for the recipient spouse, strict criteria are needed in evaluating a party's petition. No Maryland case to date has specifically set a precedent for terminating alimony payments for reasons other than death or remarriage. As a result, it is reasonable to assume that most future decisions by Maryland courts will be based on the analytical framework laid out in cases modifying alimony. Retirement is a factor that surfaces repeatedly in alimony modification cases, but is not always analyzed in a consistent fashion by each jurisdiction. Petitions to modify alimony for changed circumstances due to retirement are likely to surface with greater frequency as the divorce rate of couples hovers around fifty percent<sup>283</sup> and the percentage of American's reaching the age of retirement is expected to increase until the year 2030.<sup>284</sup>

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280. *See id.*

281. *See id.*

282. *See id.* In addition to examining the evidence presented, the trial court also took into account the demeanor of both witnesses before reaching its conclusion that the husband was still employable. *See id.*

283. *See supra* note 1 and accompanying text.

284. *See* Jan Ellen Rein, *Misinformation and Self-deception in Recent Long-term Care Policy Trends*, 12 J. L. & POL. 195, 207 (1996). One commentator emphasizes America's aging population phenomenon as follows:

Americans age sixty-five and over now outnumber the entire population of Canada, and they comprise 12.5% or more of the American population, as compared to 4% in 1900. The aging of the baby-boom generation, healthier lifestyles, and advances in medical technology all have contributed to this explosive growth in the elderly population. This increase, described as an "age wave," will not begin to decline until the year 2030.

*Id.* (footnotes omitted).

Retirement, in good faith, is accepted in some jurisdictions as a sufficient change in circumstances to warrant modification of alimony.<sup>285</sup> On the other hand, many other jurisdictions do not consider retirement grounds for modifying an award.<sup>286</sup> Instead, they look to any alternate income potential or earning capacity to sustain the original award.<sup>287</sup> Although voluntary retirement at an advanced age does not automatically entitle a payor spouse to a reduction in alimony payments, it is undeniable, from a social perspective, that people plan their lives around the goal of retiring at the approximate age of sixty-five.<sup>288</sup>

Maryland does not have a solid foundation of case law on which to analyze the issue of retirement, if it is ever confronted. This challenging issue in domestic law yet to be definitively resolved, will eventually confront the judiciary, thereby forcing the courts to choose which position they will support. The balancing test, established by the *Deegan* court, lays a clear framework for a court's analysis and would provide instructive guidance for Maryland courts.<sup>289</sup> This test appears to allow a court to thoroughly analyze the issue in its attempt to reach a fair and equitable result.

*Colleen Marie Halloran*

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285. For a discussion of decisions finding that retirement in good faith warrants a modification in spousal support obligations of the payor spouse, see *supra* notes 181-200 and accompanying text.

286. For a discussion of decisions finding that retirement in and of itself is not a sufficient ground to reduce or terminate alimony obligations, see *supra* notes 134-50, 200-11 and accompanying text.

287. For decisions pertaining to earning capacity after retirement as a method for calculating reductions or modifications in spousal support obligations, see *supra* notes 138-50 and accompanying text.

288. See *supra* note 125 and accompanying text.

289. For a discussion of the balancing test implemented in the New Jersey decision of *Deegan v. Deegan*, 603 A.2d 542 (N.J. Super. Ct. App. Div. 1992), and its subsequent application in other jurisdictions, see *supra* notes 213-37 and accompanying text.