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Recent Developments: Domestic Relations—Increase or Decrease of Permanent Alimony and Child Support—Granted without the Necessity of Showing a Change in the Circumstances of Both Parties. *Lott v. Lott*, 17 Md. App. 440, 302 A.2d 666 (1973)

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desired. A review of Maryland law offers no basis for a court changing the limitations on the measure of damages set in *Coughlan* and *Mahone*. The common law was adopted by the General Assembly and must be overridden by the General Assembly.<sup>5,7</sup> Use of judicial fiat for this purpose as was done in *Barrett* bodes more mischief.

Stephen M. Hearne

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57. MD. CONST., DECLARATION OF RIGHTS, art. 5.

DOMESTIC RELATIONS—INCREASE OR DECREASE OF PERMANENT ALIMONY AND CHILD SUPPORT—GRANTED WITHOUT THE NECESSITY OF SHOWING A CHANGE IN THE CIRCUMSTANCES OF BOTH PARTIES. *LOTT V. LOTT*, 17 Md. App. 440, 302 A.2d 666 (1973).

In *Lott v. Lott*<sup>1</sup> the Court of Special Appeals held that a substantial change in the circumstances of *both* parties is not necessary for the modification of alimony or child support. Accordingly, the court affirmed an increase in these payments which would correspond to the husband's increase in income since the original award. This modification was granted despite the petitioner-wife's concession that her needs had not changed since the time of the divorce<sup>2</sup> and the husband's assertion that a substantial change in the circumstances of *both* parties must be shown.<sup>3</sup> The determination that the husband's increase in income after divorce<sup>4</sup> may in itself justify a modification of alimony and child support reflects the unusually broad discretion which the Maryland courts of equity apply to alimony awards and to subsequent modifications.

Dr. and Mrs. Lott entered the "oft recurring phase of the war of the sexes — the primeval struggle for division of the husband's productivity after the couple have [sic] separated"<sup>5</sup> in 1970 when the peti-

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1. 17 Md. App. 440, 302 A.2d 666 (1973).

2. *Id.* at 443, 302 A.2d at 668.

3. *Id.* at 442, 302 A.2d at 668.

4. The Lotts were divorced in 1970. They were married in 1952, after which Mrs. Lott worked to put her husband through medical school. In 1968, upon Mrs. Lott's refusal to grant her husband a divorce, he left Maryland and went west with his paramour. He returned to Maryland nine months later with his companion and a child of their adultery. In his absence, the \$65,000 home previously shared by the Lotts was lost in a foreclosure sale and Mrs. Lott moved to a modest apartment. She was forced to gain employment in order to maintain herself and her son. After the final divorce was granted in 1970, Dr. Lott married his paramour and, due to alimony payments, supported his wife and the three children in addition to his previous wife and their only child.

Factors considered in the original award of alimony were: the sacrifices of the working wife while her husband attended medical school, the adultery of the husband and the wife's right to be supported in a life style to which she had become accustomed during the marriage. *Id.* at 442-43, 302 A.2d at 668.

5. *Stansbury v. Stansbury*, 223 Md. 475, 164 A.2d 877 (1960).

tioner-wife was awarded a divorce a vinculo and the husband was directed to make monthly alimony and child support payments of \$450.<sup>6</sup> On a subsequent petition by the wife the amount allocated for child support was augmented by \$40 weekly payments to cover the cost of remedial tutoring for the son. Approximately one year after the original decree, the wife again petitioned the trial court for further modification. The request was granted and a modification order directed an increase from \$250 to \$322.50 for alimony and an increase from \$200 to \$266 for monthly child support.<sup>7</sup> The weekly \$40 payments for tutoring services remained unchanged. This substantial increase awarded by the lower court was affirmed despite the appellate court's recognition of two important facts: 1) there had been no change in the pecuniary needs of the wife since the date of the original award, and 2) the husband had undertaken the financial burdens of remarriage and the support of an additional three children. His increase in salary of approximately one-third was the prevailing factor in the court's determination that a substantial change in circumstance existed<sup>8</sup> and a corresponding increase in payments was therefore affirmed as a reasonable modification of the original award.<sup>9</sup>

Although this reasoning appears inconsistent with another recent decision which construes the wife's "need" in more literal terms,<sup>10</sup> the Maryland courts of equity have traditionally established and retained exceptionally broad discretion in the alteration of an original award of alimony.<sup>11</sup> This discretion is based upon the premise that in the award of alimony, unlike any other area of chancery, "the need is more compelling to tailor the remedy to the facts of each particular case."<sup>12</sup> The courts therefore retain equity jurisdiction after the original award and may, upon petition by either party, change the allowance if there has been a sufficient intervening cause since the original decree.<sup>13</sup> The controlling factors in subjecting the decree to continuing review are usually a change in the husband's financial ability to pay and a change

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6. 17 Md. App. at 441, 302 A.2d at 667.

7. *Id.*

8. *Id.* at 449, 302 A.2d at 670.

9. *Id.* at 451, 302 A.2d at 672. In affirming the decision to grant the wife alimony payments which corresponded to the husband's augmented income, the court did not establish any limit that would preclude future increases that might be based on any further prosperity which the husband may attain. Inferentially, the wife can petition the court for a modification whenever the husband increases his wealth.

10. Although excerpts of *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971) are cited by the Lott court, the following contrasting view was expressed in the *Quinn* opinion:

It is an allowance to the wife in recognition of the husband's common law liability to support her; it is an allowance of money payable at stated periods by the husband to the wife for her support during their joint lives so long as they live apart.

In other words, the sole object of the alimony award is to provide an allowance to the wife for food, clothing, habitation and other necessities.

*Id.* at 643, 276 A.2d at 427 (citations omitted).

11. *Willoughby v. Willoughby*, 256 Md. 590, 261 A.2d 452 (1970).

12. *Eberly v. Eberly*, 12 Md. App. 117, 126, 278 A.2d 107, 112 (1970).

13. *Langrall v. Langrall*, 145 Md. 340, 345, 125 A. 695, 697 (1924).

in the wife's pecuniary needs.<sup>14</sup> Such a change in circumstances must be substantial<sup>15</sup> and may be mollified or strengthened by other factors<sup>16</sup> which have developed since the original award.<sup>17</sup> Although the court may not relitigate the circumstances which determined the permanent alimony,<sup>18</sup> the same criteria are frequently applied to a subsequent petition for modification.<sup>19</sup> The criteria were expressed in *Timanus v. Timanus*<sup>20</sup> and are as follows:

In determining an award of alimony and whether "the wife's income is sufficient to care for her needs," the court shall consider the husband's wealth and earning capacity, the station in life of the parties, age, physical condition, the ability to work, the length of time the parties have lived together, the circumstances leading up to the divorce, and the fault which destroyed the home.<sup>21</sup>

In the application of these parameters the equity courts frequently reiterate the accepted interpretation of alimony as an equitable assurance of continued financial support for the wife which is not intended as a punitive measure against the husband.<sup>22</sup> Even though the wife's need is the underlying premise of this criteria, many court decisions appear to attach greater significance to the changed income and overall financial status of the husband when the original fault was his.<sup>23</sup> This trend has been further extended by the *Lott* court's award of increased payments based solely upon the husband's augmented income despite the wife's admission that her financial needs had not increased since the date of the original decree.<sup>24</sup>

The emphasis which the courts of equity have placed upon changed circumstances of the parties in the modification of alimony is generally based upon one of three variations. In *Langrall v. Langrall*<sup>25</sup> while giving consideration to all circumstances that might suggest a need for modification, the court based their final determination on the wife's change in financial need.<sup>26</sup> Other cases give equal weight to all relevant

14. *Willoughby v. Willoughby*, 256 Md. 590, 261 A.2d 452 (1970); *Mays v. Mays*, 232 Md. 120, 192 A.2d 80 (1963); *Lopez v. Lopez*, 206 Md. 509, 112 A.2d 466 (1954).

15. *Gebhard v. Gebhard*, 253 Md. 125, 252 A.2d 171 (1969); *Langrall v. Langrall*, 145 Md. 340, 125 A. 695 (1924).

16. See p. 331-32 *infra*.

17. *Heinmuller v. Heinmuller*, 257 Md. 672, 264 A.2d 847 (1970); *Winkel v. Winkel*, 178 Md. 489, 154 A.2d 914 (1940).

18. *Hughes v. Hughes*, 216 Md. 374, 140 A.2d 649 (1958).

19. *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971); *Danziger v. Danziger*, 208 Md. 469, 118 A.2d 653 (1955).

20. 178 Md. 640, 16 A.2d 918 (1940).

21. *Id.* at 642, 16 A.2d at 920.

22. *Quinn v. Quinn*, 11 Md. App. 638, 643, 276 A.2d 425, 427 (1971).

23. *Eberly v. Eberly*, 12 Md. App. 117, 278 A.2d 107 (1970); *Warren v. Warren*, 218 Md. 212, 146 A.2d 34 (1958); *Danziger v. Danziger*, 208 Md. 469, 118 A.2d 653 (1955).

24. 17 Md. App. 440, 443, 302 A.2d 666, 669 (1973).

25. 145 Md. 340, 125 A. 695 (1924).

26. *Id.* at 343, 125 A. at 697.

changes in the financial status of *both* parties and consider the needs of the wife as only one of several considerations.<sup>27</sup> This view seeks to balance the overall financial status of the husband with the living expenses of the wife, as in *Quinn v. Quinn*.<sup>28</sup> The *Lott* court further diminishes the importance of the financial needs of the wife by awarding a modification solely upon the increased income of the husband.<sup>29</sup> The apparent inconsistency in these three views is justified by the repeated assertions that a court of equity must apply the same unusually broad discretion to a modification that is applied in the award of the original decree.<sup>30</sup>

Despite the frequent use of the guidelines expressed by the *Timanus* court<sup>31</sup> and restated in later decisions, other courts have suggested a different standard by which to view the relative circumstances of the parties.<sup>32</sup> In *Winkel v. Winkel*<sup>33</sup> the court formulated a "doctrine of relative adjustment to contemporaneous faculties:"<sup>34</sup>

[T]his doctrine of relative adjustment to contemporaneous faculties rests upon the mutual rights and obligations of the parties which they assumed for the duration of their joint lives, as well with reference to their children as to themselves. A responsibility of the husband is the support and maintenance of his wife and children in the measure of his ability and station in life. The duties and rights in these respects are subject to changes which are not foreseeable, and so cannot be adequately anticipated and taken care of by judicial decree . . . . The obligations must be correspondingly fulfilled out of the husband's contemporaneous faculties whether in wealth, in moderate means, or in poverty. *Within the gamut of fortune the wife shares. From the nature of affairs, change in tangible property and in income and in earnings may occur as well after as before the separation of spouses.*<sup>35</sup>

Because this "doctrine" interprets the support of the wife as a continuing obligation that is to be measured by the varying financial status of the husband, the *Lott* decision cited the reasoning with

27. *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971); see *Lopez v. Lopez*, 206 Md. 509, 112 A.2d 466 (1954); *Tome v. Tome*, 180 Md. 31, 22 A.2d 549 (1941).

28. 11 Md. App. 638, 651, 276 A.2d 425, 432 (1971).

29. 17 Md. App. at 447, 302 A.2d at 670.

30. *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971).

31. *Eberly v. Eberly*, 12 Md. App. 117, 278 A.2d 107 (1971); *Sanborn v. Sanborn*, 256 Md. 178, 259 A.2d 511 (1969); *Foote v. Foote*, 190 Md. 171, 57 A.2d 804 (1948).

32. An example is the "one-third rule" of awarding the wife one-third of the husband's income as alimony. *Schuman v. Schuman*, 252 Md. 13, 248 A.2d 876 (1969); *Bradshaw v. Bradshaw*, 189 Md. 322, 55 A.2d 719 (1947). Although no such standard was expressly stated by the *Lott* court, the original award and the increase each amounted to a one-third portion of Dr. Lott's income. 17 Md. App. at 450, 302 A.2d at 672.

33. 178 Md. 489, 15 A.2d 914 (1940).

34. *Id.* The *Winkel* court's use of the word "faculties" refers to the husband's financial ability to pay alimony.

35. *Id.* at 499, 15 A.2d at 919 (emphasis added).

approval.<sup>36</sup> The *Lott* court did not infer, however, that the contemporaneous faculties doctrine gives equal weight to Dr. Lott's remarriage and his financial burden of three additional children. This is despite the doctrine's suggestion that "the nature of affairs" encompasses more than merely the earnings of the husband.<sup>37</sup> The increase in salary which Dr. Lott enjoyed became the determining factor, and prompted the court's conclusion that "[a] substantial increase in the husband's income alone, can under appropriate circumstances, be legally sufficient to justify an increase in the amount of alimony even though the wife's needs continue as they existed at the time of the initial award."<sup>38</sup> A change in the financial circumstances of the husband is thereby narrowly construed as a change in income, a view that is inconsistent with that of prior decisions, and with the position that all relevant circumstances should be evaluated when the court reviews the original award.<sup>39</sup> Although re-marriage is not in itself sufficient cause for a reduction in alimony payments to the first wife,<sup>40</sup> it certainly affects the financial status of the husband.

Rather than address itself at length to either the logic of increasing alimony payments where the wife concedes that her needs have not changed or to the relative effect of re-marriage on financial status, the *Lott* court notes the wife's admission in a single sentence<sup>41</sup> and dismisses the effect of Dr. Lott's new burdens as circumstances previously considered by the lower court: "The chancellor's opinion specifically mentions these factors [the husband's remarriage and additional parental responsibilities], thereby showing that he did consider them along with other pertinent matters."<sup>42</sup> The decision relies heavily on the settled law that remarriage does not in and of itself justify a *reduction*<sup>43</sup> of alimony but does not adequately explain its relevance to a petition for the *increase* of payments.<sup>44</sup> The main thrust of the court's opinion was directed at the necessity to show only a substantial change in the circumstances of either party and that a change in the husband's income constituted such a change. This position has been previously taken although never expressly stated.<sup>45</sup> There are extenuat-

36. 17 Md. App. at 445, 302 A.2d at 669.

37. See note 30 *supra* and accompanying text.

38. 17 Md. App. at 447, 302 A.2d at 670.

39. *Quinn v. Quinn*, 11 Md. App. 638, 276 A.2d 425 (1971); *Chalkley v. Chalkley*, 240 Md. 743, 215 A.2d 807 (1965); *Danziger v. Danziger*, 208 Md. 469, 118 A.2d 653 (1956).

40. *Warren v. Warren*, 218 Md. 212, 146 A.2d 34 (1958); *Langrall v. Langrall*, 145 Md. 340, 125 A. 695 (1924).

41. "It was conceded by the wife that her needs had not substantially changed since the date of the original decree." 17 Md. App. at 443, 302 A.2d at 668.

42. *Id.* at 448, 302 A.2d at 671.

43. *Chalkley v. Chalkley*, 240 Md. 743, 215 A.2d 807 (1965); *Warren v. Warren*, 218 Md. 212, 146 A.2d 34 (1958).

44. Although the *Lott* court places little weight upon the husband's additional financial burden of remarriage and considers an increase in his income alone as a sufficient ground for modification, they quote with approval the following excerpt from *Quinn*: "The husband's overall financial ability to support (and not merely his current income), and the wife's need for support are controlling factors." 11 Md. App. at 643, 276 A.2d at 427.

45. *Winkel v. Winkel*, 178 Md. App. 489, 499, 15 A.2d 914, 919 (1940). The obligation of

ing circumstances which may be encountered by one of the parties that require modification of the decree; however, a change in the original award for such a reason should be carefully scrutinized to assure a continuing balance between the obligation of the husband and the need of the wife.

The inequities of continuing an allocation based on the fortunes of one party after the final divorce decree are noted by other jurisdictions. In the Illinois case of *Arnold v. Arnold*<sup>46</sup> the court refused to modify the original award of alimony merely because of the husband's subsequent increase in income.<sup>47</sup> The wife did, however, receive an increase which was based upon the rise in the cost of living from the date of the original award. This modification was based upon the premise that a wife's continuing support is to be determined by the lifestyle to which she was accustomed at the time of the divorce and not, as in *Lott*, by the changed fortunes of the husband.<sup>48</sup> An increase in the wife's cost of living would therefore require a modification of the award. The *Arnold* court felt that any increase beyond this adjusted maintenance would unfairly deprive the husband of any independent prosperity he had been able to attain after the divorce.<sup>49</sup> The Arnolds were divorced during the Depression, when Mr. Arnold was earning \$7500 annually. Thereafter, he substantially improved his financial position and at the time of petition for modification he had an annual income of \$70,000 and a net worth of over \$1,000,000. The court found that since the divorce of the parties was prior to the husband's acquisition of wealth, the wife had no right to a proportionate share of his augmented income.<sup>50</sup>

She cannot logically claim that because she was his wife several years before good fortune came to him, she now has a right to participate therein. By her own choice, she was not his wife when he amassed his present wealth. The station in life to which he has accustomed her was that existing in 1931 and prior thereto. It is that station in life in which he is bound to maintain her now, if he is financially able to do so.<sup>51</sup>

This rationale focuses upon the primary intent of alimony, an obligation to support an estranged wife, not to endow her.<sup>52</sup> The *Lott* court

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alimony corresponds to the husband's ability to pay (his contemporaneous faculties) without regard for a change in the wife's needs.

46. 332 Ill. App. 586, 76 N.E.2d 335 (1947).

47. *Id.*

48. *Id.* at 588, 76 N.E.2d at 337.

49. *Id.* at 589, 76 N.E.2d at 338.

50. *Id.*

51. *Id.* at 588, 76 N.E.2d at 337.

52. *Id.*; cf. *Gebhard v. Gebhard*, 253 Md. 125, 131, 252 A.2d 171, 174 (1969) (54% of husband's income was excessive alimony in that wife was entitled to support but husband also entitled to live).

has extended this fundamental premise to include an increased alimony obligation despite a lack of need. Such a decision goes beyond the maintenance and support of the wife.

### CONCLUSION

The decision in *Lott* is a natural consequence of prior inconsistent modifications of alimony by the Maryland appellate courts. The incompatibility of these decisions is continually rationalized as a necessary result of the particular exigencies of litigation which require the application of unusually broad discretion. While the chancellor's discretion should not be usurped, there is a need for greater uniformity in alimony modification. The husband's yoke of continuing support should not be so burdened with the weight of uncertainty that the final decree of alimony becomes a legal fiction. A modification that increases payments beyond the former wife's needs and fails to consider the added financial burdens of the husband is clearly excessive.

If the courts are unable to abide by the guidelines for alimony awards already imposed by the legislature,<sup>53</sup> the guidelines should be redefined. Such a clarification and perhaps even a change would seem particularly appropriate at this time. More definite criteria should reflect the changing attitudes towards the obligations of marriage.<sup>54</sup> The husband is no longer looked upon as the sole provider; women have sought and gained a significant position as productive wage earners, and children are now seldom coddled in the confines of the family until they reach the age of majority. With the sharp increase in the divorce rate and the resulting frequency of modification hearings, there is a pressing need to establish more uniform guidelines for maintaining support. If the judiciary continues to avoid facing this duty through the guise of broad judicial discretion, the legislature should redefine the criteria.

The judiciary should not continue to emphasize flexibility at the expense of an ascertainable standard that will obviate inconsistency. If the Maryland appellate courts further the present confusion, under the guise of discretion, the legislature should redefine the criteria to ensure its proper application.

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53. MD. ANN. CODE art. 16, § 5(a) (1973) provides: "In all cases where alimony or alimony pendente lite and counsel fees are claimed, the court shall not award such alimony or counsel fees unless it shall appear from the evidence that the wife's income is insufficient to care for her needs."

54. Although Maryland has adopted the Equal Rights Amendment, the appellate courts have yet to determine its applicability to an alimony award or modification. MD. CONST., DECLARATION OF RIGHTS, art. 46, § 1.