

**FAMILY LAW — MARRIAGE DISSOLUTION — FIRST DECISION BY NEBRASKA SUPREME COURT UNDER NEBRASKA'S NEW NO-FAULT MARRIAGE DISSOLUTION STATUTES LEAVES UNCERTAIN THE QUESTION OF WHETHER FAULT IS TO BE EXCLUDED FROM THE POST-DISSOLUTION DETERMINATIONS OF ALIMONY AND PROPERTY SETTLEMENT — *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973).**

## INTRODUCTION

In 1972 the Nebraska Legislature, in an effort to reform a field which has been the target of searching criticism,<sup>1</sup> replaced its former divorce statutes with a no-fault approach.<sup>2</sup>

1. See, e.g., Tenny, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 32-40 (1967).

2. NEB. REV. STAT. §§ 42-347 *et seq.* (Cum. Supp. 1972) provide in pertinent part: 42-347. *Terms, defined.* As used in sections 42-347 to 42-379, unless the context otherwise requires:

(1) Dissolution of marriage shall mean the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken. After July 6, 1972, the term dissolution of marriage shall be considered synonymous with divorce, and whenever the term divorce appears in the statutes it shall mean dissolution of marriage pursuant to sections 42-347 to 42-379 . . . .

42-353. *Petition; contents.* The form of the petition and all other pleadings required by sections 42-347 to 42-379 shall be prescribed by the Supreme Court. The petition shall include the following:

- (1) The name and address of petitioner and his attorney;
- (2) The name and address, if known, of respondent;
- (3) The date and place of marriage;
- (4) The name and date of birth of each child whose custody or welfare may be affected by the proceedings;
- (5) If the petitioner is a party to any other pending action for divorce, separation, or dissolution of marriage, a statement as to where such action is pending;
- (6) A statement of the relief sought by petitioner, including adjustment of custody, property, and support rights; and
- (7) An allegation that the marriage is irretrievably broken.

42-359. *Applications for support or alimony; financial statements.* Applications for support or alimony shall be accompanied by a statement of the applicant's financial condition and, to the best of the applicant's knowledge, a statement of the other party's financial condition. Such other party may file his statement if he so desires, and shall do so if ordered by the court. Statements shall be under oath and shall show income from salary or other sources, assets, debts and payments thereon, living expenses, and other relevant information. Required form for financial statements may be furnished by the court.

In *Magruder v. Magruder*,<sup>3</sup> the Nebraska supreme court faced its initial confrontation with the question of alimony and property settlement under Nebraska's new statutory scheme. The court, in a 4-3 decision, addressed itself to the question of alimony and stated:

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under the statute as well as under the former decisions of the court is one of reasonableness.<sup>4</sup>

Citing *Prosser v. Prosser*<sup>5</sup> and *Mandelberg v. Mandelberg*,<sup>6</sup> two pre-no-fault cases, the majority offered no explanation of how its reliance on these could be parlayed into controlling authority despite the repeal of the statutory scheme under which they were decided. This note will show why that omission was particularly important. A review of Nebraska's prior fault-oriented divorce statutes and accompanying decisions, followed by an examination of the legislative history and statutory content of the present no-fault scheme, will be made prior to an analysis of the *Magruder* decision. Further guidance will be sought by sampling the statutes and decisions of other

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42-361. *Marriage irretrievably broken; findings.* (1) If both parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

42-365. *Decree; alimony; determination; modification.* When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. Except as to amount accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but where alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

3. 190 Neb. 573, 209 N.W.2d 585 (1973) [hereinafter cited as *Magruder*].
4. *Id.* at 576, 209 N.W.2d at 587.
5. 156 Neb. 629, 57 N.W.2d 173 (1953).
6. 187 Neb. 844, 195 N.W.2d 148 (1972).

jurisdictions that have adopted no-fault dissolution statutes. Finally, the focus will turn to the problems left in the wake of *Magruder*.

### PRIOR NEBRASKA LAW

Under the provisions of previous Nebraska law, grounds for divorce were (1) adultery, (2) physical incompetence, (3) a jail sentence of three or more years, (4) willful abandonment for two years, (5) habitual drunkenness, (6) life imprisonment, and (7) incurable insanity.<sup>7</sup> The sections of the old law concerning alimony — specifically excluding an adulterous wife from eligibility — required that the award be just and reasonable, admonishing the courts to consider: (1) ability of the husband to pay, (2) character and situation of the parties, and (3) all other circumstances of the case.<sup>8</sup>

The Nebraska supreme court's interpretation of these statutory guidelines took various forms and included numerous factors, *inter alia*: age, earning ability, duration of the marriage, conduct of the parties during the marriage, station in life, customary standard of living, circumstances and necessities of each party, health and physical condition, financial circumstances, and contributions to the marriage made by each of the parties.<sup>9</sup>

Through judicial gloss, the time-honored principles of fault took on added importance in the determination of alimony. For example, the courts gave special consideration to the wife whose substantial contributions nourished her husband's success but who was cast aside through no fault of her own when they were beginning to reap the rewards of their joint efforts.<sup>10</sup> Under prior Nebraska divorce law, the relevant factors considered in alimony awards proliferated, finally becoming incapable of precise evaluation; the statutory

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7. Law of April 12, 1945, ch. 101, § 42-301 [1945], Neb. Laws 329-30 (repealed 1972).

8. Law of March 19, 1949, ch. 127, § 42-318(1) [1949], Neb. Laws 335 (repealed 1972).

9. See *Mandelberg v. Mandelberg*, 187 Neb. 848, 195 N.W.2d 148 (1972); *Fry v. Fry*, 186 Neb. 521, 184 N.W.2d 636 (1971); *Sanchez v. Sanchez*, 186 Neb. 427, 183 N.W.2d 743 (1971); *Diers v. Diers*, 185 Neb. 552, 177 N.W.2d 503 (1970); *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964); *Schwarck v. Schwarck*, 175 Neb. 560, 122 N.W.2d 489 (1963); *Cowan v. Cowan*, 160 Neb. 74, 69 N.W.2d 300 (1955); *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 173 (1953); *Peterson v. Peterson*, 152 Neb. 571, 41 N.W.2d 847 (1950).

10. *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964); *Cowan v. Cowan*, 160 Neb. 74, 69 N.W.2d 300 (1955); *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 172 (1953).

guidelines were generally disregarded in lieu of the court's discretionary determinations on a case-by-case basis.<sup>11</sup> Fault of the husband was a typical example of the variance in treatment. The court's emphasis on the husband's fault ranged from a denial that the alimony award was "a penalty imposed for the misconduct of the husband,"<sup>12</sup> to elevation of his fault to a material element in the determination.<sup>13</sup> Consistent recognition was given to the innocence of the wife.<sup>14</sup> Stated in a more felicitous way, saintliness on the part of the wife had a predictably meritorious impact on the court while the fault of the husband fluctuated in importance.

In short, Nebraska divorce case law prior to passage of no-fault legislation was replete with equitable criteria; close examination revealed confusion surrounding the court's discretionary determinations and established criteria.<sup>15</sup>

It appeared that the Nebraska supreme court itself was dissatisfied with the variance of judicial interpretations in divorce proceedings under the prior law. While the legislature was considering the no-fault dissolution legislation,<sup>16</sup> Judge McCown stated per curiam: "Legislative divorce policy of an era before Nebraska became a state may or may not reflect her modern mood."<sup>17</sup>

## PRESENT NEBRASKA LAW

The legislative hearings are inadequate for interpretation of the alimony statute; the hearings made only four specific references to

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11. See *Malone v. Malone*, 163 Neb. 517, 520, 80 N.W.2d 294, 297 (1957):

We have often said the fixing of the amount of the alimony rests, in each case, upon the sound discretion of the court.

12. *Prosser v. Prosser*, 156 Neb. 629, 634, 57 N.W.2d 173, 176 (1953) [hereinafter cited as *Prosser*].

13. *Peterson v. Peterson*, 152 Neb. 571, 41 N.W.2d 847 (1950).

14. See, e.g., *Prosser* at 632, 57 N.W.2d at 175: "[the wife] was without semblance of fault"; *Trimble v. Trimble*, 180 Neb. 647, 650, 144 N.W.2d 171, 173 (1966): "... no indication of fault on the part of [the wife]."

15. For example, "[alimony is awarded for the maintenance of the wife when the conditions exist that the statute requires." *Prosser* at 633-34, 57 N.W.2d at 176. However, when the court listed the governing criteria, it included "relative or comparative fault," a factor wholly outside of and unrelated to maintenance. *Id.*

16. L.B. 820, 82d Legis., 2d Sess. (1972) (codified at NEB. REV. STAT. §§ 42-347 to -379 (Cum. Supp. 1972)).

17. *Goree v. Goree*, 187 Neb. 774, 194 N.W.2d 212 (1972).

alimony.<sup>18</sup> In the absence of legislative guidance for the alimony statute, other interpretive guides must be utilized. The legislative scheme as a whole suggests an intent to remove the adversarial acrimony from marriage dissolution.<sup>19</sup> While the statutory scheme does not expressly preclude the use of fault evidence, it is consistent and uncompromising in the omission of the term.

The legislature provided guidelines for the courts' consideration in arriving at an equitable financial arrangement with this language:

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. (Emphasis added).<sup>20</sup>

These guidelines, plus the elimination of the "guilty party" grounds in application for dissolution of marriage, add strong support to the proposition that fault has been eliminated as a consideration in any part of the marriage dissolution proceeding. Basic principles of statutory construction support this conclusion.<sup>21</sup>

Additionally, the statute speaks of "the supported party,"<sup>22</sup> removing the presumption that only the wife is eligible for alimony. The change of focus from "ability of the husband"<sup>23</sup> to "ability of the supported party to engage in gainful employment"<sup>24</sup> suggests a fun-

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18. *Hearings on L.B. 820 Before the Comm. on the Judiciary*, 82d Legis., 2d Sess. 1 (March 16, 1972). Senator Waldron stated that the new statutory scheme would not change alimony and child support; that these would be left to the discretion of the courts. *Id.* at 11. Judge Krell of the Fourth Judicial District of Nebraska testified that evidence on alimony would remain the same as the instant law. *Id.* at 16, 18, 19. Attorney Ronald Reagan testified that common law precedent, including the fault considerations in the determination of alimony, would no longer be controlling. *Id.* at 27. Attorney Charles Scudder concluded that the new statutes would simply codify what the courts are presently doing. *Id.* at 34.

19. Attitudinal changes of the legislature concerning the scheme as a whole are evidenced by the exchange of statutory terms such as "dissolution of marriage," NEB. REV. STAT. § 42-347 (Cum. Supp. 1972), for "divorce," Law of April 12, 1945, ch. 101, § 42-301 [1945], Neb. Laws 329-30 (repealed 1972); and a statement that the marriage is "irretrievably broken," NEB. REV. STAT. § 42-353(7) (Cum. Supp. 1972), instead of "grounds," Law of April 12, 1945, ch. 101, § 42-301 [1945], Neb. Laws 329-30 (repealed 1972). Terms such as "aggrieved party" and "guilty party," Law of Feb. 19, 1875, ch. 19, § 6 (1875), Neb. Laws 79-80 (repealed 1972), are conspicuously absent.

20. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972). See text at note 2 *supra*.

21. 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 57.10, at 428 (4th ed. 1973).

22. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

23. Law of March 19, 1949, ch. 127, § 42-318(1) [1949], Neb. Laws 335 (repealed 1972).

24. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

damental change in the legislature's concept of alimony.

In view of the limited guidelines provided by the legislature, the major vice of the alimony statute lies in the impossibility of determining exactly what is meant by the listed criteria. Through thoughtful analysis, judicial determination could ameliorate those ambiguities. Mindful of this need, focus now will turn to the *Magruder* case.

### MAGRUDER v. MAGRUDER

The parties in this action married nine and one-half years prior to the plaintiff's petition for dissolution. At the time of the trial, the plaintiff-husband was thirty-two and the defendant-wife twenty-nine. Both were in good health; the marriage was childless.

During the early years of the marriage, the wife completed undergraduate work, obtained a Master's Degree and worked to provide the couple's living expenses. Her earnings totaled \$11,820.81 during the first five years of marriage.<sup>25</sup> The husband attended medical school, received his M.D. and made financial contributions of \$3,220.09 during this period.<sup>26</sup> In 1966 Dr. Magruder began his internship and became the major family provider. Mrs. Magruder taught a night class at a local college.<sup>27</sup> Dr. Magruder entered the Air Force to fulfill his military obligation in 1967; Mrs. Magruder remained in the home for the duration of the marriage. After completion of his military duty, the doctor began his practice of medicine and established a medical partnership which yielded an adjusted gross income of \$22,718 the first year (1970). His earnings rose to \$27,900 in 1971. His projected income for 1972 was \$36,000.<sup>28</sup>

At the trial, Mrs. Magruder denied that the marriage was irretrievably broken. However, the trial court decreed its dissolution. The couple's property was valued at a net worth of \$42,140.<sup>29</sup> One-half of this figure was awarded to each party. Mrs. Magruder was awarded alimony<sup>30</sup> in the amount of \$416.66 per month to be con-

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25. Brief for Appellee at 10.

26. *Id.*

27. *Id.* at 17.

28. *Magruder* at 575, 209 N.W.2d at 587.

29. Brief for Appellee at 7.

30. In explaining the method used to arrive at the alimony award, the trial court relied on one factor, stating:

The court feels that "alimony" as used in the statute means support in the sense of the obligation of one spouse to provide it in

tinued until her remarriage or the death of either party.

Appeal was taken by Mrs. Magruder urging two errors: inadequacy of the alimony award, and improper appraisal and division of property. On appeal, she requested \$1,100 permanent monthly alimony.<sup>31</sup> She was granted \$750 per month during the pendency of the appeal. Dr. Magruder cross-appealed attacking the amount of both the temporary and permanent alimony awards as well as the form of the permanent alimony. The Nebraska supreme court affirmed the property award and modified the alimony award. The court awarded Mrs. Magruder \$833.33 per month alimony to be continued for ten years and two months, a projected total of \$101,666.26. The payments were to terminate on her remarriage or the death of either party.

The supreme court's task in this case was simple: define the alimony statute's ambiguous phrase "circumstances of the parties,"<sup>32</sup> and then place the facts within that definition. Instead, the court blurred these determinations, leaving both the rationale and scope of the opinion uncertain.

Though not conclusive standing alone, the first hint of uncertainty for the basis of the majority's decision was the inclusion in the recital of facts that Dr. Magruder informed Mrs. Magruder that "other women looked good to him"<sup>33</sup> and that he desired a divorce. This occurred two or three years prior to the present action and the fact would seem to be irrelevant to the issues at hand, save one instance, that fault or conduct was later to be considered in the determination of alimony.

The court summarily concluded that the valuations of property made by the trial judge were justified prior to addressing itself to the question of alimony. The majority then recited the new alimony statute<sup>34</sup> without acknowledgement of its virginal nature. Following this, citing *Prosser and Mandelberg*, the court added:

[T]he ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. (Emphasis added).<sup>35</sup>

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the manner to which the other spouse was accustomed during the marriage, assuming ability to do so.

Brief for Appellee at 8, citing Trial Court Transcript at 43, Docket No. 9781 (Aug. 30, 1972).

31. Brief for Appellant at 23.

32. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

33. *Magruder* at 576, 209 N.W.2d at 587.

34. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

35. *Magruder* at 576, 209 N.W.2d at 587.

The majority failed to explain why these former cases were still controlling in view of the repeal of the fault-based statutory scheme under which they were decided.<sup>36</sup> Furthermore, *Prosser* itself has been criticized for its inconsistent analysis.<sup>37</sup> In that case, the following contradictory propositions appear in the same paragraph:

[Alimony] should not be allowed as a matter of sympathy to the wife or as a penalty imposed for the husband . . . . In determining the amount of alimony to be awarded . . . the relative or comparative fault of the parties is a material element.<sup>38</sup>

By simply quoting the new statute and citing the fault-based cases, without venturing to reconcile them expressly with the facts of the instant case, the majority lessened its vulnerability to accusations of considering fault in its determination of the alimony award. However, a comparison of *Magruder* and *Prosser* reveals pertinent similarities. In both cases the wives by their earnings had contributed materially to the education and earning capacities of the husbands. Both husbands had abandoned their wives.<sup>39</sup> The court in both cases underscored the righteous conduct of the wives; the result of both opinions was an increase in the alimony award. The *Prosser*

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36. Specific reference to the alimony statute rarely occurred under the former statutory scheme. This was probably due to the court's familiarity with the statutory scheme and to the fact that firmly established "tests" had been developed by the courts from those statutes for the determination of alimony. However, in *Prosser*, the majority included the alimony statute in the body of the opinion, presumably to demonstrate the correctness of their inclusion of the husband's earnings as an element to be considered in the award of alimony. *Prosser* at 633, 57 N.W.2d at 176. This reliance on the statute becomes significant when the court utilized *Prosser* for authority in the instant case, as the statute governing *Magruder* takes a diametrically opposite approach on that element; that is, the new statute mandates focus on the ability of the supported spouse to work rather than on the supporting spouse's income.

37. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.5, at 441 (1968).

38. *Prosser* at 634, 57 N.W.2d at 176.

39. In *Prosser*, the husband abandoned the wife of five years about a year after his graduation. The husband's behavior was examined at length by the court in less than approving terms:

But as [Mr. Prosser's] success mounted and he began to assume a higher station in the community, his interest in [Mrs. Prosser] cooled and he sought the society of another. . . . [Mr. Prosser] appears to have treated the marriage as one of convenience and, when his schooling was completed and his success apparently assured, he was willing to cast her aside and bestow his affections upon one who made no contribution whatever to the success that he now enjoys.

*Id.* at 632, 57 N.W.2d at 175.

opinion explicitly stated that comparative or relative fault was a material element in the determination of the amount of alimony to be awarded.<sup>40</sup>

The foregoing comparison of *Prosser* and *Magruder* suggests that the *Prosser* rationale, albeit both unarticulated and based on a fault divorce statute, was employed by the majority in *Magruder*. However, due to the majority's nonchalance in citing *Prosser*, without explanation of its specific applicability, the only conclusion that can be drawn is that the role of fault in alimony and property division in marriage dissolution is unclear. "Reasonableness," the "ultimate criteria" in *Magruder*, could mean anything.

Curiously, the *Magruder* majority inserted the new statute governing alimony<sup>41</sup> in two consecutive paragraphs, as if mere citation of the statute would remove the ambiguities and would reconcile the court's opinion with the facts at hand.

Next, the majority perfunctorily approved the annuity form of the alimony award. In so doing, it failed to respond to the argument made by Dr. *Magruder* that this type of award discourages remarriage and is contrary to public policy.<sup>42</sup> The majority commented that although not generally desirable, an annuity form of award can be proper "in some circumstances."<sup>43</sup> Without expanding on what those circumstances might be, the court again cited two fault-based decisions.<sup>44</sup> While the court's failure to consider the obsolescence of the statutory schemes underlying these decisions is not critical on this point, the uncertainty with which the opinion has proceeded thus far makes that omission assume added importance.<sup>45</sup>

When the majority faced the problem of amount and terms of the alimony award, it decided the question without resolving the precise issue of whether "circumstances of the parties" included fault.

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40. *Id.* at 634, 57 N.W.2d at 176.

41. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

42. Brief for Appellee at 4.

43. *Magruder* at 577, 209 N.W.2d at 587-88.

44. *Id.*, citing *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962); *Metschke v. Metschke*, 146 Neb. 461, 20 N.W.2d 238 (1945). These cases condemned monthly installments as a proper method of allowing alimony without fixing a gross award.

45. The last sentence of NEB. REV. STAT. § 42-365 (Cum. Supp. 1972), states:

Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

Why the majority used prior case law, instead of statutory language, for their authority for approval of the annuity plan is puzzling.

Instead, the court embarked on what appeared to be a balancing test. It noted the ages, health and self-supporting capacities of the parties and observed that it would be undesirable to have their lives bound by financial ties enduring for a lifetime.<sup>46</sup> The aforementioned appeared to be viewed as mitigating factors. The court continued:

On the other hand, the marriage did endure for about nine years and during that time [the wife] made substantial contributions to the future economic well-being of the parties . . . . [T]hey had just reached the point where they would begin to reap some of the economic rewards of their efforts.<sup>47</sup>

The court noted, too, that Mrs. Magruder wanted the marriage to continue.<sup>48</sup> The majority then abandoned its balancing approach and stated that the latter considerations of duration of the marriage, the wife's economic contributions and her expectations went to the determination of the amount of the award; the former considerations regarding age, health, self-supporting capacity and social considerations affected the duration of payment. The court failed to articulate what factors were to be considered in the determination of whether alimony should be awarded at all, a decision that should precede the determination of amount and duration.

The approach taken by the court in its consideration of amount and duration implies that expectations and economic considerations will be given great weight. In this case, those economic considerations focused explicitly on the financial contributions made by Mrs. Magruder during a critical period of Dr. Magruder's preparation for a medical career. The court seems to have presumed that the husband could not have completed his education without Mrs. Magruder's assistance. That Mrs. Magruder did not sacrifice her own education during this period was not mentioned by the court. The court seems to have accepted that Mrs. Magruder had a vested right

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46. *Magruder* at 577, 209 N.W.2d at 588. The court failed to explain why keeping the Magruders' lives bound for ten years and two months (a period longer than the duration of the marriage) was desirable.

47. *Id.*

48. *Id.* at 577, 209 N.W.2d at 588. At 51 ORE L. REV. 715, 712 (1972), the author points out that this can be nothing more than a tactic in "no-fault" dissolution proceedings; i.e., the "hold-out" spouse's opposition can be based on spite or in hopes of a more favorable post-dissolution settlement.

or expectancy in her husband's future earnings.<sup>49</sup> By nearly doubling the monthly amount awarded by the trial court and by placing a ten-year-and-two-month time span on the payments, the possibility of Mrs. Magruder's receiving her "vested" share was appreciably increased. No mention was made by the court as to the probable effect of the award. It is not unreasonable to speculate that the amount and duration of the award fixed by the court will discourage remarriage.<sup>50</sup>

The findings and rationale of the court based on Mrs. Magruder's expectations and contributions do not seem to support an award which equals nearly 300% of the total assets held by the parties.<sup>51</sup> This makes the majority's reliance on fault-based cases more significant and lends support to the dissent's allegation that the award was based on fault. If that is so, the award is clearly contrary to well-established Nebraska case law which prohibits the award of punitive damages.<sup>52</sup>

49. *Magruder* at 577, 209 N.W.2d at 588:

The parties at the time of the separation had just reached the point where they would begin to reap some of the economic rewards of their efforts. . . . These considerations lead us to believe that the alimony to be awarded [Mrs. Magruder] should be substantial . . . .

50. Brief for Appellee at 9.

51. The court's award of \$101,666.26 alimony in addition to the property valued at over \$20,000 indicates that factors other than Mrs. Magruder's economic contributions were being generously rewarded. To illustrate, had Mrs. Magruder invested her earnings (which were used for the couple's living expenses) from 1962-1968 in a savings account, the net value of that investment at the time of the dissolution of the marriage in 1972 would have been \$17,996.18. The value of these investments would have been as follows:

1962	\$ 316.93	1968	\$15,031.67
1963	\$ 2,174.41	1969	\$15,723.55
1964	\$ 6,740.28	1970	\$16,447.27
1965	\$ 9,690.59	1971	\$17,204.30
1966	\$13,029.90	1972	\$17,996.18
1967	\$14,370.24		

These computations were based upon the following assumptions: (1) Quarterly savings investments of all income by Mrs. Magruder; (2) 4½% interest rate (arrived at by computing a statistical median interest rate for the years between 1962-1972 because of the gross fluctuations in the interest rates during that period of time); and (3) continuous quarterly compounding of the principal and the interest.

The "Quarterly Factor Multiplier" of .0113135192 was utilized for the years 1962-1967. After 1968, the "Quarterly Factor Multiplier" utilized was .046278599, based on the fact that there were no further savings investments by Mrs. Magruder after that time. The Quarterly Factor Multipliers were taken from the Continuous Savings Interest Factor Tables, Chart #70075, prepared by the Financial Publishing Company, Boston, Massachusetts. Computations were prepared by Robert C. Jones. Interview with Robert C. Jones, First Federal Savings and Loan Association of Lincoln, Home-stead Office, Omaha, Nebraska, September 23, 1973.

52. *Boyer v. Barr*, 8 Neb. 68, 30 Am.R. 814 (1878).

Why the court failed to undertake the task presented it or even acknowledge that this was a case of first impression remains a mystery. Both parties recognized that an explanation of the ambiguous phrase "circumstances of the parties" was the threshold problem. Each urged an interpretation favoring his or her position<sup>53</sup> and in so doing proffered guidelines for the court to use in arriving at its own determination. The court declined the tender, and failed to make a definitive determination of "circumstances of the parties," thus creating a climate of uncertainty for future litigants.

#### DISSENT

The dissent appeared to be more willing to face squarely the real issues of the case. At the outset of its opinion, the minority emphatically assessed the amount of the award as "unconscionable," "grossly excessive," and "not harmonious" with the no-fault provisions for dissolution of a marriage.<sup>54</sup> Admonishing the majority to recognize its award as "sub silentio approval of applying the harsh and punitive considerations present in the traditional picture of a lifetime marriage, with family and children,"<sup>55</sup> the dissent properly recognized that even under the former fault approach the evidence was insufficient to support the award of the husband's earnings in the case at bar.<sup>56</sup>

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53. Mrs. Magruder argued forcefully that § 42-365 was not intended by the legislature to restrict the scope of the court's inquiry and that "circumstances of the parties" was meant to embrace all facts and circumstances considered by the court. She contended that the court should be guided primarily by the following considerations: age, earning ability, conduct of the parties during the marriage, station in life, health and physical condition, and financial circumstances. Brief for Appellant at 11-12.

Dr. Magruder took the position that the legislative intent and purpose in passing §§ 42-347 to 42-379 of the Nebraska Statutes was to repeal the fault approach in all phases of dissolution and that the purpose of alimony should be to provide an "equitable and reasonable way of allowing the supported spouse to adjust to a new life style." Brief for Appellee at 7-9.

54. *Magruder* at 578, 209 N.W.2d at 588 (White, C. J., dissenting).

55. *Id.*

56. *Id.* No cases were cited by the dissent on this point, but the case of *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964), is illustrative. In that case, the plaintiff wife worked for eleven years while her husband completed his medical education. One year after he began his medical practice the husband abandoned her. She was 45 years old at the time of the trial and the facts did not reveal any advanced education. The couple's property was valued at \$83,000. The trial court awarded the wife \$43,000 in the property settlement and an additional \$4,000 lien against the husband's land. The supreme court affirmed the property division and raised the \$4,000 award to \$10,000; thus the total award amounted to between 60% and 70% of the total assets of the parties. If the court in the instant case, where Mrs. Magruder's circumstances were far superior to Mrs. Loukota's, had followed the formula of *Loukota*, Mrs. Magruder's award would not have exceeded \$30,000.

Chief Justice White pointed out that the new statute specifically eliminated fault in the dissolution proceedings and focused on the new factors added by the legislature: "the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party."<sup>57</sup> Application of this criteria to Mrs. Magruder casts serious doubt on the justification for an alimony award amounting to over \$100,000.

The dissent scanned the statutes and decisions of other no-fault jurisdictions to support the position that fault should be abolished from consideration in the alimony award. Going further, it proposed that the trial court consider two broad factors in the determination of alimony: "social surroundings" and "the ability to help oneself."<sup>58</sup> The former would include the age and health of the parties plus the duration of the marriage; the latter would embrace the amount of assets, ability to obtain employment and the size of the income of the supporting spouse.<sup>59</sup>

Chief Justice White took two of the guidelines delineated by the statute, "duration of the marriage" and "ability of the supported party to engage in gainful employment,"<sup>60</sup> and placed them under his own amorphous categories, "social surroundings" and "ability to help oneself." Unfortunately he did not address himself to the specific statutory criterion "circumstances of the parties,"<sup>61</sup> leaving open to speculation whether his two broad factors encompass that statutory criterion or whether he was proposing that the criteria included in the statute be disregarded and his factors utilized in their place. The force of the dissent was further blunted by the unexplained manner of citing a fault-based decision, *Prosser*, for support of the proposition that fault was not to be considered in the awarding of alimony.

In sum, the dissenting opinion recognized the importance of the instant case and stated specifically that fault should be eliminated as a factor in the determination of alimony. Although clarification is needed as to the tangled criteria contained in the new alimony statute and the hybrid proposal advocated by the dissent, the minority opinion provides a starting point from which the court can,

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57. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

58. *Magruder* at 584, 209 N.W.2d at 591 (dissenting opinion).

59. *Id.*

60. NEB. REV. STAT. § 42-365 (Cum. Supp. 1972).

61. *Id.*

in future decisions, abolish fault from the alimony and property settlement considerations. The present posture of the majority appears to be contrary to both law and logic.

### STATUTES AND INTERPRETATIONS OF OTHER JURISDICTIONS

Because the majority failed to make a definitive construction in *Magruder*, Nebraska's alimony statute requires further interpretation. This can be facilitated by reference to other no-fault jurisdictions.<sup>62</sup>

California led the way in abolishing fault as the basis for divorce,<sup>63</sup> allowing evidence of fault only when relevant to child custody.<sup>64</sup> Statutory criteria for alimony<sup>65</sup> are identical to

62. Presently, eleven states have adopted irretrievable or irremediable breakdown as grounds for divorce: Arizona: ARIZ. REV. STAT. ANN. §§25-312, -316 (1973); California: CAL. CIV. CODE §4506 (West 1970). It should be noted that California has retained insanity as a ground for divorce. *Id.* Colorado: COLO. REV. STAT. ANN. §§46-1-6, 46-1-10 (Supp. 1971); Florida: FLA. STAT. ANN. §61.052 (Supp. 1973). Florida also permits divorce upon "adjudication of mental incompetence of one of the parties at least three years prior to a proceeding for dissolution of marriage." *Id.* Iowa: IOWA CODE ANN. §§598.5, 598.17 (Cum. Pamphlet 1973); Kentucky: KY. REV. STAT. ANN. §403.170 (1973); Michigan: MICH. STAT. ANN. §25.86 (Supp. 1973); Missouri: MO. ANN. STAT. §452.305 (Vernon Cum. Supp. 1974); Nebraska: NEB. REV. STAT. §42-347 (Cum. Supp. 1972); Oregon: ORE. REV. STAT. §107.025 (1971); Washington: WASH. REV. CODE ANN. ch. 157, §2 (Legis. Serv. 1973). Additionally, six states include irretrievable breakdown with other grounds for divorce: Alabama: ALA. CODE tit. 34, §20 (Supp. 1971); Connecticut: CONN. GEN. STAT. ANN. Pub. Act No. 73-373 Legis. Serv. No. 4 1973); Georgia: GA. CODE ANN. §30-102 (Supp. 1973); Hawaii: HAWAII REV. STAT. §580-41 (Supp. 1972); Indiana: IND. ANN. STAT. §31-1-11.5-1 (Burns Code ed. Supp. 1973); New Hampshire: N.H. REV. STAT. ANN. §458.7-a (Supp. 1972). "Incompatibility," a no-fault ground, is included in: Alabama: ALA. CODE tit. 34, §20.7 (Supp. 1971); Alaska: ALASKA STAT. §09.55.110(5) (1962); Connecticut: CONN. GEN. STAT. ANN. Pub. Act No. 73-373 (Legis. Serv. No. 4 1973) (living apart for 18 months due to incompatibility); Delaware: DEL. CODE ANN. tit. 13, §1522(12) (Supp. 1970) (Incompatibility must have existed for two years); Idaho: IDAHO CODE §32-603(7) (Supp. 1973) ("Irreconcilable differences"); Kansas: KAN. STAT. ANN. §60-1601(8) (Supp. 1972); Nevada: NEV. REV. STAT. §125.010(10) (1969); New Mexico: N.M. STAT. ANN. §22-7-1.1 (Supp. 1973); North Dakota: N.D. CENT. CODE §14-05-03(8) (1971) ("Irreconcilable differences"); Oklahoma: OKLA. STAT. ANN. tit. 12, §1271(7) (1961); Texas: TEX. FAM. CODE §3.01 (1970) ("Insupportability"); Virgin Islands: V.I. CODE ANN. tit. 16, §108 (1957). See, Freed & Foster, *Economic Effects of Divorce*, 7 FAMILY L.Q. 276-77 (1973).

Fault as a criteria governing the award of alimony and property division is specifically excluded in Arizona, Kentucky, Oregon, and Washington. However, fault is not mentioned in California, Colorado, Iowa or Nebraska. In Florida, the adultery of a spouse may be considered in determining whether or not alimony should be granted. See, Freed & Foster, *Economic Effects of Divorce*, 7 FAMILY L.Q. 278 (1973).

63. CAL. CIV. CODE § 4506 (West 1970).

64. *Id.* § 4509.

65. *Id.* § 4801 provides in pertinent part:

(a) *Power of court; security; revocation or modification.* In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such a period

Nebraska's. The California court of appeals interpreted their statute as a mandate for the elimination of fault in the considerations of alimony by noting:

Under the pre-existing law an award of spousal support rested in the judicial discretion of the trial court upon consideration of the circumstances of the parties, but one of the circumstances to be considered was the comparative marital fault of the parties . . . . [T]he change effected by Civil Code section 4801 was the elimination of the consideration of the comparative marital fault of the parties . . . .<sup>66</sup>

The Iowa dissolution statute allows a divorce decree to be entered

when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.<sup>67</sup>

Maintenance awards are to be allowed "as shall be justified."<sup>68</sup>

After passage of the no-fault statutory scheme,<sup>69</sup> the Iowa supreme court, in its first decision under the new statute,<sup>70</sup> faced squarely the issue of whether fault should be considered in arriving at a determination of financial or property rights. Reviewing the legislative history, the court pointed out that the legislature had declined to follow the recommendation of the Divorce Laws Study Committee of Iowa which had proposed the admission of all evidence in the determination of a marital breakdown. Judge Mason concluded:

In order to carry out this obvious legislative intent and give effect to the object sought to be accomplished, we hold,

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of time, as the court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment without interfering with the interests of the children of the parties in the custody of such spouse . . . .

66. *In re Rosan*, 24 Cal. App. 3d 885, \_\_\_\_\_, 101 Cal. Rptr. 295, 300 (1972).

67. IOWA CODE ANN. § 598.17 (1973).

68. *Id.* § 598.21.

69. *Id.* §§598.1 *et seq.*

70. *In re Williams*, 199 N.W.2d 339 (Iowa 1972).

not only the "guilty party" concept must be eliminated but evidence of the conduct of the parties insofar as it tends to place fault for the marriage breakdown on either spouse must also be rejected as a factor in awarding property settlement or an allowance of alimony or support money.<sup>71</sup>

Florida's no-fault statutes went into effect in 1971.<sup>72</sup> Dissolution of marriage is based on (a) whether the marriage is irretrievably broken or (b) mental incompetence.<sup>73</sup> The Florida Legislature retained the notion that "adultery of a spouse and the circumstances thereof" are still important criteria in the determination of alimony.<sup>74</sup> Although the legislature maintained a facet of the traditional fault concept in the dissolution proceedings, the Florida court of appeals declined to accept that posture.<sup>75</sup> In another case, *Thigpen v. Thigpen*,<sup>76</sup> the appellate court stated:

The new concept of the marriage relation implicit in the so-called "no-fault" divorce law enacted by the legislature in 1971 places both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in the event of dissolution.<sup>77</sup>

Thus, while the Florida Legislature's approach was not a complete departure from the traditional notions of divorce, the courts have interpreted the statute on clearly no-fault principles.

This scan of other no-fault jurisdictions reveals a harmony among them. Each has made a significant effort to fully implement the legislative intent concerning no-fault in the interpretation and administration of the new dissolution statutes. The Nebraska supreme

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71. *Id.* at 345.

72. FLA. STAT. ANN. §§ 61.001 to 61.20 (Supp. 1973).

73. *Id.* § 61.052(1) (Supp. 1973).

74. *Id.* § 61.08(1) (Supp. 1973).

75. *Beard v. Beard*, 262 So.2d 269 (Fla. 1st Dist. Ct. App. 1972). The majority, speaking of the woman's place in the new social order from an egalitarian point of view, noted:

Whether the marriage continues to exist or is severed through the device of judicial decree, the woman continues to be as fully equipped as the man to earn a living and provide for her essential needs. The fortuitous circumstances created by recitation of the marriage vows neither diminishes her capacity for self-support nor does it give her a vested right in her husband's earnings for the remainder of her life.

*Id.* at 272.

76. 277 So.2d 583 (Fla. 1st Dist. Ct. App. 1973).

77. *Id.* at 585.

court declined this approach in *Magruder*. Hopefully when presented with its next opportunity to interpret the alimony statute, it will hand down a definitive decision and take its place in line with California, Florida, and Iowa. Because Nebraska's alimony statute is a reflection of California's, the California decisions should be considered by the Nebraska supreme court as particularly persuasive.

### CONCLUSION

Under prior law there was confusion relating to alimony. Even though the nature and purpose of alimony grew more and more obscure, the practitioner could glean some guidelines from the midst of verbiage.

The 1972 Nebraska Legislature provided no explicit interpretive guidelines outside of the plain wording of the alimony statute and the prevalent no-fault spirit of the statutory scheme. The new no-fault scheme aims at reducing the emotional stress, bitterness and adversarial acrimony frequently accompanying the proceedings. It seems anomalous to remove the finger-pointing in the dissolution itself and then to allow it in the post-dissolution determinations of alimony and property division. It seems highly doubtful that the legislature intended such a result.

The problem of alimony under no-fault is one of serious legal and social importance. The statute's ambiguities which could have been removed by judicial determination now loom larger. In the absence of specificity, there is danger of inconsistency within the lower courts. For the practitioner proceeding under the new no-fault statute, the most pressing problem concerning alimony is definitional: what are "circumstances of the parties"? Is fault to be considered? Is past case law obsolete or controlling?

In the final analysis, the bench, bar and future litigants are in need of greater certainty concerning the factors considered in alimony. The legislature should provide more adequate specifications for defining and limiting the type of evidence that can be introduced. A thorough re-thinking of what alimony is all about would be the most efficacious starting point. Without such standards, *Magruder* tells us that the future of alimony awards depends on the particular attitudes of those on the bench. Herein lies the final caveat: legislative modification must occur in tandem with judicial treatment.