MAINTENANCE ON APPEAL

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Liability for support and maintenance of children of divorced parents arises under three general situations: first, where the divorce decree is silent both as to custody and maintenance; second, where the terms of the decree awards custody but is silent as to maintenance; and third, where the decree specifically provides for maintenance of the children.[1] This article views the problem through the eyes of the appellate court as revealed in the opinions of cases decided on appeal. The manner in which the trial court views the request for maintenance is considered elsewhere in the symposium. While some reference will be made to the general problems involved in the law relating to support, the major effort will be an analysis of those factors which enter into the courts' determination of the amount of allowance.

WHERE THE DIVORCE DECREE IS SILENT AS TO BOTH CUSTODY AND MAINTENANCE

In these maintenance cases the appellate court is faced with a set of problems somewhat different from the determination of the adequacy of a designated sum of money. Even though the parties to a divorce think only of their own convenience the welfare of the children should not be neglected; to guard against this neglect, various legal doctrines have found acceptance.

When the divorce decree is silent as to both custody and maintenance, the duties of parents with regard to support and education of the minor children are not changed by mere granting of the divorce.[2] The father's obligation is exactly the same as it was before dissolution of the marriage;[3] and this liability is not altered by the remarriage of the father or the mother.[4] However, if the wife remarries and the child is taken into the new home as a member of that family, the father may not be liable for that child's support.[5] It is the general rule that where the children remain with the mother she is entitled to maintain an action against the

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[1] Larson v. Madere, 149 La. 95, 88 So. 701 (1921); 27 C. J. S. §319a. After considering various methods of classifying the material on the subject, the writer believes the presentation employed in Corpus Juris Secundum to be quite adequate. The main divisions of this classification are followed in the present article.

[2] Hensen v. Hensen, 212 Iowa 1226, 238 N. W. 83 (1931); *In re* Ellenberg, 131 Ore. 440, 283 Pac. 27 (1929); Gallion v. McIntosh, 8 S. W. (2d) 1076 (Mo. App., 1928).

[3] Commonwealth *ex rel.* Stack v. Stack, 141 Pa. Super. 147, 15A (2d) 76 (1940); Peeler v. Peeler, 202 N. C. 123, 162 S. E. 472 (1932); Kelley v. Kelley, 317 Ill. 104, 147 N. E. 659 (1925).

[4] People *ex rel.* Wagstaff v. Matthews, 168 Misc. 188, 5 N. Y. S. (2d) 516 (Sup. Ct., 1938), affirmed 225 App. Div. 866, 7 N. Y. S. (2d) 1008 (2d Dep't, 1938); Monroe County v. Abegglen, 129 Iowa 53, 105 N. W. 350 (1905).

[5] McWilliams v. Kinney, 180 Ark. 836, 22 S. W. (2d) 1003 (1930).

father for money expended by her in supporting the children.[6] This rule is flexible and a court may refuse to invoke it when the conduct of the wife is such as does not meet with the court's approval.[7] Should the father fail in his duty to support the child, a stranger who has supported the child may recover in a suit against the father.[8]

WHERE THE DECREE PROVIDES FOR CUSTODY BUT IS SILENT AS TO MAINTENANCE

Where the divorce decree provides for custody, but is silent as to maintenance, three major situations are presented. The child may be given: to a third person, to the mother, or to the father. Where, in such event, the custody is not given to the father, there is a difference of opinion as to his liability for support. The minority line of authority holds that, unless there is some statutory provision to the contrary,[9] such a decree has the legal effect of relieving the father of liability for support of the children, while in the mother's custody.[10] Perhaps it is felt that the alimony awarded the wife had really been fixed with an eye to the cost of supporting the children whose custody she was given. Courts frequently recognize the father's liability, however, when the father has so conducted himself that it is necessary and proper to deprive him of their custody.[11] A majority of the authorities denounce the doctrine that relieves him of obligation to support children whose custody is given to the mother, as it not only ignores the rights and welfare of the child, but also enables the father to take advantage of his own wrong.[12] These better reasoned cases hold that the legal obligation of a father for the support of his children is not changed by a decree of divorce which, for his misconduct, gives the custody of the children to the mother but which is silent as to their support.[13] This is modified insofar as the father is incapacitated, or the support furnished by the mother is voluntary on her part.[14]

When, despite silence of the decree, obligation to support is held to exist and the father refuses or neglects to support the child, the remedy is not necessarily limited to additional proceedings in the court which granted the decree; the mother may recover from him in an original independent action in any court of competent jurisdiction for a reasonable sum for necessaries.[15] However, this right does not arise until the husband refuses to respond to a just claim for the child's mainte-

[6] Kelly v. Kelly, 329 Mo. 992, 47 S. W. (2d) 762 (1932).
[7] Glynn v. Glynn, 94 Me. 465, 48 Atl. 105 (1900).
[8] Laumeier v. Laumeier, 237 N. Y. 357, 143 N. E. 219 (1924).
[9] Bondies v. Bondies, 40 Okla. 164, 136 Pac. 1089 (1913).
[10] Brown v. Smith, 19 R. I. 319, 33 Atl. 466 (1895).
[11] Liebold v. Liebold, 158 Ind. 60, 62 N. E. 627 (1902).
[12] See West v. West, 114 Okla. 279, 246 Pac. 599 (1926); Boggs v. Boggs, 138 Md. 422, 114 Atl. 474, 478 (1921).
[13] Baker v. Baker, 169 Tenn. 589, 89 S. W. (2d) 763 (1935).
[14] Josey v. Josey, 114 Okla. 279, 245 Pac. 844 (1926); West v. West, 114 Okla. 279, 246 Pac. 599 (1926).
[15] Taffit v. Taffit, 162 Misc. 759, 295 N. Y. S. 807 (Sup. Ct., 1937); Ware v. Ware, 144 Kan. 121, 58 Pac. (2d) 49 (1936).

nance.[16] A mother cannot maintain such an independent action in behalf of the child for the child's future support.[17] One case holds that where there is no order fixing the amount of the husband's obligation for the support of a child, the wife, who obtained the divorce decree, may maintain a subsequent action to recover expenditures made by her for such support prior to the decree.[18] If a wife obtains a divorce and assumes the support of a child in consideration of the husband's release of any right to the child, she is barred from making any claim against the father, after the child has reached majority, for support furnished the child during its minority.[19] The fact that alimony to a divorced wife, who has custody of the children, is fully paid does not relieve the husband from liability for necessary medical services to the children, and failure to notify the husband of such services does not bar recovery from him.[20]

There is authority to the effect that the primary liability of the father to support his children is civil, and runs in favor of the person to whom custody has been awarded, whether it be the divorced wife or a third person.[21] It has been held that a wife may pledge the husband's credit for necessaries furnished to a child in her custody and the creditor may recover from the father.[22] If necessaries are furnished to a child by a stranger, the stranger may recover from the father;[23] but the child, himself, has no right of action against the father for the value thereof.[24] On the other hand, it has been held that the law will not imply that the father of an infant child has assumed to pay the mother's second husband for the child's support where, though the father has made no demand for custody of the child, the mother's second husband has never asked pay for the child's maintenance.[25] Likewise, it has been said that there is no legal duty on the part of the father to support the child where custody is awarded to the mother by a divorce decree and she remarries and the child is adequately cared for by the mother and stepfather.[26] Where a divorce was granted to the father, but custody of the children given to the mother who was awarded a substantial sum as alimony, payable in installments, the court said that suit could not be maintained against the father for funeral expenses of the child who died while in the mother's custody.[27]

Of course, where the custody of the children is awarded to the father, he must support them in compliance with his common-law duty.[28] If the father becomes

[16] Boggs v. Boggs, 138 Md. 422, 114 Atl. 474 (1921).
[17] Baker v. Baker, 169 Tenn. 589, 89 S. W. (2d) 763 (1935).
[18] Simon v. Simon, 170 Misc. 420, 10 N. Y. S. (2d) 577 (Sup. Ct., 1939).
[19] Garrett v. Garrett, 172 Ga. 812, 159 S. E. 255 (1931).
[20] Stech v. Holmes, 210 Iowa 1136, 230 N. W. 326 (1930).
[21] Johnson v. State, 22 Ala. 160, 113 So. 480 (1927).
[22] 27 C. J. S. §319c, 1203 (1941). [23] Owen v. Watson, 157 Tenn. 352, 8 S. W. (2d) 484 (1928).
[24] Hooten v. Hooten, 15 S. W. (2d) 141 (Texas Civ. App., 1929).
[25] Johnson v. Onsted, 74 Mich. 437, 42 N. W. 62 (1889).
[26] Chandler v. Whatley, 238 Ala. 206, 189 So. 751, 755 (1939). It should be noted, however, that this was a case where it was claimed by the stepfather, who asked for custody of the child after the mother's death, that the father's non-support after the divorce showed his unfitness for custody.
[27] Dodge v. Keller, 29 Ohio App. 114, 162 N. E. 750 (1927).
[28] *In re* Weber's Estate, 168 Misc. 757, 6 N. Y. S. (2d) 417 (Surr. Ct., 1938); Rice v. Andrews, 127 Misc. 826, 217 N. Y. S. 528 (Sup. Ct., 1926).

helpless and unable to furnish such support, the duty falls upon the mother, notwithstanding that the decree of divorce gave custody of the children to the father.[29] When the father is given the custody of a child and then permits the mother to have the child, he will be liable for room and board furnished to the child at the mother's request.[30] On the other hand, it has been held that where the mother takes a child away from the father, to whom the custody has been awarded, without an order for its maintenance, she cannot recover from the father for support furnished to the child while in her custody.[31]

When the husband obtains a divorce because of the wife's fault and the decree contains no provision as to the support of the children, there is authority holding that the wife has no claim upon the husband for support of the children, if he did not promise to pay for necessaries furnished by her nor request that they be furnished.[32] On the other hand, there are decisions to the effect that a wife, who is divorced because of her misconduct, has an unqualified legal right to compel the innocent husband to compensate her for expenses incurred by her for the support of their children in her custody.[33] The general rule under such circumstances is that as long as the wife has the resources to support the children in a state equal to that which the means of the father would permit, she has no recourse against him. But if the necessities of the children require the father's contribution, his obligation is not cancelled by the fact that the divorce was granted to him because of the mother's fault.[34]

WHERE THE DECREE PROVIDES FOR MAINTENANCE

Divorce decrees frequently provide specifically for the maintenance of children. When such is the case, the duty of support is upon the party who has been named by the decree.[35] The court has a wide discretion in making the order, "but the order must be just."[36] The various factors considered by the court will be discussed later. Children of divorced parents are wards of the court and the provisions for their maintenance must be made from the standpoint of the children's best interests.[37] The claims and personal rights of the parents, and even the wishes of the child, must yield to this primary consideration.[38] In the absence of a statute to the

[29] *In re* Weber's Estate, 168 Misc. 757, 6 N. Y. S. (2d) 417 (Surr. Ct., 1938).

[30] Dolvin v. Schimmel, 284 S. W. 811 (Mo. App., 1926).

[31] Thompson v. Mueller, 28 Ohio App. 51, 161 N. E. 291 (1927); Nelson v. Nelson, 146 Ark. 362, 225 S. W. 619 (1920).

[32] Drischel v. Drischel, 49 Ga. App. 619, 176 S. E. 694 (1934); Douglass v. Douglass, 22 Ohio Cir. Ct. 423, affirmed 64 Ohio St. 605, 61 N. E. 1142 (1901).

[33] Kelly v. Kelly, 329 Mo. 992, 47 S. W. (2d) 762, 765 (1932); McKannay v. McKannay, 68 Colo. App. 701, 230 Pac. 214 (1924).

[34] Bruce v. Bruce, 141 Okla. 1601, 285 Pac. 30 (1930); Post v. Post, 95 W. Va. 155, 120 S. E. 385 (1923); Graham v. Graham, 140 Tenn. 328, 204 S. W. 987 (1918); White v. White, 169 Mo. App. 40, 154 S. W. 872 (1913).

[35] Lewis v. Lewis, 174 Cal. 336, 163 Pac. 42 (1917); Johnson v. Latty, 210 Fed. 961 (N. D. Ohio, 1912).

[36] Breisach v. Breisach, 37 Ohio App. 34, 173 N. E. 317 (1930).

[37] Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340 (1939); Kane v. Kane, 241 Mich. 96, 216 N. W. 437 (1927).

[38] Kane v. Kane, 241 Mich. 96, 216 N. W. 437 (1927).

contrary, the court may impose the entire obligation of maintaining the minor children on either the father or the mother, or may divide the burden between them.[39]

Provisions in a decree awarding custody to the mother and placing the duty of support exclusively on her are binding as between the father and mother; but the father is not relieved from his duty to support the minor children if the mother becomes unable to furnish such support.[40] Under such circumstances, a third person furnishing necessaries for the children may sue the father for reimbursement on an implied contract.[41] The right of action is not affected by the fact that the person furnishing the necessaries is an adult child of the parents and had knowledge of the terms of the decree.[42]

LIMITATIONS ON LIABILITY FOR SUPPORT

The court's power to require the husband to provide support for the children is generally limited to the issue of the marriage[43] and children legally adopted by the couple.[44] An order cannot be made for the support of a child who is of age even though that child is incapable of providing for its own needs.[45] Sometimes, if a child has reached such an age that it is capable of supporting itself, the court will not require the father to contribute to its maintenance.[46] In any event, the father's liability for the support of a child absolutely terminates upon the child's reaching majority. Also, the court has no power to require the father to build up or provide for an estate payable to the child when he becomes of age.[47]

The child's lack of cordiality toward the divorced father does not forfeit its right to support.[48] The father is not relieved from liability because he is insolvent, or because his property is mortgaged greatly in excess of its actual value.[49] Nor is the father's duty affected by the mother's refusal to permit him to take the children and provide for them.[50] If custody of the child is awarded to the mother, and the father ordered to support the child, but granted the right of visitation, the order for support is not conditioned on the father's right of visitation.[51] In awarding the custody of a minor child to a mother residing in another state or a foreign country, the court may charge the father with the child's support, and the fact that the

[39] Lufkin v. Lufkin, 209 Cal. 710, 290 Pac. 8 (1930); Gibbons v. Gibbons, 75 Ore. 500, 147 Pac. 530 (1915); Hector v. Hector, 51 Wash. 434, 99 Pac. 13 (1909).

[40] Barrett v. Barrett, 44 Ariz. 509, 39 Pac. (2d) 621 (1934).

[41] *Ibid.*

[42] *Ibid.*

[43] Wood v. Wood, 61 App. Div. 96, 70 N. Y. S. 72 (4th Dep't, 1901).

[44] Burk v. Burk, 222 Mich. 149, 192 N. W. 706 (1923).

[45] Boehler v. Boehler, 125 Wisc. 627, 104 N. W. 840 (1905).

[46] Plaster v. Plaster, 47 Ill. 290 (1868).

[47] Kunc v. Kunc, 186 Okla. 297, 97 Pac. (2d) 771 (1939).

[48] Yarborough v. Yarborough, 168 S. C. 46, 166 S. E. 877 (1932); certiorari granted, 289 U. S. 718, reversed on other grounds, 290 U. S. 202.

[49] Dawson v. Dawson, 23 Tenn. App. 556, 135 S. W. (2d) 458 (1939).

[50] Kelly v. Kelly, 329 Mo. 992, 47 S. W. (2d) 762 (1932); Rue v. Kempf, 186 Mo. App. 57, 171 S. W. 588 (1914).

[51] Hatch v. Hatch, 15 N. J. Misc. 461, 192A, 241 (Ch., 1937).

father is deprived of access to the child by the divorce decree does not relieve him from the duty of support.[52]

A minor child's basic right to support by the father is not altered by any agreement between the parents in respect to such support made or pending a divorce suit.[53] However, a divorced wife, who retains custody of a child under such an agreement, has the primary duty to support it.[54] These agreements are not deemed invalid provided they are founded on an adequate consideration.[55] Although the court gives primary attention to the welfare of the child[56] and is not bound by any agreement between the parents,[57] it may give weight to such an agreement when making the decree.[58] If its terms appear to be fair and reasonable, they may be incorporated into the decree.[59] If the amount provided in the agreement is inadequate, the court should order the payment of a reasonable sum.[60] A decree made pursuant to a property agreement between the spouses for the benefit of the children is enforceable by the children.[61]

By way of summarization of the general law in regard to maintenance, it can be said that the parents' liability for the maintenance and education of their minor children is not altered by a decree of divorce, without more. The primary obligation rests on the father. The weight of authority holds that the father's legal obligation is not affected by a decree which awards custody of the children to the wife but is silent concerning their support, when the divorce is occasioned by the father's misconduct. The wife may maintain an independent action against the husband for money furnished by her for such support after the decree. If the husband obtains a divorce because of the wife's fault, some cases hold that she has no claim against him for the support of the children in her custody when the decree is silent as to their support. However, the better authorities support the contrary rule and refuse to penalize the children because of the mother's misconduct. When the decree provides for maintenance of the children, the duty of support is upon the one on whom the decree places it. Liability for maintenance extends only to the issue of the marriage and children legally adopted by the couple. This liability

[52] Kane v. Kane, 241 Mich. 96, 216 N. W. 437 (1927).

[53] Simon v. Simon, 170 Misc. 420, 10 N. Y. S. (2d) 577 (Sup. Ct., 1939); Worthington v. Worthington, 218 Ala. 80, 117 So. 645 (1928); Greenberg v. Greenberg, 99 N. J. Eq. 461, 133 Atl. 768 (1926).

[54] See Wilson v. Wilson, 271 Ky. 631, 112 S. W. (2d) 980 (1937).

[55] Watkins v. Clemmer, 129 Cal. App. 567, 19 Pac. (2d) 303 (1933); Gothard v. Lewis, 235 Ky. 117, 29 S. W. (2d) 590 (1930).

[56] Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933); Melson v. Melson, 151 Md. 196, 134 Atl. 136 (1926).

[57] Karlslyst v. Frazier, 213 Cal. 377, 2 Pac. (2d) 362 (1931); Kunker v. Kunker, 230 App. Div. 641, 246 N. Y. S. 118 (3d Dep't, 1930); Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409 (1920).

[58] Karlslyst v. Frazier, 213 Cal. 377, 2 Pac. (2d) 362 (1931); Boggs v. Boggs, 138 Md. 422, 114 Atl. 474 (1921).

[59] Bridges v. Bridges, 227 Ala. 144, 148 So. 816 (1933); Dunham v. Dunham, 189 Iowa 802, 178 N. W. 551 (1920).

[60] Melson v. Melson, 151 Md. 196, 134 Atl. 136 (1926).

[61] Cowle v. Cowle, 114 Kan. 605, 220 Pac. 211 (1923); Gould v. Gunn, 161 Iowa 155, 140 N. W. 380 (1913).

ceases when the child reaches majority. However, the father is not relieved from liability because the mother is able to support the children or because he is insolvent. The father cannot refuse to furnish support on the grounds that he is denied access to the child, as the attitude of the parents toward each other does not affect the rights of an infant child. An agreement between the parents concerning maintenance is not binding on the court, but if fair and reasonable, may be given considerable weight. The basic principle is that all provisions in the decree in regard to maintenance must be made from the standpoint of the child's best interests.

STATUTORY PROVISIONS

According to *Vernier,*[62] there are statutes in forty-seven jurisdictions on the matter of maintenance, but they go into little detail.[63] In eight of the jurisdictions statutes provide that the amount is to be "suitable";[64] in seven, "just";[65] in six, "reasonable";[66] in two, "proper";[67] in two, "fit";[68] and in one each, "sufficient"[69] or "necessary."[70] The abilities of the parties determine the amount in two jurisdictions,[71] and in Georgia the specific sum is set by a jury. In general, the language of the statutes is so broad that the courts are free to take into consideration almost any factors that may be deemed proper by the court in fixing the amount.

FACTORS DETERMINING THE AMOUNT OF THE AWARD

An appellate court dealing with a case involving a decree providing for the maintenance of children has before it the record in the lower court. After perusing that record and listening to arguments of counsel for the parties it may take any one of several steps. It may decide that it agrees with the lower court. It may conclude that even though it would have reached a different view yet the trial court has not abused its discretion. In such cases the existing decree continues in effect. But if it appears that a wrong decision was reached below and that the sum of money is either too large or too small for the intended purpose, then a new amount must be determined upon; a new decree promulgated. Sometimes the appellate court, itself, makes this new decision on the basis of the lower court records; sometimes from a consideration of other factors. Sometimes the lower court is directed to make the changes and to consider other factors.

The lawyer who represents a parent against whom a maintenance decree has issued and who is considering whether or not he should take an appeal is interested in the factors which affect judicial discretion.

[62] 2 VERNIER, AMERICAN FAMILY LAWS (1932) 95. Professor Vernier's admirable compilation was used as the source for all of the material relating to statutory provisions.

[63] *Ibid.*, p. 193.

[64] Arizona, Michigan, Minnesota, Nebraska, New York, Tennessee, Wisconsin and Wyoming.

[65] Alaska, Colorado, Hawaii, Illinois, Montana, New Jersey and Oregon.

[66] Colorado, Hawaii, Illinois, New Hampshire, New Jersey and Wisconsin.

[67] Alaska and Oregon.

[68] Illinois and New Jersey.

[69] Georgia.

[70] Wyoming.

[71] Connecticut and Hawaii.

The writer has examined a number of appellate court decisions dealing with the problem of maintenance in order to glean from the opinions those factors which are taken into consideration by the appellate courts in determining whether the amount of the award by the lower court is proper. The findings are set forth below and fall into four main categories, namely: the legal standard set by the various courts; the elements to be considered in reaching the standard; the various facts that the courts consider when appraising the situation in particular cases; and the extent of review by the appellate court, including the weight given to the trial court's decision.

THE LEGAL STANDARD SET BY THE COURTS

The term "Legal Standard" is used to describe the phrase employed by the court to designate the goal toward which it is proceeding.

In regard to the legal standard used by the court in maintenance cases, one case flatly states that there is no fixed rule for determining the amount.[72] Another failed to recite any evidence whatsoever or mention any standard but merely expressed agreement with the decision of the lower court.[73] In some instances, a complete lack of facts in the opinion may be supplemented by a meager statement to the effect that the majority of the court considers the sum awarded as liberal but not extravagant.[74] After reciting the facts of the case, some courts, in their opinions, merely let it be known: that the amount is "somewhat unfair" to the husband;[75] that it is sufficient that the order was susceptible of performance by the husband;[76] that the award is not an "onerous burden" upon the father;[77] or that the award is not "exorbitant."[78] Such opinions are not of much assistance in determining the legal standard, if any, used by the court in reaching a conclusion. More definite standards are set in those opinions that say the sum be fixed as may seem "equitable and just";[79] such sum as is deemed "just and reasonable";[80] to provide "adequately" for the children;[81] or, what "better meets the exigencies of the situation."[82] The overwhelming weight of authority is to the effect that the award must be an amount which is "reasonable" in view of all the circumstances.[83]

[72] Sawyer v. Sawyer, 57 Cal. App. (2d) 582, 134 Pac. (2d) 868 (1943).

[73] Gaddis v. Gaddis, 239 Ala. 75, 194 So. 163 (1940).

[74] See Oliphant v. Oliphant, 177 Ark. 613, 7 S. W. (2d) 783, 789 (1928).

[75] See Kamasauskas v. Kamasauskas, 248 Mich. 663, 227 N. W. 538 (1929).

[76] See Townsend v. Townsend, 115 S. W. (2d) 769, 772 (Texas Civ. App., 1938).

[77] See Creasy v. Creasy's Next Friend, 241 Ky. 403, 44 S. W. (2d) 271, 272 (1931).

[78] See Walden v. Walden, 250 Ky. 379, 63 S. W. (2d) 290, 291 (1933).

[79] See Schneider v. Schneider, 155 Miss. 621, 125 So. 91 (1929); Shaffer v. Shaffer, 181 N. W. 261, 263 (Iowa, 1921).

[80] See Haase v. Haase, 118 Neb. 94, 223 N. W. 649 (1929).

[81] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928); Hayden v. Hayden, 215 Ky. 299, 284 S. W. 1073, 1074 (1926).

[82] See Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).

[83] See Jaffe v. Jaffe, 74 App. D. C. 391, 124 F. (2d) 233, 234 (1941); Krueger v. Krueger, 210 Minn. 144, 297 N. W. 566, 567 (1941); Kunc v. Kunc, 186 Okla. 297, 97 Pac. (2d) 771 (1939); Collins v. Collins, 182 Okla. 246, 77 Pac. (2d) 74, 76 (1938); Gentry v. Gentry, 161 Va. 786, 172 S. E. 157 (1934); Roach v. Roach, 213 Iowa 314, 237 N. W. 439, 442 (1931); Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928); Miller v. Miller, 224 Ky. 234, 5 S. W. (2d) 1041 (1928); Singleton v. Singleton, 217 Ky. 38, 288 S. W. 1029 (1926); Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

THE ELEMENTS CONSIDERED IN APPLYING THE STANDARD

The next problem is to attempt an analysis of the idea embodied in the word "reasonable." It may be a subjective or objective test; or it may combine both factors.

The principal elements considered by the courts in determining whether or not the award is in accordance with the legal standard are the father's ability to pay[84] and the needs of the children. The amount must be in just proportion to the father's ability to earn money; and the court is not to place a burden on the father which is beyond his ability to carry.[85] The present needs of the child must be considered,[86] and a child is entitled to be maintained in such a fashion as the parents are able to maintain it,[87] or according to the needs of a child in that station of life.[88] The court should consider what is required to provide properly for the children[89] and the amount reasonably necessary for such support[90] with due regard to the proper nurture and education of such children[91] and the fact that they should have a decent home and decent support.[92] Full consideration is to be given to all the facts[93] and circumstances[94] and the nature of the case.[95] The character and situation of the parties,[96] including the mother's financial condition and earning ability,[97] will also receive attention. The paramount consideration is the welfare[98] and best interests of the children.[99] A lower court decree that completely overlooks the welfare of a child will not be sustained.[100]

EVIDENTIARY FACTS

After having decided what elements should be considered by the courts, such as ability of the father, needs of the child and others, it is necessary to know what

[84] See Davenport v. Davenport, 205 Ark. 337, 168 S. W. (2d) 832, 833 (1943); Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941) (an exhaustive case); Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 (N. Y. City Cts., 1936); Haase v. Haase, 118 Neb. 94, 223 N. W. 649 (1929).

[85] See Tressler v. Tressler, 118 W. Va. 251, 189 S. E. 820, 821 (1937).

[86] See Hartkemeier v. Hartkemeier, 248 Ky. 803, 59 S. W. (2d) 1014, 1016 (1933).

[87] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 ff. (N. Y. City Cts., 1936).

[88] See Hayden v. Hayden, 215 Ky. 299, 284 S. W. 1073, 1074 (1926).

[89] See Creasy v. Creasy's Next Friend, 241 Ky. 403, 44 S. W. (2d) 271, 272 (1931).

[90] See Dawson v. Dawson, 23 Tenn. App. 556, 135 S. W. (2d) 458 (1939); Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 93 (1929).

[91] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941).

[92] See Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).

[93] See Collins v. Collins, 182 Okla. 246, 77 Pac. (2d) 74, 76 (1938); Pradat v. Salathe, 186 La. 574, 173 So. 110 (1937); Cummins v. Cummins, 7 Cal. App. (2d) 294, 46 Pac. (2d) 284, 289 (1935); Kamasauskas v. Kamasauskas, 248 Mich. 663, 227 N. W. 538 (1929); Hayden v. Hayden, 215 Ky. 299, 284 S. W. 1073, 1074 (1926); Wooton v. Wooton, 283 Ky. 422, 141 S. W. (2d) 561, 563 (1940).

[94] See Sawyer v. Sawyer, 57 Cal. App. (2d) 582, 134 Pac. (2d) 868 (1943); Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941); Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932); Lee v. Lee, 250 Mich. 670, 231 N. W. 68, 69 (1930); Hipple v. Hipple, 121 Kan. 495, 247 Pac. 650, 651 (1926); Brand v. Huth, 154 La. 1054, 98 So. 664 (1923); Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).

[95] See Schneider v. Schneider, 155 Miss. 621, 125 So. 91, 93 (1929).

[96] See Haase v. Haase, 118 Neb. 94, 223 N. W. 649 (1929).

[97] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928).

[98] See Boggs v. Boggs, 138 Md. 422, 114 Atl. 474 (1921).

[99] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928).

[100] See Wooton v. Wooton, 283 Ky. 422, 141 S. W. (2d) 561 (1940).

specific evidential facts the courts are willing to evaluate in determining such ability, need or other pertinent element. A court cannot reach into thin air and, out of a vacuum, determine the father's ability to provide support. It is advisable that the attorney involved should have a thorough knowledge of what things the courts previously have considered in reaching decisions on this point in order that he may be certain that, in his case, a complete picture is presented to the court. Therefore, from an analysis of a number of cases, this writer has noted the various facts and conditions which appeared in the opinions and which influenced the court in fixing the terms of the decree. These are listed below.

A. *As to the father's ability to pay:*

1. In setting the amount of the award, the court will inquire as to the father's present income[101] and earning capacity.[102] If the father receives a pension[103] or has income from a trust fund,[104] in addition to his regular salary, there is a tendency to increase the award in due proportion. The fact that the father has, what is usually accepted as, a financially remunerative occupation[105] will be considered, and this will tend to increase the amount awarded.

2. If the father is able to do some work but refuses to accept remunerative employment, the court may consider what he might obtain by due exertion,[106] and increase the award for maintenance accordingly.

3. The court will consider the father's position and activities in the community.[107] If the father has a profession, the court may accept evidence of the extent of his practice[108] and, although his cash income is low, at the present time, if he has a considerable clientele that fact will tend to increase the award. Likewise, if the father has a substantial business,[109] there is a better chance of an increased award. On the other hand, if the father's profession is of a precarious nature[110] the court will take that fact into consideration and award a lesser sum.

4. If the husband receives a regular monthly stipend from his mother in the form of a gift,[111] or a yearly gratuity from his father,[112] there is a tendency to increase the amount awarded to the child.

[101] Practically all of the cases considered this item.

[102] See Sharp v. Sharp, 230 Ala. 539, 161 So. 709, 710 (1935); Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

[103] See Brubacher v. Brubacher, 192 La. 219, 187 So. 555, 556 (1939).

[104] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 ff. (N. Y. City Cts., 1936).

[105] See Hockensmith v. Hockensmith, 286 Ky. 448, 151 S. W. (2d) 37, 39 (1941); Brubacher v. Brubacher, 192 La. 219, 187 So. 555, 556 (1939); Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932); Lee v. Lee, 250 Mich. 670, 231 N. W. 68, 69 (1930); Szymanski v. Szymanski, 188 Iowa 931, 176 N. W. 806 (1920).

[106] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295 (N. Y. City Cts., 1936)

[107] See Newson v. Newson, 176 La. 699, 146 So. 473 (1933).

[108] See Walden v. Walden, 250 Ky. 379, 63 S. W. (2d) 290, 291 (1933).

[109] See Jaffe v. Jaffe, 124 F. (2d) 233, 234 (App. D. C., 1941).

[110] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927).

[111] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 (N. Y. City Cts., 1936).

[112] See Commonwealth v. Wilmsen, 112 Pa. Super. 119, 170 Atl. 418 (1934) .

5. If the father is in ill health and unable to work,[113] or has an impediment,[114] the amount will be decreased.

6. The amount[115] and productiveness[116] of the property held by the husband will be taken into consideration by the court in determining his ability to pay. Some courts will make an exhaustive review of the father's entire financial situation and assets,[117] even to the extent of taking eleven hundred pages of testimony in referee hearings.[118]

7. Even though the father has no apparent source of income, or only a modest one, if the husband's father supplies him with sufficient money to allow him to live in luxury,[119] the award for maintenance will be increased.

8. Also, there is a tendency to increase the amount awarded if the father is employed by a family corporation and owns considerable stock therein;[120] or if the father has turned all of his property over to a family holding company and, although earning only a moderate salary, he spends considerable sums each month.[121]

9. When the husband is not available for cross-examination as to his income,[122] the court tends to be liberal in assuming that he is capable of supporting the child in a proper fashion. If available, his testimony as to what would be a fair amount will go far in setting a minimum amount.[123]

10. The father's former occupation or business[124] and his previous income may be considered by the court when there is lack of clear evidence as to the father's present income and ability to pay. The amount annually deposited in former years may be taken as some indication of the father's true average yearly earnings.[125] His former earning capacity[126] may be important as an indication of whether the father's earnings are increasing as the years go by, or that the former family standard of living was beyond what the father actually could afford at that time.

11. The court may consider the father's age.[127] If he is middle-aged and in a mediocre financial position, the court will take into consideration the fact that he must save for a future time.[128]

[113] *Ibid.*

[114] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 (N. Y. City Cts., 1936).

[115] See Hockensmith v. Hockensmith, 286 Ky. 448, 151 S. W. (2d) 37, 39 (1941); Pradat v. Salathe, 186 La. 574, 173 So. 110 (1937); Bowers v. Bowers, 192 Wash. 676, 74 Pac. (2d) 229, 230 (1937); Steinmann v. Steinmann, 121 Conn. 498, 186 Atl. 501 (1936); Haase v. Haase, 118 Neb. 94, 223 N. W. 649 (1929); Miller v. Miller, 224 Ky. 234, 5 S. W. (2d) 1041 (1928); Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928); Hipple v. Hipple, 121 Kan. 495, 247 Pac. 650, 651 (1926).

[116] See Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

[117] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941); Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).

[118] See Rosenwasser v. Rosenwasser, 117 Misc. 123, 190 N. Y. S. 774 (Sup. Ct., 1921).

[119] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).

[120] *Ibid.*

[121] See Merritt v. Merritt, 106 Cal. App. 234, 289 Pac. 240 (1930).

[122] *Ibid.*

[123] See Nerland v. Nerland, 173 Wash. 311, 23 Pac. (2d) 24, 25 (1933).

[124] See Cummins v. Cummins, 7 Cal. App. (2d) 294, 46 Pac. (2d) 284, 289 (1935).

[125] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927); Hipple v. Hipple, 121 Kan. 495, 247 Pac. 650, 651 (1926).

[126] See Commonwealth v. Wilmsen, 112 Pa. Super. 119, 170 Atl. 418 (1934).

[127] See Miller v. Miller, 224 Ky. 234, 5 S. W. (2d) 1041 (1928).

[128] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927).

12. The court recognizes the fact that the father requires a certain amount in order to maintain himself.[129] In the father's items of expense may be included lodge dues and the amount required to keep up his insurance.[130] Also, it may appear to the court that the father's professional standing requires him to maintain a certain standard of living in his personal establishment.[131] A court may go so far as to take into consideration the fact that the father must pay the costs of the divorce action, including the amount of the wife's attorney's fee.[132] Each item of legitimate expense that the father can bring to the attention of the court will tend to reduce the amount awarded for maintenance of the child. One appellate court, in increasing the lower court's allowance, even made the observation that the father was economical insofar as his living standards were concerned;[133] although query whether this was anything more than make-weight. When there is a conflict between the father's needs and the child's requirements, there not being enough money to satisfy both, the court may consider the fact that it will be easier for the father to live on the remainder of his income than it will be for the wife and children to survive on the amount awarded.[134] Under such circumstances, the father will not be successful in any attempt to secure a reduction in the amount awarded by the court.

13. If the father is in debt, the court will give that fact due consideration, and there will be a tendency to award a smaller amount on account of it. However, the court will scrutinize the indebtedness as to nature[135] and amount[136] in order to be certain that it is a bona fide obligation and not a clever subterfuge. The rate at which the father is able to discharge the debts will influence the court and, of course, if it appears to the court that the father will not be able to discharge them at a fair rate of speed, the court will tend to award a smaller amount for maintenance of a child in order to assist the father.[137]

14. The court will consider local conditions of business,[138] and if there is difficulty in securing employment[139] or adverse business conditions,[140] the award is certain to be lower than would otherwise be the case.

15. It has been said that the award should not make the father destitute so that the wife and children can live in luxury.[141] The award may impose a great burden

[129] See Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928).
[130] *Ibid.*
[131] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. Supp. 744, 748 (Sup. Ct., 1927).
[132] See Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932).
[133] See Osten v. Osten, 286 Ky. 473, 151 S. W. (2d) 67, 68 (1941).
[134] See Roach v. Roach, 213 Iowa 314, 237 N. W. 439, 442 (1931).
[135] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[136] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941); Krueger v. Krueger, 210 Minn. 144, 297 N. W. 566, 567 (1941); Dawson v. Dawson, 23 Tenn. App. 556, 135 S. W. (2d) 458 (1939); Bowers v. Bowers, 192 Wash. 676, 74 Pac. (2d) 229, 230 (1937); Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932); Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928); Hipple v. Hipple, 121 Kan. 495, 247 Pac. 650, 651 (1926).
[137] See Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).
[138] See Walden v. Walden, 250 Ky. 379, 63 S. W. (2d) 290, 291 (1933).
[139] See Hartkemeier v. Hartkemeier, 248 Ky. 803, 59 S. W. (2d) 1014, 1016 (1933).
[140] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941).
[141] See Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).

on the father and in such a case the appellate court will consider the fact that the father cannot possibly perform the obligation imposed by the lower court.[142] The existence of these circumstances will result in a reduced maintenance award.

16. The father may have previously transferred property to the mother for the support of the child.[143] Any showing to that effect will receive due consideration, and the amount of property given outright to the wife will reduce the amount of weekly allowance accordingly.[144]

17. The fact that no alimony is being paid to the wife by the husband will tend to increase the award for maintenance of the children because the husband is probably in a better position to pay more for the children's care.[145]

18. Evidence to the effect that the husband cared well for his children by a former marriage and gave them a fair education is indicative of his general ability to pay and will influence the court in awarding a sum sufficient to guarantee that the child in question will receive similar advantages.[146]

19. If the marriage now being dissolved is a second marriage for the father, the fact that there are no dependent children by his first wife will result in a larger award than if he also had children by a prior marriage to support.[147]

20. When the husband has remarried[148] and has a child by the second marriage to support, the amount awarded for maintenance of the children of the first marriage will be less than otherwise would be the case.[149] However, if the husband's mother materially assists him in supporting his second wife and child, the court will take that fact into consideration and the amount awarded will be increased accordingly.[150]

21. When there is doubt as to the father's present ability to pay, the court may consider the amount spent by the father for living expenses during the last few years of married life.[151] The parties' previous standard of living[152] or the amount sent to the wife as support for a five-year period previous to suit,[153] may aid the court in reaching a decision as to the father's present ability to pay.

22. "Circumstantial" evidence may be received such as the fact that the father and his second wife live well; that the second wife dresses lavishly; and that they

[142] See Bowers v. Bowers, 192 Wash. 676, 74 Pac. (2d) 229, 230 (1937).
[143] See Boggs v. Boggs, 138 Md. 422, 114 Atl. 474 (1921).
[144] See Kamasauskas v. Kamasauskas, 248 Mich. 663, 227 N. W. 538 (1929).
[145] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[146] See Wooton v. Wooton, 283 Ky. 422, 141 S. W. (2d) 561 (1940).
[147] See Sharp v. Sharp, 230 Ala. 539, 161 So. 709, 710 (1935).
[148] See Commonwealth v. Wilmsen, 112 Pa. Super. 119, 170 Atl. 418 (1934); Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[149] See Prindle v. Dearborn, 161 Misc. 95, 291 N. Y. S. 295, 297 (N. Y. City Cts., 1936).
[150] *Ibid.*
[151] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927); Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[152] See York v. York, 138 Neb. 224, 292 N. W. 385, 386 (1940).
[153] See Nerland v. Nerland, 173 Wash. 311, 23 Pac. (2d) 24, 25 (1933).

attend high-class theaters and, on occasions, take supper at one of the best hotels in the city.[154]

23. The courts, in general, have set a "ceiling" on maintenance awards, in that a court will usually refuse to award more than a certain percentage of the father's income to the child. Thus, if the amount awarded will take about one-quarter of the husband's earnings,[155] or if the amount of the allowance, together with alimony, represents nearly one-half of the father's income,[156] there is very little chance of having the award increased and there is a good chance that the original award will be decreased by the appellate court.

To summarize: in determining the father's ability to pay, the court will inquire first as to his income, capacity to earn, and the amount and productiveness of property that he owns. Income may consist not only of wages and salaries. It also includes pensions or regular gifts of money from other members of the family. Next, the court will consider the nature of his occupation and his position in the community as an indication of whether the present income shown is a true average or that it is likely to continue the same in the near future. If the evidence as to the father's present income is confusing or contradictory, the court may inquire as to his previous income, savings and occupation because these may indicate his true income. In addition to these, evidence of what the father is spending at the present time will aid the court in reaching a decision. Any indication that the father is indulging in luxuries or spending considerable sums of money will encourage the court to award a greater sum for maintenance of the children. On the other hand, the courts recognize that the father has certain necessary expenses, such as interest on indebtedness, insurance, cost of maintaining a second family if he has remarried, and, in certain cases, lodge dues or the expenses of maintaining a high standard of living in his present establishment. Each item of legitimate expense that the father can bring to the attention of the court will tend to decrease the amount awarded for maintenance of the children. When the father shows these items of expense, the mother may respond with evidence that the burden does not really fall on the father, but rather, that this burden has been assumed by some other member of the family. For example, the husband's mother may have undertaken to furnish most of the support of the second wife and children. In any case, the amount awarded for maintenance of children is not likely to be in excess of approximately one-third of the father's income.

B. *As to the needs of the children:*

1. The wife's testimony as to what would be sufficient to provide for the needs of the children will carry great weight with the court, and will go far in setting the maximum amount of the award.[157]

[154] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922), approving the lower court's allowance of $50 per month, against the father's $50 a week salary. It is interesting to compare the Osten case, *supra* note 133, where the court mentioned the father's *economical* habits to justify an increased allowance.

[155] See Lee v. Lee, 250 Mich. 670, 231 N. W. 68, 69 (1930).

[156] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927).

[157] See Dawson v. Dawson, 23 Tenn. App. 556, 135 S. W. (2d) 458 (1939).

2. The number and age of the children are also important factors.[158] The greater the number of children, the larger the award for support. If the children are of tender age the award is likely to be comparatively small.[159] However, if the children are near school age the court will allow an increase,[160] and an even larger amount is likely to be provided if the children are of high school age.[161]

3. The children's necessary requirements for shelter, food and clothing, books and supplies in order to attend school, seem to be the factors that determine the minimum amount to be awarded as maintenance.[162]

4. If the child in question is a girl, the court may give considerable weight to the fact that she is on the threshold of young ladyhood and that her necessary expenses in order to gain the best advantages in life increase at that time.[163]

5. Educational needs may include a college education if the child displays sufficient capacity.[164] The court will be favorably influenced if it appears that the child is willing to earn part of her own expenses.

6. A court may not only consider the child's present needs, but also what the child will soon require and decree accordingly.[165]

7. The high cost of living at the time of the decree will be considered as a factor and may result in an increased award.[166]

8. The father should pay for any necessary medical attention.[167] Therefore, if the child is in ill health,[168] sickly,[169] or requires medical care to an unusual extent,[170] an increased amount necessary to care for these expenses will be awarded. However, if there is lack of evidence that any special expenses will be involved in caring for the child, the court may point to that fact when refusing to increase the award.[171]

9. If there is evidence to the effect that the wife is unable to support the child with the amount originally awarded, it is almost certain that the award will be increased.[172]

10. Children are entitled to be maintained according to the parents' station in life,[173] and, in this regard, one court considered that the divorced parties had been

[158] See Brand v. Huth, 154 La. 1054, 98 So. 664 (1923).
[159] See Converse v. Converse, 225 Iowa 1359, 282 N. W. 368 (1938).
[160] See Wooton v. Wooton, 283 Ky. 422, 141 S. W. (2d) 561 (1940).
[161] See Singleton v. Singleton, 219 Ky. 38, 288 S. W. 1029 (1926).
[162] See Davenport v. Davenport, 205 Ark. 337, 168 S. W. (2d) 832, 833 (1943).
[163] See Brubacher v. Brubacher, 192 La. 219, 187 So. 555, 556 (1939).
[164] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941).
[165] See Brand v. Huth, 154 La. 1054, 98 So. 664 (1923).
[166] See Riggins v. Riggins, 216 Ky. 281, 287 S. W. 715, 717 (1926); Black v. Black, 200 Iowa 1016, 205 N. W. 970, 971 (1925); Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[167] See Hockensmith v. Hockensmith, 286 Ky. 448, 151 S. W. (2d) 37, 39 (1941).
[168] See Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).
[169] See Rosenwasser v. Rosenwasser, 117 Misc. 123, 190 N. Y. S. 774 (Sup. Ct., 1921).
[170] See Dissette v. Dissette, 208 Ind. 567, 196 N. E. 684, 691 (1935); Nerland v. Nerland, 173 Wash. 311, 23 Pac. (2d) 24, 25 (1933).
[171] See York v. York, 292 N. W. 385, 386 (Neb., 1940).
[172] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).
[173] See Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

living in a luxurious manner prior to divorce; that they maintained a private golf course, two automobiles with a chauffeur, had five servants, and stayed in expensive hotels for months at a time.[174] After determining the child's station in life, the court will make an award accordingly. However, if the amount originally awarded would elevate the children above the standard of living to which they were accustomed during the marriage, the amount will be reduced.[175]

To summarize: the minimum needs of the children will be set so as to include the amount necessary for food, clothing and book supplies in order to attend school. A lesser amount is likely to be awarded if the child is an infant, but the allowance is likely to be increased as the children approach school age, and the maximum amount granted when they are in high school. The figure determined upon is likely to be larger if it can be shown that the cost of living is high, that the child is in need of medical care, or that the child requires a college education in order to take full advantage of his talents. If the father seems to have plenty of money, the court will decree that children are entitled to be maintained in his station of life. There may even be an extensive investigation of the fashion in which the family lived before the divorce. This is likely to result in a larger award. However, if the father can show that there is no evidence of a need for unusual medical attention, or that the amount originally awarded elevates the child above the standard of living to which it was accustomed during the marriage, a lesser amount is likely to be provided. In any event, the maximum amount will usually be set by the wife's testimony as to what would be sufficient to care for the needs of the children.

C. *As to the mother's ability to help support the children:*

1. The court is careful to consider the amount of the mother's income and earnings[176] together with the extent of her separate estate and the productivity of property held by her.[177] If the mother has a large independent income or sizeable separate estate, the amount to be paid by the father for the maintenance of children in her custody will be less than in other cases. On the other hand, the mother may be completely dependent on the father[178] and without other means of support;[179] or it may appear that she has no income and, due to economic conditions, has not been able to procure a permanent position.[180] Evidence to this effect will result in an increased award. Even when the wife has an independent income, if it appears that she is dependent on her own labor for the maintenance and education of the

[174] See Merritt v. Merritt, 106 Cal. App. 234, 289 Pac. 240 (1930).

[175] See Johnstone v. Johnstone, 130 Misc. 243, 223 N. Y. S. 744, 748 (Sup. Ct., 1927).

[176] See Pradat v. Salathe, 186 La. 574, 173 So. 110 (1937); Hitzler v. Hitzler, 161 La. 825, 109 So. 505 (1926).

[177] See Kamasauskas v. Kamasauskas, 248 Mich. 663, 227 N. W. 538 (1929); Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928).

[178] See Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

[179] See Jaffe v. Jaffe, 124 F. (2d) 233, 234 (App. D. C., 1941); Sharp v. Sharp, 230 Ala. 539, 161 So. 709, 710 (1935).

[180] See Newson v. Newson, 176 La. 699, 146 So. 473 (1933).

child and that the original meager award places too much of a burden on her,[181] the court will increase the amount of the award. Also, it may be that the mother works and supports herself in a profession and, during her absence, must have someone to care for the child.[182] In such a situation, the court may consider the cost of having someone to care for the child and increase the award accordingly.[183] If the mother's financial situation and ability were not shown in the record below, that fact may be considered by the court and is likely to result in affirmance of whatever sum was set by the lower court.[184]

2. The mother's age[185] and health will have a bearing on her ability to help support the children. If she is young and able-bodied, the court is likely to award a lesser sum for maintenance of the children on the theory that she is in a position to earn money and share the burden.[186] However, if she is older or in poor health and unable to work, the amount awarded for maintenance of the children will be larger.[187]

3. If the wife and children are occupying a house owned by the father and are permitted to live there free of rent, the cash award for maintenance to be paid periodically will be reduced as the rental value will be considered as a partial discharge of the maintenance obligation.[188]

4. The amount awarded will be less if it is shown that the mother and child live with the mother's parents[189] who own their own home and have an income sufficient to maintain them during the remainder of their lives.[190] The courts say that this may enable the mother to get board at a lower cost than would be possible otherwise.

To summarize: in determining the mother's ability to help the father support the children, the facts that impress the court the most are the mother's health and her ability to earn money without neglecting the children. In some instances, the mother may have a considerable separate estate and any showing to this effect will encourage the court to require her to shoulder part of the responsibility. The amount awarded is likely to be greater if it is shown that the mother is older, in ill health, unable to work, or that she cannot work without hiring someone to care for the children. On the other hand, the amount awarded for the maintenance of the children is likely to be less if it is shown that the wife and children are living

[181] See Wooton v. Wooton, 283 Ky. 422, 141 S. W. (2d) 561 (1940).

[182] See Raymond v. Raymond, 219 Ky. 608, 294 S. W. 170, 171 (1927).

[183] See Lee v. Lee, 250 Mich. 670, 231 N. W. 68, 69 (1930).

[184] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928).

[185] See Miles v. Miles, 203 Ky. 431, 262 S. W. 576, 578 (1924).

[186] See Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932).

[187] See Osten v. Osten, 286 Ky. 473, 151 S. W. (2d) 67, 68 (1941).

[188] See Jaffe v. Jaffe, 124 F. (2d) 233, 234 (App. D. C., 1941); Bowers v. Bowers, 192 Wash. 676, 74 Pac. (2d) 229, 230 (1937); Walden v. Walden, 250 Ky. 379, 63 S. W. (2d) 290, 291 (1933); Miller v. Miller, 224 Ky. 234, 5 S. W. (2d) 1041 (1928); Rosenwasser v. Rosenwasser, 117 Misc. 123, 190 N. Y. S. 774 (Sup. Ct., 1921).

[189] See Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932); Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).

[190] See Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928).

in a house owned by the father or that they live with the mother's parents. If the father has plenty of money, he is not likely to be able to impress the court much by any effort to show that the mother is able to help support the children.

D. *Miscellaneous items that appear in the opinions:*

1. When both parents possess equal ability in regard to property and income, the award for maintenance is likely to be such an amount as will equalize the burden between the parents.[191] If the mother has remarried and the combined income of the mother and her second husband exceeds the father's income, the court may take that fact into consideration in decreasing the award,[192] especially if the father is in financial distress.

2. An agreement between the parents, although not binding on the court, may be considered in determining the amount to be awarded.[193] If the terms of the agreement are reasonable as to amount, the court will usually incorporate them into its own decree.

3. The amount may be left to the discretion of the defendant father, if there is a stipulation to that effect. However, this discretion must be exercised in a reasonable manner.[194]

4. Custody of the children may be divided between the parents in order to aid in solving the problem of maintenance.[195] This is likely to happen when there are a number of children and the father is not able to furnish adequate support to maintain all of the children in a separate home with the mother. As a result, one or more of the children will live with the father and the others with the mother.

5. As a general rule, it is always stated that the duty of support is not altered by an award of alimony to the wife.[196] However, there is an indirect effect in that the amount awarded for maintenance of the children is likely to be larger if no alimony has been awarded to the wife.

6. The needs of society and government as well as the need of the family are factors to be considered by the court, especially with regard to education of the children.[197] This factor was mentioned by a court in bolstering a decree which included a college education among the necessary requirements for the proper maintenance of a child.

7. In determining the manner in which a child should be supported, the court cannot consider extravagant expenditures in favor of the child by the mother and grandfather from their own estates.[198]

8. The testimony of outsiders as to what would be proper is not entitled to

[191] See Black v. Black, 200 Iowa 1016, 205 N. W. 970, 971 (1925).
[192] See Sawyer v. Sawyer, 57 Cal. App. (2d) 582, 134 Pac. (2d) 868 (1943).
[193] See Boggs v. Boggs, 138 Md. 422, 114 Atl. 474 (1921).
[194] See Swanton v. Curley, 273 N. Y. S. 325, 7 N. E. (2d) 250 (1937), reversing 248 App. Div. 704, 290 N. Y. S. 109, reargument and amendment of remitter denied, 8 N. E. (2d) 617.
[195] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928).
[196] See Singleton v. Singleton, 217 Ky. 38, 288 S. W. 1029 (1926).
[197] See Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941).
[198] See Commonwealth v. Wilmsen, 112 Pa. Super. 119, 170A, 418 (1934).

much weight and the court will take judicial notice of the fact that expenditures for the support and maintenance of children vary widely in different homes.[199]

9. When setting the amount, the courts remember that they are always open to the father if he can show facts justifying a reduction of the amount awarded.[200] This view sometimes results in a larger award because the father is at this time not in a position to emphasize his future inability to pay the sum awarded.

10. The fact that the divorced husband has threatened to leave the country encourages the court to order a lump sum award rather than provide for periodic payments.[201] The court may require the wife to post security for the proper use of money and return of any sum not expended for the child's support at its majority.[202]

EXTENT OF REVIEW BY THE APPELLATE COURT

The primary duty of determining the amount rests on the trial court.[203] It is a matter of judicial discretion[204] and, when affirming the lower court decree, the overwhelming weight of authority holds that the amount is within the sound[205] or reasonable discretion of the trial court[206] which will not be disturbed unless it clearly appears that such discretion has been abused.[207] A less positive view is to the effect that "a certain discretion" lies with the trial court.[208] Usually, the trial court, in exercising its discretion, is permitted to consider all the facts and circumstances; but in some instances the discretion is limited to conditions and financial ability existing at the time of the order.[209]

It is generally said that the appellate court is limited to the question of whether or not the trial court abused its discretion, and there is no settled rule which can be invoked.[210] On the other hand, one appellate court says that it will consider and weigh the evidence for itself, but, unless the chancellor's finding is against the weight of the evidence, or if the evidence does no more than raise a doubt as to the lower court's finding, it will not be disturbed.[211] Thus, there is a trial de novo in the appellate court with the trial court being relegated to a position similar to that of a referee. Sometimes the court says merely that "this allowance we think reasonable, and have no disposition to disturb it,"[212] or that the amount was not deemed

[199] See Dawson v. Dawson, 135 S. W. (2d) 458 (Tenn., 1939).

[200] See Cummins v. Cummins, 7 Cal. App. (2d) 294, 46 Pac. (2d) 284, 289 (1935); Szymanski v. Szymanski, 188 Iowa 931, 176 N. W. 806 (1920).

[201] See Steinmann v. Steinmann, 121 Conn. 498, 186 Atl. 501 (1936).

[202] *Ibid.*

[203] See Krueger v. Krueger, 210 Minn. 144, 297 N. W. 566, 567 (1941).

[204] See Black v. Black, 200 Iowa 1016, 205 N. W. 970, 971 (1925).

[205] See Sawyer v. Sawyer, 57 Cal. App. (2d) 582, 134 Pac. (2d) 868 (1943); Steinmann v. Steinmann, 121 Conn. 498, 186A, 501 (1936).

[206] See Merritt v. Merritt, 106 Cal. App. 234, 289 Pac. 240 (1930); Hipple v. Hipple, 121 Kan. 495, 247 Pac. 650, 651 (1926).

[207] See Dissette v. Dissette, 208 Ind. 567, 196 N. E. 684, 691 (1935).

[208] See Bear v. Bear, 241 S. W. 955 (Mo. App., 1922).

[209] See Merritt v. Merritt, 106 Cal. App. 234, 289 Pac. 240 (1930).

[210] See Dissette v. Dissette, 208 Ind. 567, 196 N. E. 684, 691 (1935).

[211] See Creasy v. Creasy's Next Friend, 241 Ky. 403, 44 S. W. (2d) 271 (1931).

[212] See Sharp v. Sharp, 230 Ala. 539, 161 So. 709, 710 (1935).

unreasonable by the trial judge and "we concur in the conclusion reached by him."[213]

Even a touch of the ironical is encountered, as when the appellate court will raise the $25 allowed by the Chancellor to $40 and at the same time state: "The Chancellor is no doubt fully aware that as to . . . maintenance of the wife and child, he has full and complete control . . . in the exercise of his judicial discretion."[213a]

The courts freely discuss and place great emphasis on the trial court's wide discretion whenever the appellate court decides to affirm the decree of the lower court; but there is a strange silence on this point in those opinions that reverse lower court decisions. In case after case lower court awards have been modified or reversed without even a hint in the opinions that the trial court is vested with any measure of discretion or that such discretion has been abused.[214] Here, the appellate courts merely express dissatisfaction with the amount awarded and set a new sum. Of the cases examined by this writer, only one was reversed on the express grounds that there had been an abuse of discretion by the lower court.[215]

CONCLUSION

When it comes to determining what amount should be decreed for support, the courts are faced with problems of every description and, of necessity, must consider all the available facts. Where a small amount of bread and butter must feed many, the problem of what should be done is often equal to the famous Chinese puzzle[216] and legal niceties will receive less emphasis in an effort to find some sort of solution. On the other hand, if the father's estate is considerable, the approach is more that of delicately determining the proper manner in which the luscious melon should be sliced, and the appellate court insures proper use of the legal measurements. After an analysis of some of the cases, this writer is convinced that in most maintenance cases on appeal, whatever be the linguistic ritual, there is actually a trial de novo by the appellate court, with the record in the court below constituting the evidence. If the upper court is unable to think of a better solution, then the trial court's action is affirmed with stress being placed on the lower court's wide discretion. On the other hand, if the appellate court is of the opinion that it can do a better job than the trial court did in fixing the terms of the decree, then the decree of the lower court will be modified accordingly, without any mention of the trial court's discretion.

[213] See Brubacher v. Brubacher, 192 La. 219, 187 So. 555, 556 (1939).

[213a] See Osten v. Osten, 286 Ky. 473, 151 S. W. (2d) 67, 68 (1941).

[214] See Davenport v. Davenport, 205 Ark. 337, 168 S. W. (2d) 832, 833 (1943); Jackman v. Short, 165 Ore. 626, 109 Pac. (2d) 860, 872 (1941); Collins v. Collins, 182 Okla. 246, 77 Pac. (2d) 74, 76 (1938); Pradat v. Salathe, 186 La. 574, 173 So. 110 (1937); Bowers v. Bowers, 192 Wash. 676, 74 Pac. (2d) 229, 230 (1937); Hartkemeier v. Hartkemeier, 248 Ky. 803, 59 S. W. (2d) 1014, 1016 (1933); Bush v. Bush, 245 Ky. 172, 53 S. W. (2d) 352 (1932); Haase v. Haase, 118 Neb. 94, 223 N. W. 649 (1929); Sawyer v. Sawyer, 224 Ky. 522, 6 S. W. (2d) 679 (1928); Raymond v. Raymond, 219 Ky. 608, 294 S. W. 170, 171 (1927); Riggins v. Riggins, 216 Ky. 281, 287 S. W. 715, 717 (1926); Black v. Black, 200 Iowa 1016, 205 N. W. 970, 971 (1925); Brand v. Huth, 154 La. 1054, 98 So. 664 (1923).

[215] See Krueger v. Krueger, 210 Minn. 144, 297 N. W. 566, 567 (1941).

[216] See Watland v. Watland, 206 Iowa 1191, 221 N. W. 819 (1928).

This writer is of the opinion that in every case relating to maintenance the provisions of the decree should be left to the sound discretion of the trial court after a consideration of all the facts and circumstances. The trial court is in close touch with the entire situation; its decision should be modified by the appellate court only when there is a clear abuse of that discretion. Strict adherence to such a policy would tend to discourage litigation on appeal where it is clear that there has been no abuse of discretion although another court might reasonably have made different provisions. The present practice, in effect, too often places the appellate court in the position of a second trial court without serving any other useful purpose.

Many appeals result from the fact that the trial court is presented with a situation for which no satisfactory solution is possible. There just are not enough resources available adequately to care for the minimum needs of the children, hence the Chinese puzzle. As a result, the children are subjected to considerable deprivation after the parents are divorced. Often there is a need for supplementing the resources of divorced parents in order to provide a minimum standard of living for the children. Legal liability for support is of no practical assistance to the child if the parents do not have any income or property. The writer believes that little in the way of improving the situation can be done by mere judicial development of a "better" set of rules of common law or equity, or by simple legislation that merely reshapes a common-law doctrine. One might venture the suggestion that, in view of the fact that such a situation is a possible hazard inherent in every marriage, there should be some form of compulsory insurance[217] for married couples in order to provide a fund with which to alleviate such distress.

[217] Perhaps this is a matter for inclusion in a Social Security Act.