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Alimony Modification and Cohabitation in North Carolina

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Rising divorce rates,[1] falling marriage rates,[2] and a growing incidence of unmarried cohabitation[3] have combined to create an increasingly common situation: unmarried cohabitation between a dependent spouse[4] and a third party. What effect should this cohabitation[5] have on a supporting spouse's[6] continued duty to pay alimony[7] to the dependent spouse?[8] This Note examines the various ways in which states have dealt with this question, focuses on North Carolina's treatment of the problem, and proposes a legislative solution.

The rationale underlying alimony awards never has been clear.[9] Historically, the fault of one or both of the parties in causing the marital dissolution was considered sufficient reason for awarding alimony.[10] Today, financial need is widely recognized as the primary justification for granting alimony awards.[11]

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1. *See* H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY 28 (1976). For a summary of historical trends in American divorce, see Norton & Glick, *Marital Instability in America: Past, Present, and Future*, in DIVORCE AND SEPARATION 7 (G. Levinger & O. Moles ed. 1979).

2. *See* Blumberg, *Cohabiting without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1130 (1981) (noting that the marriage rates in Western countries have fallen sharply).

3. In 1980, 1,560,000 heterosexual couples shared a household, a 200% increase since 1970. U.S. BUREAU OF THE CENSUS, SERIES P-20, NO. 365, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1980 (1981).

4. A "dependent spouse," also called a "recipient" or "payee" spouse, is defined by North Carolina law as a spouse who is "actually substantially dependent upon the other spouse for his or her maintenance and support." N.C. GEN. STAT. § 50-16.1(3) (1984).

5. Cohabitation has been defined as "a stable, more or less permanent relationship between two persons who are not married . . . and who share living facilities." M. FREEMAN & C. LYON, COHABITATION WITHOUT MARRIAGE 4 (1983). For a more comprehensive definition of cohabitation, see Blumberg, *supra* note 2, at 1131-36.

Although there are many kinds of cohabitation, including roommate situations, cohabitation between relatives, and cohabitation based purely on financial considerations (such as boarding arrangements), this Note deals primarily with heterosexual cohabitation. Attempts to modify alimony obligations based on same-sex cohabitation are rare. Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 630 (1982). *But see* Kenney v. Kenney, 76 Misc. 2d 927, 352 N.Y.S.2d 344 (1974) (supporting spouse sought to terminate alimony based on alleged lesbian cohabitation of dependent spouse). For a collection of cases and commentaries discussing the major legal issues raised by cohabitation, see W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 115-224 (1983).

6. The "supporting spouse" —the spouse who pays alimony to a dependent spouse—is also called the "payor" spouse. A supporting spouse is defined in North Carolina law as one "upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support." N.C. GEN. STAT. § 50-16.1(4) (1984).

7. Alimony, also called "maintenance" or "spousal support," is "the allowance which a supporting spouse may be compelled to pay the dependent spouse for support and maintenance." 2 R. LEE, NORTH CAROLINA FAMILY LAW 137 (1980).

8. Another issue raised by such cohabitation that is outside the scope of this Note is cohabitation's effect on child custody rights. *See* Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 263-65 (1977); Note, *Custody and the Cohabiting Parent*, 20 J. FAM. L. 697 (1982).

9. Rationales advanced for alimony include punishment of the husband for wrongdoing, protection of the wife against becoming an economic burden on the state, and repayment of the wife's investment in the marriage. H. CLARK, THE LAW OF DOMESTIC RELATIONS 421 (1968).

10. *Id.* at 421-22.

11. "The ability of the husband to pay and the needs of the wife may be said to constitute the basic alimony equation." Deservine, *Grounds for Modification of Alimony Awards*, 6 LAW & CON-

Modification[12] of alimony awards generally is allowed upon a showing of "changed circumstances,"[13] such as the death of one of the parties,[14] remarriage of the dependent spouse,[15] or changed financial circumstances between the parties.[16] Determining whether changed financial circumstances exist usually entails an examination of the increase or decrease in the dependent spouse's needs, as well as any decrease in the supporting spouse's ability to pay.[17]

States have implemented both legislative[18] and judicial[19] solutions in re-

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TEMP. PROBS. 236, 239 (1939). This increased emphasis on financial need as opposed to fault coincides with the rise of "no-fault" divorce. *See* R. EISLER, DISSOLUTION & NO-FAULT DIVORCE, MARRIAGE AND THE FUTURE OF WOMEN 11 (1977) ("What we are seeing . . . is a fundamental shift in social attitudes and values. No-fault divorce laws are one legal manifestation of that shift."); Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 373-441 (1983) ("All American jurisdictions, except South Dakota, have some form of 'no-fault' divorce."); L. Halem, Divorce Reform (1980) (discussing movement towards no-fault divorce in the United States).

There is a growing trend towards "rehabilitative" or "term" alimony. Rehabilitative alimony is "an equitable award given to a spouse, until the recipient develops an earning capacity or another source of support is found." Oldham, *supra* note 5, at 632. The law in this area, however, is unsettled. *See* Foster, *Alimony Awards*, in AMERICAN BAR ASS'N, ECONOMICS OF DIVORCE 1 (1978). For an overview of recent changes in divorce law, see Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976).

12. "Modification," as used in this Note, may be an increase, decrease, suspension, or termination of the original award.

13. Deservine, *supra* note 11, at 237.

14. H. CLARK, *supra* note 9, at 461-63.

15. *Id.* at 457-59. Remarriage of the supporting spouse will not affect the alimony award. *Id.*

16. *Id.* at 459-61. Under the modern view, post-divorce sexual activity of a dependent spouse uniformly is rejected as a "changed circumstance" warranting alimony reduction or termination. *Id.* at 463; *see, e.g.*, O'Dell v. O'Dell, 57 Ala. App. 185, 326 So. 2d 747 (1976) (post-divorce sexual relations insufficient ground for alimony modification); McBrayer v. McBrayer, 227 Ga. 224, 179 S.E.2d 772 (1971) (ex-wife's post-divorce sexual conduct irrelevant to the continuation of alimony payments); Atkinson v. Atkinson, 13 Md. App. 65, 281 A.2d 407 (1971) (post-divorce sexual behavior did not rise to level of flagrant misconduct necessary to warrant modification of alimony). The dependent spouse owes the supporting spouse "no greater duty to lead a pure and virtuous life than she owes to society generally." Deservine, *supra* note 11, at 246.

17. H. CLARK, *supra* note 9, at 459-61. Increase of the dependent spouse's award because of the increased income of the supporting spouse generally is not allowed; if the original alimony award still satisfies the dependent spouse's needs, no modification is warranted. *Id.* at 460-61.

18. In 1934 New York enacted the first statute dealing with cohabitation's effect on alimony obligations. Act of Apr. 16, 1934, ch. 220, § 1, 1934 Laws of New York 703; *see* Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse Upon His or Her Right to Continue to Receive Alimony*, 17 J. FAM. L. 249, 256 (1978). By 1981 six states had adopted some form of cohabitation statute. Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 432-33 (1981) [hereinafter cited as Note, *Property Division and Alimony Awards*]. Today, 11 states have enacted statutes that allow modification of alimony upon cohabitation of the dependent spouse. *See* ALA. CODE § 30-3-55 (1983) ("[A]limony . . . shall be modified . . . upon proof that the [dependent spouse] . . . is living openly or cohabiting with a member of the opposite sex."); CAL. CIV. CODE § 4801.5 (West Cum. Supp. 1984) ("[T]here shall be a rebuttable presumption . . . of decreased need for support if the supported party is cohabiting with a person of the opposite sex . . . . Upon a determination that circumstances have changed, the court may modify the payment of support."); CONN. GEN. STAT. ANN. § 46b-86 (West Cum. Supp. 1984) ("[court may] suspend, reduce or terminate . . . alimony upon a showing that the party receiving the periodic alimony is living with another person . . . because the living arrangements cause such a change of circumstances as to alter the financial needs of that party"); GA. CODE. ANN. § 19-6-19 (Cum. Supp. 1984) ("[T]he voluntary cohabitation of [the dependent spouse] with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments . . . . 'Cohabitation' means dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex."); ILL. ANN. STAT. ch. 40, § 510(b) (Smith-Hurd Cum. Supp. 1984) ("The obligation to pay future maintenance is terminated . . . if the party receiving mainte-

sponse to problems presented by the cohabitation of a dependent spouse. In a minority of states,[20] alimony is terminated automatically upon proof of cohabitation of the dependent spouse with a third party.[21] Under the majority

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nance cohabits with another person on a resident, continuing conjugal basis."); LA. CIV. CODE ANN. art. 160 (West Cum. Supp. 1984) ("alimony . . . terminates if the spouse to whom it has been awarded . . . enters into open concubinage"); N.Y. DOM. REL. LAW § 248 (McKinney 1977) ("upon proof that the wife is habitually living with a man and holding herself out as his wife, although not married to such man, [the court] may modify [alimony]"); OKLA. STAT. ANN. tit. 12, § 1289D (West Cum. Supp. 1983) ("[V]oluntary cohabitation of a former spouse with a member of the opposite sex shall be a ground to modify provisions . . . for alimony. . . . Cohabitation means the dwelling together continuously and habitually of a man and woman who are in a private conjugal relationship."); PA. STAT. ANN. tit. 23, § 507 (Purdon Cum. Supp. 1984) ("[no alimony awardable to dependent spouse if] such petitioner has entered into cohabitation with a person of the opposite sex who is not a member of the petitioner's immediate family within degrees of consanguinity"); TENN. CODE ANN. § 36-5-101(a)(3) (Supp. 1984) ("where . . . the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that: the third person is contributing to the support of the alimony recipient . . . or . . . [t]he third person is receiving support from the alimony recipient . . . and the court therefore should suspend all or part of the alimony obligation of the former spouse"); UTAH CODE ANN. § 30-3-5(3) (1984) ("alimony . . . shall be terminated upon . . . establishing that the former spouse is residing with a person of the opposite sex unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact").

These statutes vary substantially in their requirements and effects. Some automatically terminate alimony upon proof of cohabitation (Ala., Ill., Pa.), while others allow modification instead of termination (Cal., Conn., Ga., Okla., Tenn.). Most of the statutes require that the cohabitation be with a member of the opposite sex (Ala., Cal., Ga., N.Y., Okla., Pa., Utah), and some require specifically the existence of a sexual relationship between the cohabitants (Ga., Ill., La., Okla., Utah). Several states require that the cohabitation be continuous (Ga., Ill., N.Y., Okla.), although no exact length of time is specified in any of the statutes. Open cohabitation is required in several states (Ala., Ga., Cal., N.Y.). In some states proof of cohabitation and proof of changed financial circumstances are necessary to warrant alimony modification (Cal., Conn., Tenn.), and in two states proof of cohabitation creates a rebuttable presumption that financial circumstances have changed (Cal., Tenn.). For a review of cohabitation statutes, see Note, *Alimony, Cohabitation and the Wages of Sin: A Statutory Analysis*, 33 ALA. L. REV. 577 (1981) [hereinafter cited as Note, *Wages of Sin*].

Constitutional challenges have been raised against these statutes on equal protection (cohabiting ex-spouses singled out for discriminatory treatment), due process (automatic termination of property rights), and invasion of privacy grounds (cohabitation is a protected intimate relationship). *See id.* at 608, 611. Courts have "uniformly dismissed constitutional attacks launched against them." *Id.* at 608; *see, e.g.*, Roberts v. Roberts, 657 P.2d 153 (Okla. 1983) (constitutional challenge to Oklahoma cohabitation statute based on equal protection and due process grounds dismissed as "ludicrous").

Application of these statutes has revealed many problems. Cohabitation statutes have been criticized widely because they "either limit modification too severely, enable easy circumvention, or contain language sufficiently broad to confuse both the courts and the parties involved." Wadlington, *supra* note 8, at 269.

19. *See, e.g.*, B.W.D. v. B.A.D., 436 A.2d 1263 (Del. 1981) (cohabitation does not terminate alimony automatically, but can be a substantial changed circumstance warranting modification); Gayets v. Gayets, 92 N.J. 149, 456 A.2d 102 (1983) (cohabitation is a changed circumstance, but modification depends on whether financial needs have changed); Myhre v. Myhre, 296 N.W.2d 905 (S.D. 1980) (cohabitation is only a factor to be considered in determining modification); Van Gorder v. Van Gorder, 110 Wis. 2d 188, 327 N.W.2d 674 (1983) (all circumstances, including cohabitation, must be considered in modification decisions); *see also* Note, *Cohabitation Alone is Insufficient Ground for Termination of Maintenance*, 66 MARQ. L. REV. 605 (1982) (analyzing *Van Gorder* decision) [hereinafter cited as Note, *Cohabitation Alone is Insufficient*]; Note, *Cohabitation Not Grounds for Modification Absent Showing of Recipient's Reduced Financial Needs*, 15 SUFFOLK U.L. REV. 1324 (1981) (analyzing *Myhre* decision) [hereinafter cited as Note, *Cohabiting Not Grounds for Modification*].

20. Oldham, *supra* note 5, at 650.

21. *See, e.g.*, McHann v. McHann, 383 So. 2d 823, 826 (Miss. 1980) ("appellant . . . forfeited her right to future support . . . because her admitted adultery was of sufficient duration and frequency"); *see also* ILL. ANN. STAT. ch. 40, § 510(b) (Smith-Hurd Cum. Supp. 1984) ("obligation to

"changed circumstances" view,[22] however, alimony is modified only upon proof that the cohabiting dependent spouse's financial needs have changed;[23] cohabitation alone is not considered a changed circumstance sufficient to warrant automatic alimony modification.

The minority rule has been characterized as punitive in nature; the dependent spouse is "punished" for post-divorce sexual activity by a cessation of alimony payments.[24] Automatic alimony termination also may reflect an unexpressed state view that cohabitation is a form of de facto marriage:[25] that is, cohabitation is considered a functional legal substitute for remarriage. Thus, because alimony generally terminates automatically upon remarriage of the dependent spouse,[26] cohabitation also is deemed to justify automatic termination.[27]

Whatever the underlying rationale, automatic alimony termination is an

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pay future maintenance is terminated . . . if the party receiving maintenance cohabits"); UTAH CODE ANN. § 30-3-5(3) (1984) ("alimony . . . shall be terminated . . . [if] the former spouse is residing with a person of the opposite sex"). Oldham refers to the automatic termination concept as the "moral outrage" view. Oldham, *supra* note 5, at 650.

22. Oldham, *supra* note 5, at 650. Oldham refers to this majority view as the "traditional" approach because it employs the traditional changed circumstances test for alimony modification. *See supra* text accompanying notes 12-16.

23. *See, e.g.*, Alibrando v. Alibrando, 375 A.2d 9 (D.C. 1977) (modification of alimony not a punishment for cohabitation but warranted only upon changed financial needs); Mitchell v. Mitchell, 418 A.2d 1140 (Me. 1980) (only financial factors may be considered in a petition for modification); *In re* Marriage of Vaughn, 25 Or. App. 655, 550 P.2d 1243 (1976) (cohabitation justifies alimony modification only if it results in substantially changed financial circumstances); *see also* CAL. CIV. CODE § 4801.5 (West Cum. Supp. 1984) (alimony modifiable "[u]pon a determination that circumstances have changed"); CONN. GEN. STAT. ANN. § 46b-86(b) (West Cum. Supp. 1984) (alimony modifiable "because the living arrangements cause such a change of circumstances as to alter the financial needs of that party").

24. Oldham, *supra* note 5, at 650. This rationale is reminiscent of the *dum sola et casta vixerit* clauses historically included in English divorce decrees. The clauses freed the supporting spouse from the duty to pay alimony if the dependent spouse was proven unchaste or otherwise morally derelict. *See* Wadlington, *supra* note 8, at 265.

25. Oldham, *supra* note 5, at 635. A de facto marriage is a relationship having all the attributes of legal marriage: support, sexual relations, and shared activities. The only difference is that there has been no ceremonial or legal recognition of the relationship. For an argument favoring the recognition of de facto marriage as a ground for alimony termination, see the vehement dissent in Lydic v. Lydic, 664 S.W.2d 941, 944 (Ky. Ct. App. 1983) (Miller, J., dissenting) (arguing that the dependent spouse "[has] not remarried in a traditional sense, but has chosen a lifestyle having the attributes of marriage . . . as permanent as a matrimonial affair," and thus that alimony should be terminated).

26. H. CLARK, *supra* note 9, at 457. Termination of alimony is automatic upon remarriage primarily because the new spouse is presumed to assume the obligation to support the dependent spouse. *Id.*

27. New York's cohabitation statute is apparently based on the de facto marriage theory. The statute requires more than mere cohabitation: the cohabitants must hold themselves out as husband and wife before alimony modification is allowed. N.Y. DOM. REL. LAW § 248 (McKinney 1977). Cases interpreting the statute have refused consistently to modify alimony solely on proof of cohabitation. *See, e.g.*, Northrup v. Northrup, 43 N.Y.2d 566, 373 N.E.2d 1221, 402 N.Y.S.2d 997 (1978) (refusing to modify alimony to cohabiting dependent spouse because dependent spouse was not holding herself out as wife of third party). Thus, under the New York statute, alimony will be terminated only if the cohabitation is the functional equivalent of remarriage.

This statute and the decisions interpreting it have stirred much controversy. *See* Note, *Alimony Modification: Cohabitation of an Ex-Wife with Another Man*, 7 HOFSTRA L. REV. 471 (1979) (discussing New York statute and *Northrup* decision). The rigid "holding out" requirement of the statute yielded an interesting result in Kenney v. Kenney, 76 Misc. 2d 927, 352 N.Y.S.2d 344 (N.Y. Sup. Ct. 1974). The court concluded that a lesbian relationship could not trigger alimony modification under the statute because the cohabitants could not hold themselves out as "husband and wife."

unworkable solution to the problem because it ignores the premises upon which current alimony law rests. If modern alimony is recognized as an attempt to alleviate the dependent spouse's financial need,[28] mere proof of the dependent spouse's cohabitation does nothing to demonstrate that the dependent spouse's financial need has decreased.[29] This approach presumes that the third-party cohabitant has assumed financial responsibility for the dependent spouse in the same way a new spouse assumes a duty of support after marrying the dependent spouse.[30] Although there has been a recent trend towards recognition of legally enforceable rights between cohabitants,[31] cohabitants, unlike married persons,

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28. *See supra* text accompanying note 11.

29. The possible harsh results of applying an inflexible, automatic termination policy are illustrated by the facts in Wight v. Wight, 284 S.E.2d 625 (W. Va. 1981). In *Wight* the supporting spouse sought modification based on the dependent spouse's cohabitation with a third party. The dependent spouse had sustained brain damage from beatings suffered at the hands of the supporting spouse during their marriage. As a result, she frequently fainted and thus needed the third party to help her at home. The court refused to reduce the alimony payments. Another possible harsh result is illustrated by the facts in Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1980). In *Knuteson* the dependent spouse was forced to move out of her home because the supporting spouse had failed to make alimony payments and, as a consequence, the dependent spouse's electricity, water, and gas had been cut off. The supporting spouse then sought to have alimony terminated under the state's cohabitation statute, because the dependent spouse had moved into the home of a third party. The court denied the modification.

Automatic termination may produce the harshest results in those jurisdictions where the threshold cohabitation necessary to trigger such termination is poorly defined. The possibility is greater in these states that alimony may be terminated based on temporary liaisons between the dependent spouse and a third party.

30. Although "[e]xperience tells us that one cohabitant will support the other during their relationship . . . the same cannot be said after they have separated." Blumberg, *supra* note 2, at 1151. In many cases avoidance of the support obligation may have been one of the primary reasons for the parties' decision to cohabit instead of marry. Oldham, *supra* note 20, at 265 & n.60.

31. Oldham notes that there has been "an avalanche of cases involving various legal issues related to unmarried cohabitants." Oldham, *supra* note 5, at 615. Although there is an increasing tendency to recognize legally enforceable rights between cohabitants, and between cohabitants and the state, these rights still are minimal at best. *See* S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS 164-82 (1984). The leading case recognizing enforceable contractual agreements between cohabitants is Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976); *see also* Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976) (express oral contracts between cohabitants, exchanging domestic services for property acquired during the relationship held enforceable).

Some courts enforce express contracts between cohabitants. Implied contracts are not enforced in some jurisdictions on the ground that enforcement effectively would revive the concept of common-law marriage, thereby violating the public policy of those states that have abolished common-law marriage. *See, e.g.*, Morone v. Morone, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980). Some courts, however, refuse to recognize any agreements between cohabitants on the ground that recognition would violate a public policy supporting marriage. *See* Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977) (refusing to enforce an agreement exchanging domestic services for property between parties who had cohabited for 18 years because cohabitation was immoral and thus unenforceable consideration for the contract); Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (recognition of property rights between cohabitants would violate state policy). *But cf.* Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984) ("[T]he position that courts will not participate in resolving the disputes [between cohabitants is] . . . unrealistic and unresponsive to social need."). For a review of case law dealing with contracts between cohabitants, see Knauer v. Knauer, 470 A.2d 553, 560-64 (Pa. Super. 1983).

One commentator characterized current law dealing with cohabitants as follows: "American law treats cohabitants in a lopsided fashion. In dispensing economic benefits [such as workers' compensation and social security] . . . it ignores unmarried cohabitation. In imposing economic disability, [such as terminating alimony payments] it more often than not equates unmarried cohabitation with marriage." Blumberg, *supra* note 2, at 1137-38.

generally are unable to impose support obligations on each other when their relationship ends.[32] Because alimony usually cannot be reinstated once the cohabitation relationship ends,[33] automatic termination of alimony on proof of cohabitation may leave the dependent spouse without needed financial support—a result at odds with the original grant of the alimony award.[34]

The majority rule—which allows modification or termination of alimony only upon proof of changed circumstances—is more reasonable. Under this approach the alimony award may be modified only if it is clear that the financial needs of the dependent spouse have decreased;[35] alimony cannot be modified solely on proof of cohabitation. If the dependent spouse is cohabiting and receiving support from a third party, the financial needs of the dependent spouse may have decreased sufficiently to warrant reduction or termination of alimony payments.[36] If a dependent spouse is supporting or helping to support a third party with alimony funds, such support also may demonstrate a lack of need sufficient to justify reduction of alimony payments.[37] If alimony is modified

32. Wadlington, *supra* note 8, at 270; *see also* Mitchell v. Mitchell, 418 A.2d 1140, 1143 (Me. 1980) (cohabitants have neither legal support obligations nor any right to demand support).

33. Oldham, *supra* note 5, at 645; *see, e.g., In re* Support of Halford, 70 Ill. App. 3d 609, 388 N.E.2d 1131, 1134 (1979) (court interpreted state's cohabitation statute to apply only to cohabitation that rises to the level of de facto marriage, thereby terminating permanently all future alimony just as legal remarriage would terminate alimony obligation).

34. The consequences sought to be avoided by the original award of alimony then may occur. For example, the dependent spouse may be forced to seek support from the state. *See* H. CLARK, *supra* note 9, at 441. One commentator noted that the automatic termination policy ultimately may increase the length of time over which the supporting spouse must pay alimony. With such severe economic penalties for "trial relationships," a dependent spouse may be less willing to form new relationships and thus less likely to remarry and relieve the supporting spouse of the alimony obligation. Oldham, *supra* note 5, at 639.

35. *See, e.g.*, Sheffield v. Sheffield, 310 So. 2d 410 (Fla. Dist. Ct. App. 1975), *cert. denied*, 328 So. 2d 844 (Fla. 1976); Sovel v. Sovel, 6 Fam. L. Rep. (BNA) 2704 (Mich. Cir. Ct. 1980); Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979).

The "changed circumstances" language also has been used as a pretext by courts to impose moral sanctions. In McRae v. McRae, 381 So. 2d 1052, 1055 (Miss. 1980), the dependent spouse lived with a third party who was separated, but not yet divorced. The Mississippi Supreme Court terminated alimony payments, stating that dependent spouse's

> abode with the man for more than a year, openly living in adultery, enduring the embarrassment of it, and, in addition by silence, setting that kind of example before her daughters constituted a material change in the circumstances of the parties and that, by her unconscionable conduct, she forfeited her right to future alimony.

Similarly, in Anonymous v. Anonymous, 5 Fam. L. Rep. (BNA) 2127, 2127 (Minn. Dist. Ct. 1978), the court concluded that "[recipient's] post-decree lesbianism is a material change in circumstances which justifies the termination of alimony."

36. *See, e.g.*, Fahrer v. Fahrer, 36 Ohio App. 2d 208, 304 N.E.2d 411 (1973). In *Fahrer* dependent spouse and a third party maintained joint checking and savings accounts, were the beneficiaries of each other's insurance policies, and used the same surname. The couple had applied for a marriage license, but admitted that they had not gone through with the ceremony so that dependent spouse could continue receiving alimony payments. The court presumed that the third party was capable of supporting dependent spouse and terminated alimony.

37. *See, e.g.*, Hall v. Hall, 25 Ill. App. 3d 524, 323 N.E.2d 541 (1975) (dependent spouse paid mortgage, real estate taxes, insurance, and utility bills; third party lived in dependent spouse's home but paid no rent). In Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799 (1975), the court, concerned that dependent spouse might give support to or receive support from the third party, adopted a test that provided for alimony modification on proof of the existence of either situation. One commentator concluded that adoption of such a test "protect[s] the former spouse from incidentally supporting an unforeseen third party and prevent[s] the alimony recipient from receiving unneeded support." Note, *The Effect of Third Party Cohabitation on Alimony Payments*, 15 TULSA L.J.

under this rule, it typically is only reduced or suspended, not permanently terminated. Alimony is reinstatable if the cohabitation relationship ends or the financial need of the dependent spouse is reestablished.[38]

Although this approach deemphasizes the punitive aspects of the minority approach, it is not without problems. Under the majority rule cohabitants who agree to share expenses can create "an apparent perpetual support need, even if need for support does not exist."[39] If expenses are carefully kept separate, no "changed circumstances" warranting a modification of alimony will arise, regardless of the length of the cohabitation or the wealth of the individual cohabitants.[40] Thus, "the seemingly benign formula that reduces a support obligation according to reduction of the [dependent spouse's] economic needs is unworkable. Any sensible [dependent spouse] will make certain that her economic contribution to the new household equals her monthly income from alimony and other sources."[41] As long as the dependent spouse and the third party keep their finances separate, alimony payments cannot be reduced on the grounds of changed circumstances, even if the dependent spouse actually derives a financial benefit from the cohabitation relationship.

772, 779 (1979); *see also* TENN. CODE ANN. § 36-5-101(a)(3)(A)-(B) (Supp. 1984) (raises rebuttable presumption upon proof of cohabitation that "[t]he third person is contributing to the support of the [dependent spouse]" or "[t]hat the third person is receiving support from the [dependent spouse]").

The sense of injustice to the supporting spouse that arises upon proof of either situation has been the impetus for some of the recent development in this area of the law. One court noted that the purpose of Utah's cohabitation statute is to "prevent injustice to a [supporting] spouse who frequently pays through the nose . . . to an undeserving [dependent] spouse." Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1980). Another court noted that "there is something distasteful in requiring one to subsidize a former spouse, in his or her subsequent cohabitation." Lydic v. Lydic, 664 S.W.2d 941, 943 (Ky. Ct. App. 1983) (Miller, J., dissenting). In O'Connor v. O'Connor, 40 Cal. App. 3d 90, 114 Cal. Rptr. 773 (1974), the court stated that "the former husband is understandably chagrined at supporting his ex-wife's 'boyfriend.' " Most states are not concerned with the simple sharing of household expenses between the dependent spouse and a third party. If they were, states also would recognize roommate situations as justifying modification of alimony. Obviously, the central concern is that alimony benefits might be shared with a cohabitant-lover at the supporting spouse's expense.

38. *See* Blumberg, *supra* note 2, at 1151 (if cohabiting couple separates, obligor spouse's support obligations should survive); Oldham *supra* note 20, at 268; *see also* Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799 (N.J. Super. Ct. App. Div. 1975) (alimony revivable upon termination of the cohabitation relationship if need is reestablished); Taake v. Taake, 75 Wis. 2d 115, 233 N.W.2d 449 (1975) (abuse of discretion for trial court to bar all future alimony). The California statute allows alimony to be reinstated after a suspension based on cohabitation: "Nothing in this section shall preclude later modification of support upon proof of change in circumstances." CAL. CIV. CODE § 4801.5(c) (West Cum. Supp. 1985). In support of suspension and revival of alimony payments, one student commentator has noted:

> Three distinct parties would benefit from limited revival of alimony: the payor would be allowed some degree of economic freedom while payment is suspended even though the support obligation might become effective again after a re-hearing to establish need; the recipient would not be penalized for sexual conduct and would have a source for support if need could be re-established; and the state's interest in preventing the payee's dependence on state welfare funds would be protected.

Note, *supra* note 37, at 789.

39. Oldham, *supra* note 5, at 617.

40. *Id.* at 623; *see also* Porter v. Porter, 137 Vt. 375, 406 A.2d 398 (1979) (although dependent spouse cohabited seven years and had two children by a third party who was helping to support the children, court denied modification of alimony because cohabitants shared expenses).

41. Blumberg, *supra* note 2, at 1150.

Some states have dealt with this problem by shifting the burden of proof of changed circumstances to the dependent spouse once cohabitation between that spouse and a third party has been established. If the supporting spouse establishes that the dependent spouse is cohabiting, a rebuttable presumption of changed circumstances arises; to overcome this presumption the dependent spouse must prove that financial circumstances have not changed during the cohabitation period.[42] Shifting the burden of proof in this manner, however, may not reduce significantly the ability of cohabitants to circumvent modification if they scrupulously keep their finances separate.[43] In these situations, courts have had difficulty formulating satisfactory justifications for modifying alimony obligations.[44]

Another criticism frequently voiced is that the majority rule discourages remarriage and encourages cohabitation because it allows alimony payments to

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42. California and Tennessee have adopted this rebuttable presumption approach by statute. *See supra* note 20; *see also* Grossman v. Grossman, 128 N.J. Super. 193, 319 A.2d 508 (N.J. Super. Ct. Ch. Div. 1974) (rebuttable presumption concept adopted judicially). The rationale underlying the rebuttable presumption approach is that because information on the finances of the cohabitants is relatively inaccessible to the supporting spouse and a changed circumstances test may be circumvented with relative ease by cohabitants sharing expenses, the burden should be shifted to the dependent spouse to prove that financial need has not decreased. Although such a presumption may not always be justified, it provides some protection to the supporting spouse by "instruct[ing] the court to redetermine the financial needs of the recipient spouse." Note, *Wages of Sin*, *supra* note 18, at 596. *But cf.* Note, *Cohabitation Not Grounds for Modification*, *supra* note 19, at 1334 (contending that burden of proof should not be shifted because "the [dependent spouse's] need for enforcement of the legal right to support clearly outweighs the interest in the accessibility of facts").

43. *See, e.g., In re* Lieb, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978) (changed financial circumstances could not be established, even under California's rebuttable presumption approach; nevertheless, supporting spouse's alimony payments suspended on equitable grounds).

44. The holding in *In re* Lieb, 80 Cal. App. 3d 629, 145 Cal. Rptr. 763 (1978), illustrates this difficulty. In *Lieb* dependent spouse cohabited with a third party for two years, during which time dependent spouse was unemployed and the third party was employed. Expenses were kept separate by the cohabitants. Names, bank accounts, and properties also were kept separate. Thus, the apparent need for alimony payments was not reduced. The court suspended alimony payments, even though California applies the traditional changed circumstances approach and invokes a rebuttable presumption of reduced financial need, on the theory that a dependent spouse could not give domestic services to the third party free of charge, at the supporting spouse's expense. Although the dependent spouse "has the undoubted right to give her [domestic] services to [the third party, she] . . . has no right to ask a court to collect for her from her former husband spousal support in a sum sufficient to enable her to make the gift." *Id.* at 642, 145 Cal. Rptr. at 770.

In B.W.D. v. B.A.D., 436 A.2d 1263 (Del. 1981), the court struggled with the application of the traditional approach. Dependent spouse lived with a third party for three years, during which time they moved from an apartment to a four-bedroom house purchased by the third party. The cohabitants shared the expenses of furnishing and maintaining the home, as well as food and vacation expenses. An evenly divided court upheld the application of the changed circumstances test but reduced alimony, even in light of the evidence that expenses had been "shared." One judge expressed dissatisfaction with the changed circumstances approach as applied to this situation, noting that dependent spouse

> has all the benefits of cohabitation . . . while she continues to enjoy the alimony provided by her first husband. That seems to us to be a fraud on the Statute which terminates alimony upon remarriage and, clearly, it is unfair to the former spouse who is required by the Court to help underwrite the new relationship.

Id. at 1266 (Duffy, J., controlling opinion for an equally divided court).

One commentator has suggested that the problem presented by cohabitants who technically keep their finances separate but are in fact benefitting from mutual support can "be satisfactorily resolved only by treating all the cohabitant's uncommitted income as available to the [dependent] spouse." Blumberg, *supra* note 2, at 1151.

continue to the cohabiting dependent spouse.[45] The cohabitants are "rewarded" economically for avoiding marriage by the continuation of alimony payments. Conversely, the remarriage of the dependent spouse would be "punished" by termination of such payments. This result contravenes the strong public policy in many states favoring the marital relationship.[46]

Several solutions have been proposed to the problems of both the majority and minority approaches.[47] One writer has suggested replacing the widely accepted principle that alimony terminates automatically upon remarriage with a strict financial needs test: alimony would be reduced or terminated only upon a showing of changed financial need, regardless of the dependent spouse's marital status. Under this view cohabitation would not be encouraged in preference to marriage because alimony would not terminate automatically upon remarriage.[48] Another writer has suggested that alimony payments should be reduced or suspended automatically on proof of cohabitation, but courts should be able to reinstate payments upon termination of cohabitation if need is reestablished by the dependent spouse.[49] Still another commentator has suggested that all equitable factors, including the "length of the marriage, the length of the cohabitation, the amount of property of the [dependent spouse] received in connection with the divorce, whether the [dependent spouse] has custody of any children, and the earning capacities of the [supporting spouse] and the [third party cohabitant]," should be considered by the court.[50] Under this approach, if the cohabitation has been of significant duration and the third-party cohabitant is financially capable of supporting the dependent spouse, the alimony payments would be suspended for the duration of the cohabitation.[51]

North Carolina currently has no statute that deals specifically with the problem of alimony modification in the context of cohabiting dependent spouses.

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45. *See, e.g.*, Note, *Cohabitation Alone is Insufficient Ground*, *supra* note 19, at 620 (noting that dependent spouse "has little to lose and much to gain by cohabiting").

46. Oldham, *supra* note 5, at 638.

47. Another problem that frequently arises in a cohabitation context involves separation agreements adopted by divorcing couples that are not modifiable by the courts. If the agreement is a legal, arm's length contract between the supporting and dependent spouse, created without fraud or duress, courts generally will enforce the agreement according to its terms. *See, e.g.*, Whiteley v. Whiteley, 329 So. 2d 352 (Fla. 1976) (enforcing a provision restricting any adult male from living in the marital home with the dependent spouse). If the separation agreement does not specifically list cohabitation as one of the conditions triggering alimony modification, a court will not interfere with the terms of the separation agreement to allow modification based on cohabitation. Wadlington, *supra* note 8, at 273; *see also* Riddle v. Riddle, 32 N.C. App. 83, 230 S.E.2d 809 (1977) (court refused to look beyond specific terms of separation agreement—cohabitation rejected as grounds for modification). Separation agreement provisions permitting alimony modification must be worded carefully. In O'Connor Bros. Abalone Co. v. Brando, 40 Cal. App. 3d 90, 114 Cal. Rptr. 773 (1974), the separation agreement provided that alimony payments could be terminated if dependent spouse appeared "to maintain a marital relationship with any person." *Id.* at 93, 114 Cal. Rptr. at 774. A court battle ensued over whether dependent spouse's cohabitation was similar enough to a "marital relationship" to warrant terminating alimony. For a discussion of the *Brando* case, see Wadlington, *supra* note 8, at 274-76.

48. Langbein, *Post-Dissolution Cohabitation: The Best of Both Worlds?*, 57 FLA. B.J. 656, 658 (1983).

49. Wadlington, *supra* note 8, at 270.

50. Oldham, *supra* note 5, at 642.

51. *Id.* at 636.

Alimony has been awardable upon absolute divorce[52] in North Carolina since 1967[53] based on one of the ten grounds enumerated in North Carolina General Statutes section 50-16.2.[54] Although the fault of the parties may be taken into consideration in determining the alimony award,[55] alimony is awarded primarily for demonstrated need, not "as a punishment for a broken marriage."[56] Alimony automatically terminates upon the death of either party[57] or the remarriage of the dependent spouse.[58]

In North Carolina alimony awards are modifiable based on changed circumstances;[59] the burden of proving changed circumstances is upon the party seeking to modify the alimony award.[60] These changed circumstances are the same circumstances considered in determining the amount of the original award.[61] The court considers "[t]he estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."[62] Petition for modification may be made if the financial need of the dependent spouse or the ability to pay of the supporting spouse has changed.[63]

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52. Alimony also is awardable upon "limited" divorce—also known as "alimony without divorce." Limited divorce is a legal separation without an actual termination of the marital relationship. Temporary alimony—alimony "pendente lite"—may be awarded pending and during the divorce process. 2 R. LEE, *supra* note 7, at 191.

53. *Id.* at 188. North Carolina recognizes a duty of support only between persons who are "legally married." N.C. GEN. STAT. § 50-16.1 (1984). North Carolina law concerning cohabitant rights is largely undeveloped. Contracts, if legally enforceable between two parties, are not invalid simply because they are contracts between cohabitants, Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759 (1984), unless supported by immoral consideration, Brown v. Kinsey, 81 N.C. 245 (1879).

54. N.C. GEN. STAT. § 50-16.2 (1984).

55. Williams v. Williams, 299 N.C. 174, 182, 261 S.E.2d 849, 858 (1980). North Carolina recently joined, to a limited extent, the nationwide trend towards eliminating fault considerations in divorce laws. In 1983 North Carolina abolished its fault-based grounds for divorce, making a one year separation the sole grounds for divorce. Law of July 15, 1983, ch. 613, § 1, 1983 N.C. Adv. Legis. Serv. 42 (codified at N.C. GEN. STAT. § 50-6 (1984)). Some commentators contend that no-fault divorce also should signal the end of fault-based alimony awards. *See* Note, *Does No-Fault Divorce Portend No-Fault Alimony?*, 34 U. PITT. L. REV. 484 (1973); *see also* Marschall, *Proposed Reforms in Divorce Law*, 8 N.C. CENT. L.J. 35, 43-45 (1976) (proposing elimination of fault considerations from North Carolina General Statutes).

56. Williams v. Williams, 299 N.C. 174, 187, 261 S.E.2d 849, 858 (1980). Alimony is determined by the needs of the dependent spouse and the ability of the supporting spouse to pay. Sprinkle v. Sprinkle, 17 N.C. App. 175, 182, 193 S.E.2d 468, 474 (1972).

57. 2 R. LEE, *supra* note 7, at 246.

58. N.C. GEN. STAT. § 50-16.9(b) (1984).

59. *Id.* § 50-16.9. "[Alimony] may be modified or vacated at any time, upon . . . a showing of changed circumstances." *Id.* § 50-16.9(a). This power to modify includes the power to terminate the alimony award. Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967). Alimony awards may not be modified absent a showing of changed circumstances. Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975). A supporting spouse cannot artificially create a change in circumstances by purposely reducing income—in such cases, the alimony obligation will be based on earning *capacity* instead of actual earnings. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

60. Gill v. Gill, 29 N.C. App. 20, 222 S.E.2d 754 (1976). The moving party must prove that the award is "either inadequate or unduly burdensome." Medlin v. Medlin, 64 N.C. App. 600, 602, 307 S.E.2d 591, 592 (1983).

61. Rowe v. Rowe, 51 N.C. App. 646, 654, 280 S.E.2d 182, 187 (1981), *rev'd on other grounds*, 305 N.C. 177, 287 S.E.2d 840 (1982).

62. N.C. GEN. STAT. § 50-16.5(a) (1984).

63. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980). Comparisons based solely on incomes of the parties are insufficient to support a finding of changed circumstances. The court must

The court is required to compare the totality of circumstances at the time of the original award with the overall circumstances at the time modification is sought;[64] the changed circumstances must be substantial[65] and must relate to financial need.[66] Modification is not allowed for "fluctuations in income alone."[67]

The North Carolina Court of Appeals has rejected the notion that the post-divorce sexual activities of the dependent spouse are grounds for alimony modification. In *Stallings v. Stallings*[68] the court of appeals held that post-divorce sexual activity does not constitute a changed circumstance sufficient to affect alimony payments. In *Stallings* the supporting spouse petitioned for a modification of alimony because a third party was staying at the home of the dependent spouse five or six nights each month, and the dependent spouse engaged in sexual intercourse with the third party on those occasions.[69] The court rejected the petition, stating that North Carolina has no statute which allows modification of alimony awards "solely because of post-marital fornication."[70] The court noted that modification is allowed under section 50-16.9 only upon a showing of changed circumstances that "bear upon the *financial needs* of the [parties],"[71] and that the "post marital conduct of either party has no relevance" to changed circumstances.[72] The court also emphasized that under North Carolina law, only remarriage, not sexual conduct, justifies termination of alimony to a dependent spouse.[73]

The North Carolina Supreme Court has not dealt with the issue of the effect of cohabitation by a dependent spouse upon the alimony obligation. Several court of appeals decisions, however, have addressed the issue. In *Shankle v. Shankle*[74] the dependent spouse cohabited for five years with a third party while

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consider "the present overall circumstances of the parties . . . compared with the circumstances existing at the time of the original award . . . ." *Id.* at 474, 271 S.E.2d at 928.

64. Broughton v. Broughton, 58 N.C. App. 778, 781, 294 S.E.2d 772, 775, *cert. denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

65. Rowe v. Rowe, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982).

66. Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966).

67. Britt v. Britt, 49 N.C. App. 463, 472, 271 S.E.2d 921, 927 (1980).

68. 36 N.C. App. 643, 244 S.E.2d 494, *disc. rev. denied*, 295 N.C. 648, 248 S.E.2d 249 (1978).

69. *Id.* at 644, 244 S.E.2d at 495.

70. *Id.*

71. *Id.* at 645, 244 S.E.2d at 495.

72. *Id.* Absent a clause in the separation agreement barring sexual activities of a dependent spouse, sexual activity after the execution of a separation agreement but before a decree for absolute divorce will not affect the alimony award in such agreement. Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements and the State*, 59 N.C.L. REV. 819, 845 (1981). Post-divorce sexual relations between ex-husband and ex-wife (and cohabitation), however, even if infrequent, will void a separation agreement and terminate alimony obligations. Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978).

73. The court stated:

> The Legislature has seen fit to provide that if a dependent spouse receiving alimony under an order of a court of the state shall remarry, the right to alimony shall terminate . . . . If so inclined, the Legislature could have added other conditions under which the award could be terminated. It did not do so.

Stallings, 36 N.C. App. at 645, 244 S.E.2d at 495.

74. 26 N.C. App. 565, 216 S.E.2d 915, *cert. denied*, 288 N.C. 246, 217 S.E.2d 670 (1975).

continuing to receive alimony payments.[75] The dependent spouse admitted that during this time she generally was known as the wife of the third party.[76] When the third party died the dependent spouse received rights to the entire income from his estate for ten years, as well as inheritance rights to the entire estate, valued in excess of $130,000, at the end of the ten-year period.[77] Despite this evidence, the trial court rejected the supporting spouse's contention that changed circumstances as well as the "remarriage" of the dependent spouse warranted a termination of alimony payments.[78]

The court of appeals reversed and ordered a new trial, holding that "there was some evidence to support [the supporting spouse's] assertion that there has been a change in [the dependent spouse's] financial circumstances."[79] In discussing the supporting spouse's contention that the dependent spouse essentially had remarried and thus alimony should be terminated, the court noted that, although North Carolina does not recognize common-law marriage,[80] circumstantial evidence such as " 'reputation, cohabitation, [and] the declarations and conduct of the parties' " may be used to prove a ceremonial marriage.[81] The court, however, did not reach the question of whether the facts were sufficient to establish a ceremonial marriage justifying termination of alimony under the remarriage statute.[82]

The court of appeals also has held that proof of cohabitation is not sufficient to modify or terminate the alimony obligations established in a separation agreement if the agreement does not specify cohabitation as a ground for modification or termination. In *Riddle v. Riddle*[83] the dependent spouse claimed a breach of provisions of a separation agreement providing for payment of alimony until the dependent spouse died or remarried.[84] The supporting spouse argued that the dependent spouse was circumventing the intent of the agreement by cohabiting with a third party and "enjoying all the benefits of the marital relationship."[85] The court rejected the supporting spouse's claim that alimony payments should be modified, holding that "[u]nder the agreement, [the dependent spouse's] rela-

75. *Id.* at 567, 216 S.E.2d at 917.

76. The dependent spouse used her cohabitant's name as a member of a local country club. *Id.*

77. *Id.* at 567, 216 S.E.2d at 917-18.

78. *Id.* at 567, 216 S.E.2d at 918.

79. *Id.* at 569, 216 S.E.2d at 919.

80. *Id.* at 568, 216 S.E.2d at 918.

81. *Id.* at 569, 216 S.E.2d at 918 (quoting Jones v. Reddick, 79 N.C. 290, 292 (1878)).

82. *See supra* note 58 and accompanying text. The court did note that there was sufficient evidence to support an allegation of remarriage. Thus, it was erroneous for the trial court to direct a verdict for dependent spouse on this point. *Shankle*, 26 N.C. App. at 569, 216 S.E.2d at 919. Interestingly, the court seemed to be suggesting an approach analogous to the New York "holding out" statute. *See supra* note 27. Under this view, cohabitation alone is not sufficient, but if there is evidence that the couple behaved as husband and wife, they will be deemed to have "ceremonially" married, and alimony then may be terminated under the remarriage statute. *See, e.g.*, Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968) (evidence that cohabitants lived together for years, were known generally as husband and wife in the community and by husband's employer, and "husband" included cohabitant as "wife" on federal income tax forms held sufficient to prove a ceremonial marriage, entitling the "wife" to workers' compensation benefits).

83. 32 N.C. App. 83, 230 S.E.2d 809 (1977).

84. *Id.* at 84, 230 S.E.2d at 810.

85. *Id.* at 88, 230 S.E.2d at 812.

tions with other people, short of marriage, do not offer defendant any defense to the enforcement of its provisions. The separation agreement must be enforced according to its own terms."[86]

Similarly, in *Sethness v. Sethness*[87] the court of appeals refused to look beyond the terms of a separation agreement to determine whether alimony payments should be modified.[88] In *Sethness* the supporting spouse alleged that the dependent spouse had "lewdly and lasciviously associated, bedded and cohabited with a man."[89] The supporting spouse sought to set aside the separation agreement on the ground that such conduct violated public policy.[90] The court rejected this argument, noting that under the terms of the separation agreement cohabitation was not a ground upon which alimony could be modified:[91] "We do not condone illicit cohabitation or illicit intercourse and we note that such acts violate the laws of this state. We cannot say, however, that such acts . . . would be cause for voiding the agreement . . . ."[92]

It is clear from these cases that North Carolina follows the majority rule,[93] allowing modification of alimony only upon a showing of changed financial circumstances. How can the recognition of cohabitation implicit in this approach[94] be reconciled with the state's antifornication statute, which makes cohabitation outside marriage a criminally punishable offense?[95] Also, how can

86. *Id.*

87. 62 N.C. App. 676, 303 S.E.2d 424 (1983).

88. North Carolina courts will not invalidate separation agreements unless they are void at the time of their creation. "[N]o separation agreement has ever been declared void on the grounds of unfairness in a North Carolina court." Sharp, *supra* note 72, at 832-33.

Historically, North Carolina distinguished between separation agreements that were "adopted" by the court and those that were simply "approved" by the court. Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964). Adopted agreements were like any other court order—they were modifiable and enforceable by the court. *Id.* at 69, 136 S.E.2d at 242. Approved agreements were enforceable only as ordinary contracts, and were modifiable by the court only upon consent of the parties. *Id.* This somewhat artificial distinction was abolished recently by the North Carolina Supreme Court in Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983). In *Walters* the court held that any separation agreements brought before the court during divorce proceedings will be considered modifiable. If the parties desire to retain the nonmodifiable, contractual nature of their separation agreement, they must keep the agreement out of court. *Id.* at 386, 298 S.E.2d at 342.

Even if the separation agreement is modifiable and changed circumstances warranting modification exist, actual modification of a separation agreement may be quite difficult due to the tendency in divorce settlements to provide for alimony and property division in one comprehensive scheme. If the alimony and property provisions of an agreement are inseparable, the agreement may not be modified—because property divisions are generally nonmodifiable. *See* 2 R. LEE, *supra* note 7, at 146. In North Carolina it is presumed that alimony and property provisions are separate unless proved otherwise.

89. *Sethness*, 62 N.C. App. at 678, 303 S.E.2d at 426. The supporting spouse's allegation echoes the language of North Carolina's criminal antifornication statute, N.C. GEN. STAT. § 14-184 (1981), which reads: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor . . . ." Infractions are punishable "by a fine not to exceed five hundred dollars . . . imprisonment for not more than six months, or both." *Id.*

90. *Sethness*, 62 N.C. App. at 678, 303 S.E.2d at 426

91. *Id.* at 681, 303 S.E.2d at 427-28.

92. *Id.* at 681, 303 S.E.2d at 428.

93. *See supra* notes 20-21 and accompanying text.

94. *See supra* note 45.

95. *See supra* note 89.

the traditional approach, which may encourage cohabitation, be squared with North Carolina's public policies supporting marriage and rejecting cohabitation?[96]

Because allowing alimony payments to continue to a non-needy cohabiting dependent spouse is an implicit condonation of the cohabitation relationship, the changed circumstances approach, as currently applied, is irreconcilable with North Carolina's antifornication statute. Implicit condonation of the cohabitation relationship also is inconsistent with the public policy supporting marriage because the changed circumstances approach as currently applied encourages cohabitation in preference to remarriage.[97]

Adoption of legislation[98] aimed specifically at the problem of cohabiting dependent spouses would best resolve these conflicts. The simplest legislative solution would be to add cohabitation to the existing statutory framework as a special changed circumstance warranting alimony modification. Such a statute could read as follows:[99]

> (1) Upon a showing that a dependent spouse is cohabiting with a third party, the court shall consider all relevant equitable factors including but not limited to:
>
> (a) the length of the prior marriage;
>
> (b) the length of the cohabitation;
>
> (c) the estate, earnings, and earning capacity of the supporting spouse;
>
> (d) the estate, earnings, and earning capacity of the third party; and
>
> (e) the financial needs of the dependent spouse.
>
> (2) If the totality of circumstances examined in subsection (1) indicates that the dependent spouse's financial needs have decreased, the court may suspend or reduce alimony payments accordingly.
>
> (3) Alimony payments may be reinstated by the court at any

96. North Carolina courts have made clear their condemnation of cohabitation. *See, e.g.*, Collins v. Davis, 68 N.C. App. 588, 593, 315 S.E.2d 759, 762 (1984) ("we disapprove of plaintiff's . . . immoral liaison with defendant"); *Sethness*, 62 N.C. App. at 681, 303 S.E.2d at 428 ("we do not condone illicit cohabitation").

97. In Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329 (1977), Judge Schroeder's vehement dissent argued that not terminating alimony because of cohabitation conflicts with state antifornication statutes and is contrary to public policy. *Id.* at 293-94, 559 P.2d at 332-33 (Schroeder, J., dissenting). Most states have repealed their antifornication statutes, Oldham, *supra* note 5, at 650, and existing statutes seldom are enforced. *See* Fineman, *Law and Changing Patterns of Behavior: Sanctions of Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 285-98.

98. Legislation addressing the alimony-cohabitation problem was introduced in the North Carolina General Assembly in 1983. The legislation proposed amending N.C. GEN. STAT. § 50-16.9 (1976) by adding a new subsection, providing that:

> Evidence that a party is cohabiting with a person of the opposite sex shall be admissible to show changed circumstances pursuant to (a) or (c). Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

H.R. 520, 1983 N.C. Gen. Assembly (introduced March 24, 1983, by Representatives Rabon and Lancaster). The bill died in committee.

99. Portions of this proposed statute are drawn from Oldham's model statute, *see* Oldham *supra* note 5, at 653-54.

time pursuant to subsections (1) and (2) upon proof of changed circumstances resulting in the renewed financial need of the dependent spouse. If alimony payments originally were awarded for a limited period, payments may be reinstated only for the remainder of that time.

(4) Cohabitation, for the purposes of this section, is defined as the voluntary, continuous residence with a third party for more than ninety days.

In the proposed statute the consideration of the listed equitable factors, as well as the discretionary power to consider other relevant factors, allows the court to inquire into the true financial nature of the cohabitation relationship.[100] This inquiry will eliminate the problems inherent in the traditional changed-circumstances approach because cohabitants cannot avoid alimony modification by superficially keeping their finances separate when they are actually providing for or receiving financial support from each other. The court's closer scrutiny should uncover any such masked support arrangements. The proposed statute eliminates financial incentives for the dependent spouse to cohabit rather than remarry. This result is consistent with the public policy favoring marriage and discouraging cohabitation.[101]

Such scrutiny also ensures that alimony will not be terminated to a cohabiting dependent spouse whose financial status has *not* been improved as a result of the cohabitation. Consideration of equitable factors thus helps to avoid the harsh results of automatic alimony termination. If the court determines that the dependent spouse still is in need of financial support, alimony payments will continue regardless of the cohabitant's living arrangements. If alimony is suspended or reduced, it may be reinstated upon termination of the cohabitation if financial need is reestablished.[102]

Cohabitation is defined explicitly by the statute to avoid several problems

100. Arguably, North Carolina already has adopted the spirit of the equitable approach by emphasizing consideration of the totality of the circumstances in a modification proceeding. Britt v. Britt, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980). Also, North Carolina courts already look beyond the surface of the financial relationship between the parties to determine whether modification is warranted. Robinson v. Robinson, 10 N.C. App. 463, 467-68, 179 S.E.2d 144, 147 (1971). Even the language of the current statute, which allows the court to consider "other facts of the particular case," indicates a willingness to consider appropriate factors not specified in the statute. *See* N.C. GEN. STAT. § 50-16.5 (1984).

101. *See supra* note 96 (discussing North Carolina's public policy favoring marriage over cohabitation). The proposed statute will not eliminate the dependent spouse's financial incentive to cohabit with rather than marry the third party: remarriage automatically terminates alimony payments, *see supra* note 58 and accompanying text, whereas cohabitation under the proposed statute will terminate alimony only if equitable factors so dictate. The financial incentive to cohabit could be eliminated completely only by accepting equitable rather than automatic alimony termination on remarriage—an unlikely scenario—or by automatically terminating alimony upon proof of cohabitation.

The proposed statute, while avoiding the problems inherent in the automatic termination approach's attempt to eliminate the dependent spouse's incentive to cohabit—problems such as ignoring the dependent spouse's needs for financial support or shifting them to the state—at the same time decreases that incentive by requiring that the dependent spouse's true financial support from the third party be considered.

102. Because North Carolina does not recognize a right of support between cohabitants, support generally should be reinstated after separation from a cohabitant, upon proof of renewed financial need, when the dependent spouse originally was adjudged by the State to be in need of such support.

that frequently arise in the cohabitation context. First, the cohabitation must be "voluntary"; this requirement avoids invocation of the statute in situations in which cohabitation is based purely on financial necessity. Second, the cohabitation must be "continuous," precluding application of the statute to situations involving only intermittent stayovers.[103] Last, the statute sets a ninety-day minimum for establishment of cohabitation.[104] Although this time limit is arbitrary, it is an attempt to differentiate between brief liaisons and more permanent cohabitation relationships.

The overriding principle in resolving questions concerning alimony awards and their modification is the assurance of fairness to the parties.[105] In cases involving a cohabiting dependent spouse, fairness to both parties is best ensured by providing continued support only to a truly needy dependent spouse, regardless of the spouse's living arrangements. North Carolina must confront these problems because, as one commentator noted:

> Inevitably, divorce law must effect a workable compromise between conflicting values . . . . If the written law fails to take into account the legitimate needs of individuals as well as the public concern over family stability, it is a safe prediction that by custom, fiction, or artifice, litigants and their lawyers will distort the law or find a way to bypass it.[106]

Clear legislative guidelines should define cohabitation and allow courts to suspend or reduce alimony upon a consideration of the totality of equitable factors comprising changed circumstances. These guidelines would achieve the twin goals of assuring fairness to both spouses and upholding the traditional public policy supporting marriage. The proposed statute provides a realistic solution to the problems inherent in modification of alimony to a cohabiting dependent spouse.

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103. "Continuous" should be construed broadly to avoid circumvention by contrived periods of separation.

104. Courts have struggled to determine what length of time is sufficient to constitute cohabitation. *See, e.g., In re* Marriage of Sappington, 123 Ill. App. 3d 396, 462 N.E.2d 881 (1984) (intermittent stayovers not sufficient to constitute cohabitation). None of the cohabitation statutes specify a length of time. One commentator suggested that a 60-day provision would be "sufficient to distinguish a transitory relationship from stable cohabitation." Blumberg, *supra* note 2, at 1152.

105. Britt v. Britt, 49 N.C. App. 463, 474, 271 S.E.2d 921, 928 (1980).

106. Foster, *Current Trends in Divorce Law*, 1 FAM. L.Q. 21 (1967).